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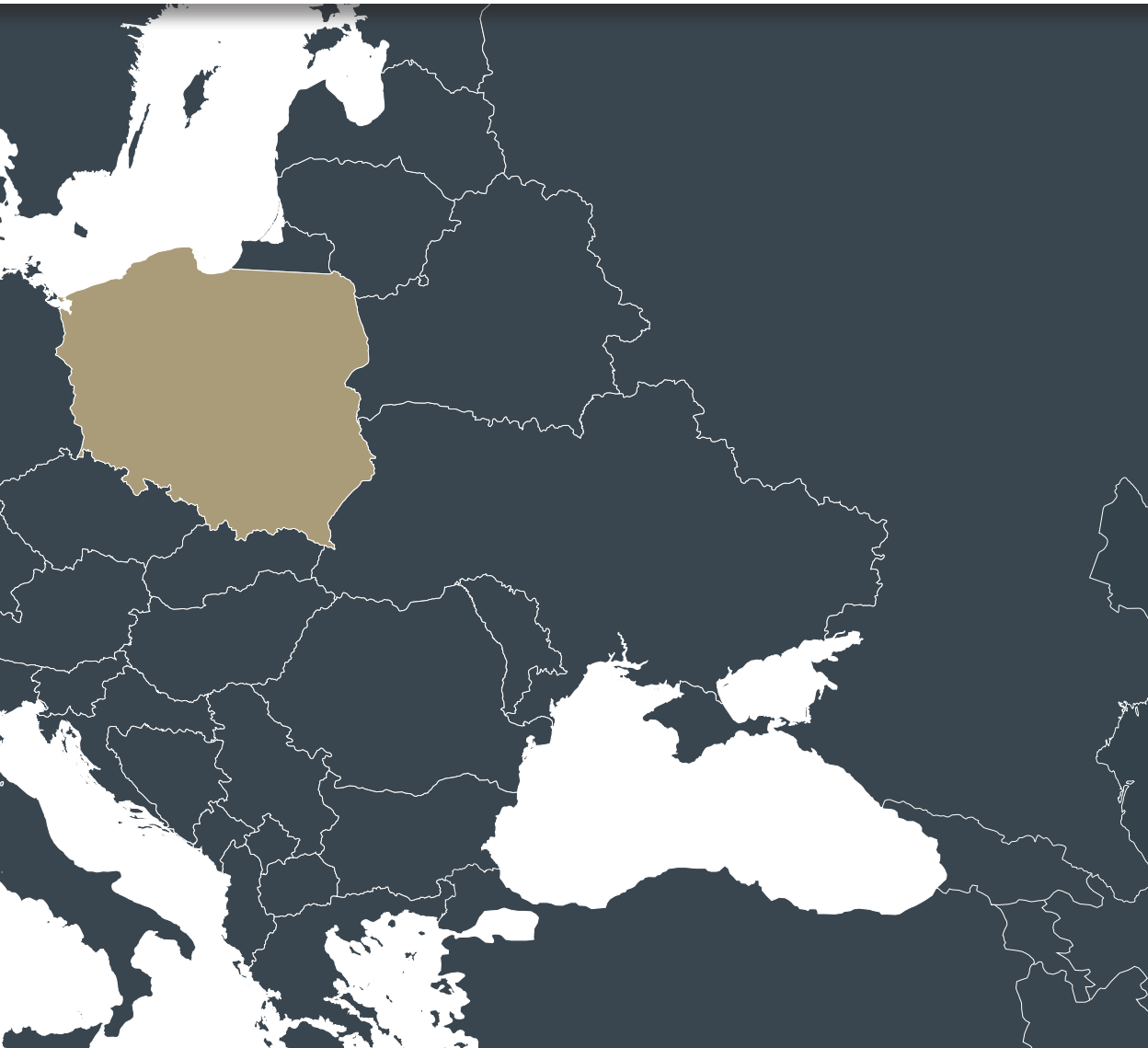

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Contemporary Central and East European Law

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ABBREVIATIONS

ABH ..... Actual Bodily Harm
ACI ..... Airports Council International
ADP ..... Aéroports de Paris [Paris airports]
Aena SME S.A. ..... Aeropuertos Españoles y Navegación Aérea [Air Traffic Navigation and Management]
AMS ..... Amsterdam Airport Schiphol
AIS ..... Acta Iuris Stetinensis [czasopismo wydawane przez Wydział Prawa i Administracji Uniwersytetu Szczecińskiego]
ATL ..... Hartsfield-Jackson Atlanta International Airport
BCN ..... Aeroport Internacional de Barcelona
BSCA ..... Bachelor of Science in Customs Administration
CC&EEL ..... Contemporary Central & East European Law
CCP ..... Polish Code of Criminal Procedure
CDG ..... Charles de Gaulle International Airport
CDL ..... Conseil de l'Europe [Council of Europe]
CJEU ..... Court of Justice of European Union
CPBP ..... Certified Proposal And Bidding Professional
CRL ..... Brussels South Charleroi Airport
CUP ..... Cambridge University Press
DFW ..... Dallas-Fort Worth International Airport
DUB ..... Dublin Airport
DXB ..... Dubai International Airport
EC ..... European Commission
ECHR ..... European Convention on Human Rights
ECJ ..... European Court of Justice
EEA ..... European Economic Area
EEC ..... European Economic Community
EJPM ..... European Journal of Public Matters
EMAS ..... Eco-Management and Audit Scheme
EU ..... European Union
EUIPO ..... European Union Intellectual Property Office
FRA ..... Frankfurt Airport
GDP ..... Gross Domestic Product
GmbH ..... Gesellschaft mit beschränkter Haftung [Limited liability company]
GMO ..... Genetically Modified Organism
HKG ..... Hong Kong International Airport
HND ..... Tokyo International Airport
IATA ..... International Air Transport Association
ICAO ..... International Civil Aviation Organization
ICON ..... International Journal of Constitutional Law
ILS PAS ..... Institute of Law Studies of the Polish Academy of Sciences
IP ..... Intellectual Property
IWS ..... Instytut Wymiaru Sprawiedliwości
JeMa ..... Journal of Environmental Management
JFK ..... John F. Kennedy International Airport
JoL ..... Journal of Law [Dziennik Ustaw]
KUL ..... Katolicki Uniwesytet Lubelski [The Catholic University of Lublin]

LAX ..... Los Angeles International Airport
LHR ..... London Heathrow Airport
LIP ..... Law on Industrial Property
MAD ..... Adolfo Suárez Madrid-Barajas Airport
MUC ..... Munich Airport
NAC ..... National Appeals Chamber
OHIM ..... Office of the Harmonisation of the Internal Market
OJ ..... Official Journal (of the European Communities)
ORD ..... Chicago O'Hare International Airport
OSNCP ..... Orzecznictwo Sądu Najwyższego. Izba Cywilna
OTK ..... Orzecznictwo Trybunału Konstytucyjnego
[Judgment of the Constitutional Tribunal]
OTK-A ..... Orzecznictwo Trybunału Konstytucyjnego. Seria A
[Judgment of the Constitutional Tribunal. Series A]
PCC ..... podatek od czynności cywilnoprawnych [tax on civil law transactions
PDO ..... Protected Designation of Origin
PEK ..... Beijing Capital International Airport
PGI ..... Protected Geographical Indication
PLL ..... Polish Airport State Enterprise
PPL ..... Public Procurement Law
PSC ..... Polish Supreme Court
PSC ..... Polish Society of Cinematographers [Stowarzyszenie Autorek i Autorów Zdjęć Filmowych]
PVG ..... Shanghai Pudong Airport
PYIL ..... Polish Yearbook of International Law
REPiS ..... Ruch Prawniczy, Ekonomiczny i Socjologiczny
[Legal, Economic and Sociological Movement]
SAAZF ..... Stowarzyszenie Autorek i Autorów Zdjęć Filmowych
[Polish Society of Cinematographers]
SOWAER ..... Société Wallonne des Aéroports
[Walloon Airports Association]
SWD ..... Commission Working Document
SZTE-ÁJTK . Szegedi Tudományegyetem Állam- és Jogtudományi Kar Nemzetközi és Regionális Tanulmányok Intézete [University of Szeged Faculty of Law and Political Sciences]
TFEU ..... Treaty on the Functioning of the European Union
TIAT ..... Tokyo International Air Terminal Corporation
TNOiK ..... Towarzystwo Naukowe Organizacji i Kierownictwa
[Scientific Society of Organization and Management]
TSG ..... Traditional Specialities Guaranteed
TSP-W ..... Toruńskie Studia Polsko-Włoskie [Toruń Polish-Italian Studies]
UAM ..... Uniwersytet im. Adama Mickiewicza w Poznaniu [Adam Mickiewicz University in Poznań]
USA ..... United States of America
WIPO ..... World Intellectual Property Organization
WKP ..... Wolters Kluwer Polska
WN UAM .Wydział Neofilologii Uniwersytetu im. Adama Mickiewicza w Poznaniu [Faculty of Modern Lanuages and Literatures Adam Mickiewicz University, Poznań]
WSPiA ..... Wyższa Szkoła Prawa i Administracji
[University of law and administration
ZaöRV ..... Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
[Journal of Foreign Public Law and International Law. Heidelberg Journal of International Law]

FOREWORD

It is a great pleasure for us to present to you the second issue of the journal Contemporary Central & East European Law (CC&EEL), issued by the Institute of Law Studies of the Polish Academy of Sciences. Our journal publishes the works of scholars from the region concerning all areas of law, in particular those adopting comparative and interdisciplinary approaches.

After the warm welcome of the first issue of the CC&EEL, we are proud to submit a new volume of the journal, which covers seven crucial legal problems. The opening article, authored by dr Boldizsár Szentgáli-Tóth discusses the question of constitutional identity from the perspective of both Poland and Hungary. It concludes with a statement that in recent years the scope of constitutional identity has been considerably extended by the Polish and Hungarian Constitutional Courts, becoming regrettably a political instrument.

The following text, by dr Robert Siwik, examines the resolution of the Polish Supreme Court of 25 February 2020 (ref. III CZP 16/20) regarding compensation for damages resulting from violations of public procurement laws by contracting authorities. The Author suggests the necessity of legislative amendments to ensure effective remedies for aggrieved contractors.

The third article, submitted by Joanna Florecka, also deals with procurement law, but from the perspective of EU regulations. The paper highlights a gradual shift in EU public procurement goals, evolving from purely economic objectives to include other goals, such as social objectives.

In the next article, dr Alina Sperka-Cieciura discusses problems of privatisation in the aviation industry by comparing airport ownership structures, with a special focus on airports located in the EU. The results of the research presented in the text clearly demonstrate that the ownership structure does not influence airport functions.

Then, dr Kinga Wernicka asks important questions about the so-called 'green marks', including those supervised by the EU and created by municipalities or entrepreneurs. The Author seeks to present their role and aim in the EU market.

The sixth article by dr Anna Natalia Schulz furnishes facts and data about the results of the application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in Poland.

Last but not least, the article by dr Anna Urbańska-Łukaszewicz analyses the legal situation of minor parents in determining the parentage of their child and placing them for adoption in Polish law. The author concludes that the Polish Family and Guardianship Code has tried to balance both the protection of the rights of minor parents and their children.

Wishing you an interesting and inspiring read,
Professor Celina Nowak
Editor-in-Chief
Contemporary Central & East European Law

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Contemporary Central & East European Law

A concept at the edge of national and European constitutional law: Different understandings within the same region. Constitutional identity in Poland and Hungary*

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Abstract

The Polish Constitution does not expressly postulate the term of constitutional identity, however the Constitutional Tribunal of Poland has elaborated this concept in detail in its case law. This framework has been used to justify internal reforms; however, it has been mostly applied as a constitutional argument for the protection of national sovereignty within the European legal space.
Similarly, the Hungarian Constitutional Court has stated:

The constitutional identity of Hungary does not constitute the exhaustive and closed list of values, but some of its elements may be highlighted as examples, which are identical with the recently acknowledged constitutional values: the fundamental rights; the separation of powers; the republican form of state; the freedom of religion; the rule of law; parliamentarian; equality under the law; the respect of the judicial power; and the protection of the nationalities living together with us.[1]

My study aims to make a comparison between the relevant case-law of the two constitutional courts and provide some recommendations on how constitutional identity should be reconceptualized; separated more clearly from other forms of identity; and how it could fulfil its task more efficiently at the edge of the national and European legal orders with the help of European-wide standards.

* I would like to sincerely appreciate the valuable information, materials and comments from Professor Monika Szwarc, the leader of the European Law Department of the Polish Academy of Sciences, Institute of Law Studies, who was so kind to organise my research visit to Warsaw. Apart from her, I would like to say also thank you to Joanna Florecka, Agata Kleczkowska, Wojciech Lewandowski, Karol Popławski and Agnieska Sołtys, also from the ILS PAS. This study forms part of project NKFIH. no. 128796 which outlines the normative elements of the principle of democracy from the perspective of constitutional and European law.

1 Ruling of the Constitutional Court of Hungary 22/2016.(XII.5.) [2017] point 65, <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf> accessed 19 Mar 2022.

Keywords
constitutional identity; constitutional review; law of the European Union; sovereignty; comparative constitutional law; constitutional interpretation

1. Introduction

The relationship between national constitutional frameworks and the Law of the European Union has been a uncertain matter for decades, and this discussion was intensified significantly by the accession of several Central-European countries.[2] Traditionally, the German Federal Constitutional Court was the primary judicial body that elaborated on the concept of national constitutional identity in-depth,[3] while the European Court of Justice (hereinafter: ECJ) attempted to crystallize a framework of national identity with more or less similar content.[4] The difference between the two approaches were the main highlights: the ECJ relied on the supremacy of EU law over even national constitutions,[5] while the German Federal Constitutional Court identified certain elements of the German constitutional order which should not be undermined by the legal development of European integration.[6]

From 2004 onwards, new member states joined the European integration project with inherently different historical experience than the 'old' West-European member states: due to the almost continuous thread of sovereignty over Central-European states by neighbour empires,[7] several constitutional scholars in these countries looked for concepts which could justify stronger protection of national legal orders within the European legal space *vis a vis* European Law. Moreover, the original, mostly economic, community had been extended to certain fields of strengthened political cooperation, and consequently, the debates around sovereignty intensified, so additional legal arguments were sought to justify different political approaches.

As part of these endeavours, constitutional identity has been explored as an important tool not only to distinguish the scope of European and national law but also to conceptualize the background of the legal differences between member states despite their clear willingness to harmonize their applicable rules on certain well-defined matters. As a result, in recent years, and especially in the Central-European countries, numerous academic contributions have been

2 P Minkkinen, 'Political Constitutionalism Versus Political Constitutional Theory: Law, Power, and Politics' (2013) ICON 11(3), 590 <https://doi.org/10.1093/icon/mot020>.

3 M Poplzin, *Verfassungsidentität* (Mohr Siebeck 2018).

4 Judgement of the EJC C-202/11 EU:C:2013:239.

5 Judgement of the EJC C-11/70 EU:C:1970:114.

6 Judgment of Second Senate BVerfGE 30 [1970], 1; Judgment of Second Senate BVerfGE 89 [1993], 155; Judgment of Second Senate BVerfGE 134 [2014], 366; Judgement of the Second Senate 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09 BVerfGE 123 [2009], 267; Judgement of Second Senate BVerfGE 146 [2017], 216.

7 For the conceptualization of the Central-European characteristics of the sovereignty framework please see: N Brack, R Coman, A Crespy, 'Sovereignty Conflicts in the European Union' (2019) Les Cahiers du Cevipol vol. 4, 3–30 <https://www.cairn.info/revue-les-cahiers-du-cevipol-2019-4-page-3.htm> accessed 31 Nov 2021.

devoted to the notion and the functions of constitutional identity.[8]

In light of the recent spread of this framework, and bearing in mind its growing importance in the contemporary constitutional discourse around Europe, in my view, we have to extend the comparative scope of this research further, and to more deeply understand what kinds of models exist in this regard.[9] As part of a series of comparative materials on constitutional identity, the constitutional texts of the Visegrád countries have been also analysed,[10] and the first steps have been made towards a comparative evaluation of the relevant constitutional case law from these countries.[11] The contribution of this paper to this process will be a parallel detailed assessment of some crucial Polish and Hungarian constitutional court rulings dealing with constitutional identity, and on this basis, I will argue for the necessity of European-wide judicial standards for constitutional identity to avoid arbitrary use of this instrument.

If we aim to describe the concept of constitutional identity in a particular country, in my view, six factors should be considered: the origin of the concept; the elements of constitutional identity in the legal system; the functions assigned to it; its role in outlining the relationship of European and national law; the role of the national legal traditions at the discussion; and the main concerns identified around this concept. In the following sections, I will analyse the Polish and the Hungarian concepts of constitutional identity around these six aspects, and will provide a deeper understanding of the conceptualization of this framework in these two countries with comparable situations, but somewhat different circumstances and characteristics.

2. The origins of two different constitutional identity concepts

In the two countries examined, constitutional identity as a concept was first introduced by the Polish Constitutional Tribunal in 2010, after the issuing of several rulings outlining the scope

8 For instance, please see: E Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) Neth J Leg Philos vol. 2, 82–98 <https://www.doi.org/10.5553/NJLP/.000049>; T Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) Ger Law J 21(2), 105–130 <https://www.doi.org/10.1017/glj.2020.1>; I Stumpf, 'Sovereignty, Constitutional Identity and European Law' (2020) Hung Rev 11(3), 35–46 <https://hungarianreview.com/article/20200515_sovereignty_constitutional_identity_and_european_law/> accesed 7 Nov 2021; M Jovanović, 'Sovereignty – Out, Constitutional Identity – In: The 'Core Areas' of Controversy of EU Membership' (2015) Acta Jur Hung 56, 249 <https://doi.org/10.1556/026.2015.56.4.2>.

9 For this purpose, I spent two weeks at the Institute for Law Studies PAS in October 2021, where I had the opportunity to consult with several Polish experts on the topic and to collect English materials from Polish authors about this matter. On these grounds, I drafted the present comparative study between the Polish and Hungarian interpretations of constitutional identity, which is still to be detailed further but might be a proper point to begin to initiate additional comparative research between the two countries and also between other countries concerned.

10 For instance: K Popławski, 'Introductory Parts to the Constitutions of Visegrad Group Countries. Their Relevance, Constitutional Identity and Relation Towards European Constitutional Identity' (2019) Central European Papers 7(1), 25-50 <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-beb43450-9f00-408b-a665-88e3610a679b> accessed 19 Mar 2022.

11 V Mihálíková, 'National and Constitutional Identity in the Case-Law of Constitutional Courts of the Visegrad Group' (2020) Stud Iurid Cass 8(1), 38-50 <https://doi.org/10.33542/SIC2020-1-04>.

of the country's sovereignty.[12] In this particular case, the Tribunal reviewed the constitutionality of the Lisbon Treaty and the additional limitations on Poland's sovereignty provided by this new treaty.[13] By contrast, the Hungarian Constitutional Court relied on this concept six years later, when at the request of the government it interpreted the provisions of the Fundamental Law on Hungary's participation in European integration. The common point is that both countries implemented this conceptual framework in their constitutional discourse in order to reconsider the relationship between the European and national legal orders, but regarding the further circumstances, the closer context of the two implementations was inherently different.

In Poland, the primary issue was a legal challenge that has also been heard by numerous other constitutional courts in the European Union. The constitutionality of the Lisbon Treaty was debated in several member states,[14] but ultimately, its constitutionality has been upheld by all judicial bodies that have dealt with the matter. Nevertheless, this was probably the first moment in Central Europe when the necessity of explicit legal limitations on European integration was seriously considered.[15] The Polish Constitutional Tribunal recognised that constitutional identity, which had been mentioned several times by the German Federal Constitutional Court as including the unamendable principles of the German Basic Law,[16] might be the proper tool for Poland to also determine those key principles of the Polish constitutional framework which should be vested by a supreme legal character over the other constitutional articles and also over EU law. However, although the Polish Constitutional Tribunal provided a list of principles and values which should be understood as the components of Poland's constitutional identity, it failed to determine the exact

12 Please see the following cases of the Polish Constitutional Tribunal of 24 February 1997, K 19/96 (1997) OTK 6; of 5 January 1999, K 27/98 (1999) OTK 1; of 28 April 1999, K 3/99 (1999) OTK 73; of 12 January 2000, P 11/98 (2000) OTK 3; of 10 July 2000, SK 12/99 (2000) OTK 143; of 8 May 2000, SK 22/99 (2000) OTK 107; of 28 June 2000, K 25/99 (2000) OTK 141; of 5 June 2001, K 18/00 (2001) OTK 118; of 29 November 2001, P 8/01 (2001) OTK 268; of 19 February 2003, P 11/02 (2003) OTK-A 12; of 27 May 2003, K 11/03 (2003) OTK-A 43; of 28 January 2003, K 2/02 (2003) OTK-A 4; of 21 April 2004, K 33/03 (2004) OTK-A 31; of 27 April 2004, P 16/03 (2004) OTK-A 36; of 31 May 2004, K 15/04 (2004) OTK-A 47; of 12 January 2005, K 24/04 (2005) OTK-A 3; of 31 January 2005, P 9/04 (2005) OTK-A 9; of 27 April 2005, P 1/05 (2005) OTK-A 42; of 22 June 2005, K 18/04 (2005) OTK-A 49; of 30 May 2005, P 14/04 (2005) OTK-A 47; of 19 December, P 37/05 (2006) OTK-A 177; of 2 July 2007, K 41/05 (2007) OTK-A 72; of 17 July 2007, P 16/06 (2007) OTK-A 79; of 7 November 2007, K 18/06 (2007) OTK-A 122; of 12 February 2008, P 62/07 (2008) OTK-A 17; of 10 July 2008, P 15/08 (2008) OTK-A 105; of 15 December 2008, P 57/07 (2008) OTK-A 178; of 18 February 2009, KP 3/08 (2009) OTK-A 9; of 16 July 2009, KP 4/08 (2009) OTK-A 112; of 28 October 2009, KP 3/09 (2009) OTK-A 138; of 13 April 2010, P 35/09 (2010) OTK-A 39; of 1 June 2010, P 38/09 (2010) OTK-A 53; of 15 July 2010, K 63/07 (2010) OTK-A 60; of 1 December 2010, SK 50/07 (2010) OTK-A 130.

13 Judgement of Polish Constitutional Tribunal of 10 November 2010, K 32/09 (2010) OTK-A 108.

14 'Amongst others: Ruling of the Czech Constitutional Court on the constitutionality of the Lisbon Treaty', <https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf> accessed 6 Oct 2021; the ruling of the German Second Senate, 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09 [2009]; Ruling of the Hungarian Constitutional Court, 143/2010. (VII.14.) (2010) ABH 698.

15 W Czapliński, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) ERA Forum vol. 12, 97–204, <https://www.doi.org/10.1007/s12027-011-0206-z>.

16 B Bakó, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary' (2018) ZaöRV vol. 78, 863–902, <https://www.zaoerv.de/78_2018/78_2018_4_a_863_902.pdf> accessed 2 Feb 2022>.

source of constitutional identities, such as the unamendable constitutional provisions in Germany.[17] Without this, it is a hard task to attribute any normative character to constitutional identity, since it comprises just a set of principles and values selected on unknown grounds. In the first years, constitutional identity was used as a legal concept in the case-law of the Polish Tribunal, however, it has gradually become politicised, especially after 2015, when a constitutional crisis occurred in the country,[18] in the recently published abortion judgment, or the latest ruling concerning the alleged conflict between the founding treaties of the European Union and the Constitution of Poland.[19]

In Hungary, the first to use constitutional identity as an argument were a dissenting and concurring opinion,[20] while the majority reasoning first relied on this concept in 2016. At that time, the Hungarian Government had requested the abstract interpretation of Art. E) (2) of the Fundamental Law of Hungary[21] to decide whether so-called migration quotas could have binding force for Hungary. The Constitutional Court made an international comparison, which has been criticised by several scholars: according to the contesting views, the cases mentioned were arbitrarily selected for the sake of favouring the governmental motion.[22] The reasoning detailed the term of constitutional identity and used it as an argument for the protection of national sovereignty *vis a vis* the supremacy of EU law. The reasoning provided a list of the main elements of constitutional identity,[23] but this enumeration is not exhaustive, and the Constitutional Court shall define on a case-by-case basis the content of constitutional identity as a set of constitutionally provided values.[24]

17 S Dudzik, N Półtorak, 'The Court of the Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Law' (2012) Yearb Pol Eur Stud vol. 15, 225–258, <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.cejsh-e4e3acc9-c00c-44ea-ae46-0b38fad00a88> accessed 19 Mar 2022.

18 Commission Working Document of 20 July 2021, 2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland SWD(2021) 722 final, <https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_poland_en.pdf> accessed 9 Oct 2021>.

19 Judgement of Polish Constitutional Tribunal of 7 October 2021, K 3/21 (2021) OTK-A 65.

20 The ruling of the Hungarian Constitutional Court, 23/2015.(VII.7.) [2015] ABH 548 dissenting opinion of Justice Varga Zs., 83–98; and ruling of the Hungarian Constitutional Court, 3130/2016.(VI.29.) [2016] ABV 16 concurring opinion of Justice Varga Zs.,19–33.

21 Art. E(2) of the Fundamental Law of Hungary (prior to the Ninth Amendment, adopted on 15 December 2020) CDL-REF(2021)046, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e> accessed 20 Mar 2022, reads as follows: 'With a view to participating in the European Union as a Member State and based on an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure'.

22 N Chronowski, A Vincze, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján' [Self-identity and European integration – the Constitutional Court looking for identity] (2017) Jogtud Köz vol. 3, 117 <http://real.mtak.hu/id/eprint/100617> accessed 19 Mar 2022.

23 'The constitutional identity of Hungary does not constitute the exhaustive and closed list of values, but some of its elements maybe highlighted as examples, which are identical with the recently acknowledged constitutional values: the fundamental rights; the separation of powers; the republican form of state; the freedom of religion; the rule of law; parliamentarian; equality under the law; the respect of the judicial power; and the protection of the nationalities living together with us. Amongst others, these are such achievements of our historical constitution, on which the Hungarian legal system relies.' Ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.) [2017] point 65, <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf> accessed 19 Mar 2022.

24 Ibid., point 66.

So, similarly to the Polish implementation, the Hungarian definition is still too vague, only the aforementioned exemplificative enumeration has been provided for those elements of the constitutional framework which shall be seen as sources of constitutional identity. Moreover, the Hungarian Fundamental Law prescribes the duty of all state authorities to interpret the Fundamental Law in the light of its purpose, of the National Avowal as a preamble to the Fundamental Law, and the achievements of the historical constitution of Hungary.[25] And this is again a point where the Hungarian implementation differs from the Polish one. The Hungarian concept is closely linked to the still ongoing discourse on the role of historical traditions in the current constitutional framework, which dates back to the enactment of the Fundamental Law in 2011.

Art. (R) (3) of the Fundamental Law of Hungary prescribed that the provisions of the Fundamental Law shall be interpreted amongst others in light of the achievements of the historical constitution of Hungary.[26] This provision highlighted the relevance of Hungarian constitutional traditions as elaborated until 1944, and generated discussion on Hungary's constitutional specialities within the European legal space.[27] As will be detailed later, the concept of constitutional identity has been attached to an already existing set of constitutional reasoning and scholarship in the country, therefore the context of the Hungarian implementation-oriented it towards a historically more deeply rooted approach.

Moreover, the Hungarian introduction of constitutional identity was a legal answer to a particular political situation, when the so-called quota referendum was legally unsuccessful, but the vast majority of the votes cast supported the governmental policies.[28] Less than fifty percent of voters took part in the referendum, so the validity threshold had not been met,[29] but more than 90 percent of the votes cast opposed the acceptance of migration quotas. The proposed amendment of the Fundamental Law for the rejection of migration quotas was not enacted by Parliament due to the lack of a two-thirds governmental parliamentary majority during that period, so in this situation, the Government looked for other legal means to exclude the allocation of refugees to the country on the grounds of the planned quota system, and constitutional identity was one of the legal tools chosen to further this purpose.

Apart from the lack of a coherent definition, a further similarity between the two countries should be underlined: there was an important borderline in the development of the constitutional case law in both countries.[30] In Poland, since the constitutional crisis started in 2015, the Constitutional Tribunal has been reluctant to cite earlier jurisprudence,[31] and the interpretation of

25 Ruling of the Hungarian Constitutional Court, 19/2019.(VI.18.) [2019], <https://hunconcourt.hu/uploads/sites/3/2019/12/19_2019_eng_final.pdf> accessed 19 Mar 2022.

26 Article R(3) of the Fundamental Law of Hungary of 25 April 2011, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54412e794> accessed 19 Mar 2022.

27 L Csink, 'Az Alaptörvény identitása – Honnan hová?' [The identity of the Fundamental Law: from where to where?] (2015) Acta Univ Szeged vol. 78, 134–141 <http://acta.bibl.u-szeged.hu/45269/1/juridpol_078_134-141.pdf> accessed 19 Mar 2022.

28 V Kéri, Z Pozsár-Szentmiklósy, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről' [The ruling of the Constitutional Court from the interpretation of Article E) of the Fundamental Law'] (2017) JeMa vol. 1–2, 5–15 <https://jema.hu/article.php?c=469> accessed 19 Mar 2022.

29 Art. 8. (4) of the Fundamental Law of Hungary.

30 V Mihálikova (2020) 8.

31 S Biernat, M Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C Asser Press 2019) 773, <https://doi.org/10.1007/978-94-6265-273-6_16>.

constitutional identity has been changed. In the meantime, the Fourth Amendment to the Fundamental Law of Hungary stipulated[32] that the rulings of the Hungarian Constitutional Court issued under the previous Constitution of the country shall lose their effect. The Constitutional Court held in one of its rulings that the former ruling should be cited unless the Fundamental Law significantly reconsiders the context of the subject.[33] However, in the reality, cases before 2011 are rarely mentioned in reasoning, just as parts of the historical development. But it is also noteworthy that several recent rulings of the Constitutional Court repeat key sentences from old judgments,[34] maintaining at least the perception of case law's continuous development in Hungary.

In Hungary, despite several criticisms addressed at its recent composition and case law, the formal legitimacy of the Constitutional Court has not been questioned, and it is generally acknowledged that this body is authorized to elaborate on the detailed interpretation of constitutional identity. This is not currently the case in Poland, where the legitimacy or even the legality of the current Constitutional Tribunal or at least of some constitutional judges has been questioned by several domestic and international counterparts.[35] One should not expect a body with questionable recognition to develop a concept which should represent some minimum legal points of consent for the whole society.

The cursory glance at these two implementations highlights the lack of a unitary European discussion on constitutional identity. Due to the lack of a clear European definition or at least standard on this legal instrument, each member state faced this issue under different circumstances, which determined the functions assigned to constitutional identity. If constitutional identity emanates from diverse backgrounds in each member state, it will be hard to apply this concept as a term of European law.

3. The elements of constitutional identity in Poland and Hungary

In Poland and Hungary, despite some clear differences, the structure of the two constitutional identity frameworks is inherently similar, therefore, similar doubts may be raised regarding the explicit content of constitutional identity. To clarify the shortcomings in this regard, firstly, the key sentences of the Polish Lisbon Treaty judgment should be cited:

> The Constitutional Tribunal shares the view expressed in the legal scholarship that the competences of the sovereign state, under the prohibition of conferral to international organisations, constitutes the constitutional identity, and thus reflects the values the Constitution is based on. Therefore, constitutional identity is a concept which determines the scope of "excluding – from the competence to confer competences – the matters which constitute [...] the heart of the matter, i.e., are fundamental to the basis of the political system of a given state", the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competencies, the following should be included among the matters under the complete prohibition of the conferral: decisions specifying the fundamental principles of the

32 Art. 19(2) of the Fourth Amendment of the Fundamental Law.

33 The ruling of the Hungarian Constitutional Court, 13/2013.(VI.17.) [2013] ABH.

34 At first the cited old sentences are expressly mentioned in justifications of new rulings; but once an old statement has been repeated by recent case law, subsequent reasonings will refer to these recent repeats of the old statements instead of the original rulings based on the previous Constitution of Hungary.

35 P Tuleja, 'The Polish Constitutional Tribunal' in A von Bogdandy, P Huber, C Grabenwarter (eds), *The Max Planck Handbooks in European Public Law.* Vol 3: *Constitutional Adjudication: Institutions* (Oxford University Press 2020) 619–672, <https://www.doi.org/10.1093/oso/9780198726418.003.0012>.

> Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state under rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power of the people and the bicameral Polish Parliament to amend the Constitution and the competence to determine competences.[36]

The Polish Constitutional Tribunal aimed to identify a standard for reasonably narrowing the scope of constitutional identity and clarifying its meaning. The main argument from the body was the declaration of equivalence between the unalienable competencies of the sovereign Polish State under Art. 90 of the Polish Constitution[37] and its constitutional identity. However, despite this commendable step towards constructing a coherent framework, the Tribunal managed only to provide an exemplificative enumeration of certain elements, which should form part of constitutional identity. However, the list remains open-ended, and it is up to the interpretation to confer an unalienable character on further principles and values to extend the scope of constitutional identity. Moreover, this approach does not consider that due to its aforementioned ambiguity, constitutional identity should be elaborated jointly by national constitutional courts and by the ECJ[38], as confirmed several times by the ECJ and national constitutional courts.
The relevant argumentation of the Hungarian Constitutional Court faces similar shortcomings, as demonstrated by the following crucial sentences:

> The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, based on the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law.[39]
>
> The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.[40]
>
> The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall

36 Judgement of the Polish Constitutional Tribunal, K 32/09.
37 Article 90. of The Constitution of Poland (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483) stipulates: 'The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'.
38 E Cloots (2016) 82.
39 The Ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.), point 64.
40 Ibid., point 65.

> remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.[41]

Sovereignty is at the heart of the Hungarian reasoning, and the inalienable competencies of the Hungarian sovereign are mentioned, but the collection of these is not understood as the equivalent of constitutional identity like in Poland.[42] Instead, the Constitutional Court nominated two explicit sources of constitutional identity: the National Avowal, and the achievements of the historical Constitution, however, the second category is itself still overbroad . Nevertheless, the ruling provides the entire Fundamental Law as the potential basis of constitutional identity, undoubtedly too vague a background for this concept. Constitutional identity as a normative idea should describe those core provisions or clauses of the constitution, which shall be over'ordinary' constitutional provisions, and which should constitute substantial restrictions on constitutional amendments[43] as well as on the limitation of sovereignty. By contrast, the Hungarian definition just provides a list of evidently crucial constitutional principles and values without constructing any coherent framework of interpretation behind them.

There are huge uncertainties around the elements of constitutional identity in Poland and Hungary, and this is again explained by the lack of any common sense about the standards behind constitutional identity. The content of this concept cannot be the same in all member states, since the uniqueness of each country should be reflected, however, at least the key formal and substantial principles should be agreed, possibly during a future amendment of the founding treaties of the European Union, which should be borne in mind during the national conceptualizations of constitutional identity.

4. The functions of constitutional identity in Poland and Hungary

The special character of constitutional identity is well reflected by the functions assigned to it. According to the model of Anna Śledzińska-Simon, constitutional identity has an individual, a relational, and a collective aspect, and all of these are used in both Poland and Hungary.[44] The individual and the collective aspects are the strongest, and the highlights are slightly different depending on the exact circumstances of the two countries.

The individual aspect of constitutional identity describes those elements of a constitutional framework that provides its speciality *vis a vis* other national legal systems. The characteristics identified under this aspect shall also form the basis of the relational and the collective aspects, while it should restrict the constitution-amending power's room for manoeuvre. Regarding this second point, both the Polish and the Hungarian Constitutional Court have consistently rejected substantial review of constitutional amendments and opened a review only on formal

41 The ruling of the Hungarian Constitutional Court, 22/2016.(XII. 5.), point 67.

42 Ibid., point 60.

43 T. Drinóczi, 'Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján' [Again the constitution-making power, from the constitution-amending power and from unconstitutional constitutional amendments on the ground of the Fundamental Law] (2015) Jogtud Köz 790(7-8), 362 <https://matarka.hu/klikk.php?cikkmutat=2250631&mutat=http://real-j.mtak.hu/1901/32/jk1578.pdf> accessed 19 Mar 2022.

44 A Śledzińska-Simon, 'Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland' (2015) ICON 13(1), 124 <https://doi.org/10.1093/icon/mov007>.

grounds.[45] Consequently, constitutional identity is not utilised as a substantial standard for the scrutiny of constitutional amendments. Nevertheless, especially in Hungary, where the role of historical traditions is closely linked to the discussion on constitutional identity, the constitutional uniqueness of the country is highlighted.

Regarding the relational aspect, constitutional identity shall secure for the state that it has equal status in its diplomatic relations with foreign countries, and its sovereignty should be respected in cases of international cooperation.[46] Despite the fact that constitutional identity is sometimes cited as a legal argument in bilateral interstate relations, the role of this concept is usually not crucial in the field of international law.[47]

Under the collective aspect, the constitutional identity of member states determines the national authorities' room for manoeuvre within the European legal space, as a community of equal and sovereign legal entities.[48] At this point, the inherent ambiguity of constitutional identity should be highlighted again: member states should preserve their unique character but should also conclude agreements in certain fields to establish unitary regulation within the whole community.[49] The shortcomings regarding the European and national dimensions of constitutional identity will be conceptualized elsewhere; here the judicial bodies' role in expressing national sovereignty should be highlighted. When constitutional identity was introduced in Poland and Hungary, mainly the governmental margin of movement was addressed, however, especially in Poland after the beginning of the constitutional crisis, the status of the Polish judiciary has been a controversial matter at the international level. Several international organisations expressed their concerns, while the ECJ, as well as the European Court of Human rights, have several times declared the incompatibility of the Polish judicial reforms with European Law and with the European Convention on Human Rights.[50] The uncertainty around constitutional identity is demonstrated excellently by the fact that the current Polish government relies on constitutional identity when it rejects the competencies of European and international actors to interfere; while opponents of the recent judicial reforms consider that the constitutional identity of Poland should primarily prevent the government from conducting such measures which may undermine the independence and the legitimacy of the judiciary.[51]

Despite the intense relevant debates also taking place in Hungary,[52] this context of controversies around the status of the judiciary has less weight, however, the planned reorganisation of the Hungarian administrative judiciary was heavily criticized by a wide range of international

45 The ruling on the Hungarian Constitutional Court, 61/2011.(VII.13.) [2011] ABH 290.

46 Judgement of the ECJ C-364/10 EU:C:2012:630.

47 E Várnay, 'Az Európai Bíróság ítélete a Magyarország kontra Szlovákia ügyben' [The judgement of the European Court of Justice in the case Hungary v. Slovakia.] (2013) JeMa vol. 4, 84.

48 L Trócsányi, 'Nemzeti alkotmányok, európai integráció és alkotmányos identitás' [National constitutions, European integration and constitutional identity] (2017) Acta Univ Szeged vol. 1, 319 <http://acta.bibl.u-szeged.hu/45281/1/juridpol_078_319-328.pdf> accesssed 19 Mar 2022.

49 A von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe' (2005) ICON vol. 2–3, 295 <https://www.doi.org/10.1093/icon/moi021>.

50 SWD(2021) 722 final.

51 D Miąsik, M Szwarc, 'Effectiveness of EU Directives in National Courts – Judicial Dialogue Continues: The Court of Justice's Judgment in C-545/17 Pawlak' (2019) PYIL vol. 39, 267–284, <https://doi.org/10.24425/pyil.2020.134485>.

52 Parliamentary questions of 21 March 2019, Question for written answer E-001444-19 to the Commission Rule, 130, Csaba Molnár (S&D), <https://www.europarl.europa.eu/doceo/document/E-8-2019-001444_EN.html accessed> 19 Mar 2022.

stakeholders. Ultimately, the envisaged reforms were withdrawn.[53] Probably in the light of the Polish experience and the doubts around the Hungarian administrative justice, the Hungarian Parliament adopted a constitutional amendment, which underlined the significance of constitutional identity as well as the role of the national authorities in its protection: *All bodies of the State shall protect the constitutional self-identity of Hungary*.[54]

The term 'constitutional self-identity', commonly used in the Hungarian case law and literature, also shows that the functions assigned to constitutional identity are slightly different in Hungary than in Poland. Even the normativity of the Polish concept is subject to severe concerns, but the Hungarian framework is also supposed to contain several extra-legal elements. The issues raised by this characteristic will be detailed in the fifth and the sixth sections.

5, Constitutional identity in the European legal space: The Polish and Hungarian experiences

The issue around constitutional identity is based on a core tension between the European and the national aspects of the issue, and the scientific discourse has not substantially reflected on that.[55] On one hand, constitutional identity shall embody the specificity of a member state, and shall enumerate those elements of the national constitutional order which distinguish it from the constitutional identity of other countries, and which shall be untouchable even for constitutional amendments,[56] like the eternity clauses in certain constitutions.[57] On the other hand, if constitutional identity is invoked as a limit on the supremacy of EU law over national constitutions, it should have a unitary character, or at least a coherent European-wide standard, to prevent member states from justifying several overbroad exceptions from the scope of European harmonization.

Due to the political circumstances and the numerous legal controversies concerning Poland and Hungary before the European judicial bodies during the recent years, in both countries, constitutional identity has been used as an argument to retain the sovereignty of member states within the European legal space.[58] Owing to these tendencies, the scope of constitutional identity has been considerably extended during recent years by the Polish and Hungarian Constitutional Courts, when compared with the traditional concept of national identity.[59] National identity, protected by Art. 4 (2) of the Treaty on the European Union,[60] has been a regularly invoked argument, accepted

53 E Burján, B Szentgáli-Tóth, 'A Cursory Glance on the Hungarian Administrative Justice System After Two Main Reform Attempts' (2015) Dublin Law & Politics Review, 1–15 <http://real.mtak.hu/116981> accessed 28 Oct 2021.

54 Seventh Amendment to the Fundamental Law of Hungary, art. 4.

55 AF Tatham, 'A case of 'Friendliness is next to Stateliness'? The Migration of Constitutional Ideas on Euro-Conform Interpretation of National Law' (2013) Revija za evropsko parvo 15(1), 5 <http://scindeks.ceon.rs/article.aspx?artid=1450-79861301005T> accessed 19 Mar 2022.

56 A Bragyova, F Gárdos-Orosz, 'Vannak-e megváltoztathatatlan normák az Alaptörvényben?' [Are there unamendable provisions at the Fundamental Law?] (2016) Állam- és Jogtudomány vol. 3, 35 <http://real.mtak.hu/43468/1/2016_03_BragyovaA_GardosOroszF.pdf> accessed 19 Mar 2022.

57 S Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021), <https://www.doi.org/10.1093/oso/9780198858867.001.0001>.

58 K Popławski (2019).

59 T Drinóczi, 'Az alkotmányos identitásról. Mi lehet az értelme az alkotmányos identitás alkotmányjogi fogalmának?' [From constitutional identity: what might be the advantages of constitutional identity?] (2016) MTA Law Working Papers 3(15), 4 <http://real.mtak.hu/121445/> accessed 19 Mar 2022.

60 A von Bogdandy, S Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag' (2010) ZaöRV vol. 70, 712 <https://www.zaoerv.de/70_2010/70_2010_4_a_701_734.pdf> accessed 12 Mar 2022.

several times[61] by the ECJ.[62] This concept has justified the differing regulations of member states in the field of language issues, use of names, or certain family law cases. National identity has been an important consideration in the reasoning of the ECJ, however to date it has not constituted an absolute value, other factors and the common European interest might outweigh it.[63]

The difference of opinion between the ECJ and national constitutional courts is certainly not a new dispute.[64] While ECJ has acknowledged national identity only in certain narrow fields,[65] the German Federal Constitutional Court interpreted the unamendable provisions of German Basic Law as the constitutional identity of Germany and stated that the priority of these norms should not be questioned by the supremacy of European law.[66] For instance, the Court concluded that national law should prevail over European law when the supremacy of EU law would diminish the level of the fundamental protection of rights in Germany.

In Polish and Hungarian discussions, constitutional identity has appeared as a factor protecting the key elements of state sovereignty: its territory, its integrity, its population, and its internal structure of administration.[67] The Polish Constitutional Tribunal, especially since 2015[68], and since 2016 also the Hungarian Constitutional Court, have given such an interpretation to constitutional identity, which has been criticised heavily by the European authorities.[69] It should be noted that the recent development of constitutional identity, whether in Poland or Hungary, is just an indicator of increased political and social tensions within the European community as a whole. Due to the ambiguity of constitutional identity outlined, in my view, the ideal way out of this dilemma would be to outline a minimum standard in the founding treaties and for detailed case law based on this to be jointly elaborated by the ECJ and the national constitutional courts.[70] The standard should contain some rigid components to establish the unity of the European Union as one pillar; but also should leave broad space for member states to manoeuvre, reflecting their unique characteristics.

The dialogue between these judicial entities has not been fruitful at any stage of European integration; nevertheless, several steps have been made to moderate the alleged tensions and to bring the different approaches closer to each other. It is worth contemplating that both constitutional courts have shown a willingness to consider the case-law of Luxembourg and Strasbourg, with several Polish and Hungarian rulings containing an extensive overview of the relevant European

61 Article 4(2) of the Treaty on the European Union (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] JoL C 115, 1-338).

62 D Preshova, 'Battleground or Meeting Point? The Respect for National Identities in the European Union – Article 4(2) The Treaty on the European Union' (2012) Croat Yearb Eur Law Policy vol. 8, 284 <https://hrcak.srce.hr/clanak/139309> accessed 19 Mar 2022.

63 Judgement of the ECJ C-51/15 EU:C:2016:985.

64 Judgement of the ECJ C-6/64 EU:C:1964:66; Judgement of the ECJ C-11/70.

65 Judgement of the ECJ T-529/13 EU:T:2016:282.

66 M Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) ICON 14(2), 411, <https://doi.org/10.1093/icon/mow035>.

67 A Voßkuhle, *Verfassungsgerichtsbarkeit und europäische Integration* (Bundesverfassungsgerichts 2012), <https://www.vfgh.gv.at/downloads/verfassungsgerichtsbarkeit_und_europaeische_integration_(hup.pdf> accessed 3 Nov. 2021.

68 Judgements of the Polish Constitutional Tribunal of 20 April 2020, U 2/20 (2020) OTK-A 61; of 28 January 2020, Kpt 1/20 (2020) OTK-A 60; of 15 June 2021, P 7/20 (2021) OTK-A 49.

69 Last time confirmed by the ruling of the Hungarian Constitutional Court, 33/2021.(XII.22.) [2021] ABH.

70 Judgement of the ECJ C-208/09 EU:C:2010:806; Judgement of the ECJ C-391/09 EU:C:2011:291; Judgement of the ECJ C-438/14 EU:C:2016:401.

jurisprudence. However, requests for preliminary rulings have not been submitted to the ECJ by the Polish or Hungarian Constitutional Courts,[71] at most these bodies sometimes suspended the proceedings before them when the matter was being simultaneously heard by the ECJ, and waited for the European judgment.[72]

The attitude of Central-European constitutional courts has also changed recently: national constitutional courts are more reluctant to deal with European legal practice; greater weight is given to the development of national case law based on local specificities. For instance, the Polish Constitutional Tribunal analysed the imperialism of international courts in its recent abortion ruling.[73] Obviously, these tensions are partly consequences of the continuous deepening of European integration, which has consistently generated opposing views from supporters of broader national sovereignty at the national level,.

Constitutional identity has an inherent place in the European legal space and constitutes a legitimate reflection of member states on European integration while retaining certain elements of their sovereignty. Nevertheless, I hold that this concept should not be used as a political instrument, and should not be a victim of the increasing political and social tensions around Europe.[74] More willingness for cooperation and compromise-finding will be necessary, both in Poland and Hungary, and also across Europe, in order to establish the proper place of this concept in the European constitutional discourse and to avoid further misconceptualisation. For this purpose, a clear standard coming from the founding treaties is necessary to create common grounds for the national definition of constitutional identity to be vested with a normative legal character.

6. The relationship of constitutional identity with the historical traditions of the nation

A framework with a normative legal character should be clearly distinguished from the terms of other branches of science and should not be mixed up with sociological or cultural, legally non-tangible elements.[75] This requirement has specifically not been fulfilled in Hungary, where the legal character of constitutional identity has not been crystallized yet. In Poland, constitutional identity is based on the 1997 Constitution of the country, at the extremes the Constitution of 4 May 1791 might be also considered. Constitutional identity based on the case-law of the Constitutional Tribunal on the unalienable competencies of the state, only its content is dubious. This is the reason why lawyers call on the concept of Polish constitutional identity in inherently different contexts.

In Hungary, the new Fundamental Law raised the significance of historical traditions in constitutional argumentation.[76] As a consequence, several scholars shared their views about the

71 A Vincze, 'Előzetes döntéshozatal és alkotmánybíráskodás' [Request for preliminary ruling and constitutional review] (2018) Alkotmánybírósági Szemle vol. 1, 22.

72 L Blutman, 'Az Alkotmánybíróság és az előzetes döntéshozatali eljárás' [The Constitutional Court and requests for preliminary ruling] (2015) Közjogi Szemle vol. 4, 1.

73 The judgement of the Polish Constitutional Tribunal of 22 October 2020, K 1/20 (2021) OTK-A 4.

74 LFM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) Utrecht L Rev (6)3, 36 <http://doi.org/10.18352/ulr.139>.

75 M Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2010).

76 Z Fejes, 'Constitutional Identity and Historical Constitution Clause in the Hungarian Fundamental Law and Its Effects on Constitutional Interpretation' in Z Szente, F Mandák, Z Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan 2015) 25–44.

constitutional uniqueness of the country,[77] and the Constitutional Court has also analysed the historical development of particular actual laws on several occasions.[78] Constitutional identity as a concept was seen from the perspective of this discussion, and the undefined range of historical constitutional achievements was considered to be the main source of constitutional identity. When this framework was officially acknowledged by the Constitutional Court, its conceptualization has been conducted under very problematic terms:

> The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created – just acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State.[79]

This amounts to a discrepancy with the normative approach experienced in Poland: The Hungarian Constitutional Court failed to properly distinguish constitutional identity from other forms of identity. Constitutional identity should be a primarily legal category with legally tangible elements and with such a level of precision that may provide substantial orientation for the interpretation. However, the Hungarian reasoning mostly relies on a cultural approach to national identity, which is merely acknowledged by the legal norms, even by the constitution. This approach is based on undoubtedly crucial factors for a national community to build its own collective identity, and these values should be preserved by the society in daily life. Nevertheless, as far as legal interpretation is concerned, a more rigorous and normative approach would be necessary to implement constitutional identity in the legal system with sufficient transparency. Constitutional identity does not serve as the basis of a country's self-identity; it is just a framework of interpretation elaborated for serving special purposes, especially the substantial review of constitutional amendments or restricting the scope of European integration.[80] By contrast, the Hungarian Constitutional Court declared that constitutional identity is not established by the Fundamental Law of Hungary, but merely acknowledged. This statement is valid for national identity in its cultural sense for the whole community since the Fundamental Law or constitution

77 For instance amongst the first of those please see: Z Szente, 'Történeti alkotmány és a Szent Korona az új Alaptörvényben' [Historical constitution and Holy Crown in the Fundamental Law] (2011) Közjogi Szemle vol. 3, 1.

78 Amongst others please see: ruling of the Hungarian Constitutional Court, 33/2012.(VII.17.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0033_2012.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 45/2012.(XII.29.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0045_2012.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 28/2013.(X.9.) [2013] ABH 865; ruling of the Hungarian Constitutional Court, 7/2014.(III.7.) [2014] ABH; ruling of the Hungarian Constitutional Court, 3072/2015.(IV.23.) [2015] ABH 1616; ruling of the Hungarian Constitutional Court, 2/2016.(II.8.) [2016] ABH; ruling of the Hungarian Constitutional Court, 12/2017.(VI.19.) [2017], <https://hunconcourt.hu/uploads/sites/3/2018/11/12_2017_en_final.pdf> accessed 19 Mar 2022; ruling of the Hungarian Constitutional Court, 15/2019.(IV.17.) [2019] ABH; ruling of the Hungarian Constitutional Court, 22/2020.(VIII.4.) [2020] ABH 2048.

79 The ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.), point 67.

80 A Kustra-Rogatka, 'Constitutional Identity as Implied Limits of Constitutional Amendment Powers. The Case of Poland' (2019) TSP-W vol. 15, 39–53 <http://dx.doi.org/10.12775/TSP-W.2019.003>.

are just concrete expressions of national identities with legal terms.[81] This meaning of national identity should also not be mixed up with the notion of national identity that appears in the reasoning of the ECJ,[82] since the latter falls closer to constitutional identity at the national level.[83]

The wording of 'constitutional self-identity' consistently used by the Hungarian Constitutional Court[84] and by several scholars also clearly demonstrates that the Hungarian concept is filled with crucial elements, but also with components which lack any normative character. So, in my view, even though the Fundamental Law acknowledges the national identity of Hungary, the constitutional identity of the country as a legal framework is or should be grounded in the Fundamental Law. Without this distinction, constitutional identity would fail to fulfil its functions as outlined in the third section, and would be just an empty concept in the Hungarian constitutional discourse.

7. The main concerns around constitutional identity in Poland and Hungary

In the light of the preceding details, one may raise four main concerns regarding the current development of constitutional identity in Poland and Hungary, inherently similar in the two countries despite having slightly different highlights, and perhaps also worthy of consideration for other European countries.

Firstly, constitutional identity should enumerate those constitutional principles and values which are shared by the whole community; otherwise, it will not strengthen the legal cohesion of the country. If there is a commonly accepted definition of constitutional identity, its elements would still obviously be subject to further interpretation, but at least the grounds would be identical for everyone. Without clearly established sources and content, constitutional identity cannot play a primary role in constitutional discourse[85] and should be seen as an argument rather than a concept, and it will be subject to manipulative misconceptualisations by the different sides.[86]

Secondly, constitutional identity should be coherently distinguished from other forms of identity. It should be borne in mind that constitutional identity is not just a list of common values, but also a narrow set of constitutional principles with normative legal force that should fulfil well-defined functions in the legal discourse.[87] Regardless of the huge number of common

81 GJ Jacobsohn, *Constitutional Identity* (HUP 2010).

82 Judgement of the ECJ C-393/10 EU:C:2012:110; Judgement of the ECJ C-58/13 EU:C:2014:2088; Judgement of the ECJ C-673/16, EU:C:2018:385.

83 M Sulyok, 'Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában' [National and constitutional identity in the case law of national constitutional courts] in MA Jakó (ed), *Nemzeti identitás* és *alkotmányos identitás az Európai Unió* és *a tagállamok viszonylatában* (SZTE-ÁJK 2014) 44–62, <http://acta.bibl.u-szeged.hu/63836/> accessed19 Mar 2022.

84 The ruling of the Hungarian Constitutional Court, 2/2019.(III.5.) [2019] ABH 28–62; the ruling of the Hungarian Constitutional Court, 11/2020.(VI.3.) [2020] ABH 1118-1131.

85 A Śledzinska-Simon, M Ziółkowski, 'Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?' in C Calliess, G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 243–267, <https://www.doi.org/10.1017/9781108616256.012>.

86 T Sulyok, G Deli, 'A nemzeti identitás az Alkotmánybíróság gyakorlatában' [National identity at the case law of the Constitutional Court] (2019) AB Szem vol. 1, 59.

87 T Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) Camb Yearb Eur Leg Stud vol. 13, 195 <https://www.doi.org/10.5235/152888712801753031>.

elements, constitutional identity is far from national self-identity. In my view, it should not prevail outside of legal argumentation, it should not secure the engagement of the people towards the state and the national community. There are other instruments, other forms of identity which should further these purposes and which should be strengthened in society to ensure the protection of national traditions in any field of life.

Thirdly, the ambiguity of constitutional identity should be understood, and particular weight should be given to this characteristics of this framework. Exchange of views on this matter evolves along two effectively independent branches: there is a discussion within member states on developing their constitutional identity, while the role of this concept is also uncertain in the European legal space. Constitutional identity must contain static and dynamic elements, even from a European perspective. One should not expect member states to operate with identical meanings for constitutional identity, since this would undermine the diversity of European integration and the right of member states to retain the core of their sovereignty. However, if a minimum European standard of constitutional identity is not met, this provides member states with unlimited potential to justify exceptions from rules with uniform European applicability.

This problem concerns European integration as a whole, not only in Poland and Hungary, and the solution might be imaginable only on two levels. An amendment of the founding treaties should provide certain minimum standards with which the constitutional identity of each member state should comply, and with this in place, the ECJ may precisely define the terms of the founding treaties in its case law. Simultaneously, member states should explicitly provide in their constitutions their definition of constitutional identity, which should be filled with more detailed content by the national constitutional courts in cooperation with the European judicial bodies. I am fully aware of the fact that in light of the current political and social situation these recommendations may be seen as idealistic, but in my view, the difficulties should not prevent us from at least defining proper targets and looking for steps which may lead us towards these aims.

One may also argue that the method of treatment outlined is quite time-consuming and therefore its impact might be tangible only for the long term, but such a complex issue as constitutional identity may not be reconsidered otherwise than at the end of an inclusive, transparent, and long series of negotiations. For instance, the Copenhagen Criteria, which were accepted by all new member states before their accession to the European Union, might constitute the basis of the minimum standards which the constitutional identity of each member state should comply with.[88]

Fourthly, the attitudes of judges and other stakeholders regarding constitutional identity should considerably change to moderate the discussions around it.[89] Due to the European and national aspects of this matter, constitutional identity should be elaborated by constructive dialogue between the ECJ and national constitutional courts.[90] Regrettably, during recent years the dialogue, especially between the ECJ and the Polish and Hungarian constitutional courts, has not been fruitful, and all stakeholders have shown less willingness to understand the

88 P Rezler, 'The Copenhagen Criteria: Are They Helping or Hurting the European Union?' (2011) Touro Law Rev vol. 14, 390 <https://www.tourolaw.edu/ilr/uploads/articles/v14_2/5.pdf> accessed 19 Mar 2022.

89 I Kukorelli, 'Az Alaptörvény és az Európai Unió' [The fundamental law and the European Union] (2013) Pro Bono Publico 1(1), 4–11 <https://folyoirat.ludovika.hu/index.php/ppbmk/article/view/3129/2379> accessed 19 Mar 2022.

90 M Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) Eur Const Law Rev 10(2), 263 <https://doi.org/10.1017/S1574019614001187>.

counterarguments.[91] If this attitude remains dominant, constitutional identity might be further misconceptualised, and will mostly serve as a political argument rather than an effective framework of legal interpretation.[92] Now we are hopefully still at a stage early enough to prevent constitutional identity from being irreversibly politicised.

8. Conclusion

This contribution has reflected on an issue with increasing importance and attempted to add a new point of view to the ongoing discussion. Constitutional identity should be based on the legal tradition of each member state, but discussions on this matter should shift to a European level. The elements of national identity within the case-law of the ECJ, and constitutional identity in national jurisprudence, should be considered to establish a coherent legal instrument for wider European integration, as well as for each member state. A certain margin of freedom should be left for member states, but some restrictions on this flexibility should be agreed upon by the member states to make the European project viable in the long term.

To achieve this purpose, we must further examine the issue of constitutional identity on a supranational level with a comparative methodology to better understand what happens to the same legal concepts in the different corners of Europe, especially in the Visegrád region. A continuous dialogue would be necessary across the whole community to outline the proper place of constitutional identity in constitutional debates, and this is not feasible without constructing a detailed overview from the recent relevant developments within the Central-European region in this regard.

The role of constitutional identity has gradually grown alongside the deepening of European integration. Since the scope of harmonization is still increasing, constitutional identity has a prospective and evolving role in the constitutional dialogue of Europe, therefore greater efforts should be devoted to clarifying this legal construction.[93] Constitutional identity should avoid being relegated to an arbitrary argument with no justification.

As a closing remark, having considered carefully the difficulties entailed in this idea, I would like to stress again the importance of constitutional identity; its sufficiently deep elaboration would provide potential answers to several currently unresolved constitutional dilemmas. If compromises can be concluded from its interpretation, constitutional identity would not only clarify and partly reconsider the complex relationship between the European and national legal systems, but will also constitute convincing grounds for substantial review of constitutional amendments. Despite the fact that most stakeholders in Poland and Hungary focus on the European dimension of constitutional identity, this might be also an effective tool for national constitutional courts to protect the fundamental values of the constitution from internal attacks, so from constitutional amendments substantially incompatible with the spirit of the constitution. But we can only expect this in the case of a more transparent and balanced conceptualization of constitutional identity, based on joint and mutual respect of national identities and the interests of the European integration.

91 A Soltys, 'The Obligation to Interpret National Law in Accordance with the European Law in the Jurisprudence of Polish Constitutional Court – Focus on Limits' (2017) EJPM vol. 1, 51–62 <https://wpia.uwm.edu.pl/czasopisma/sites/default/files/uploads/EJPM/2017/1/52-63.pdf> accessed 14 Oct 2021.

92 R D Kelemen, L Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) Camb Yearb Eur Leg Stud vol. 21, 59–74 <https://doi.org/10.1017/cel.2019.11>.

93 AF Tatham, *Central European Constitutional Courts in the Face of EU Membership. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013).

References

Literature

Bakó B, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary' (2018) ZaöRV vol. 78, 863–902 <https://www.zaoerv.de/78_2018/78_2018_4_a_863_902.pdf> accessed 2 Feb 2022.

Besselink LFM, 'National and Constitutional Identity before and after Lisbon' (2010) Utrecht L Rev 6(3), 36–49 <http://doi.org/10.18352/ulr.139>.

Biernat S, Kawczyńska M, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C Asser Press 2019) 745–794, <https://doi.org/10.1007/978-94-6265-273-6_16>.

Blutman L, 'Az Alkotmánybíróság és az előzetes döntéshozatali eljárás' [The Constitutional Court and requests for preliminary ruling] (2015) Közjogi Szemle vol. 4, 1–8.

Bogdandy von A, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe' (2005) ICON vol. 2–3, 295–315 <https://www.doi.org/10.1093/icon/moi021>.

Bogdandy von A, Schill S, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag' (2010) ZaöRV vol. 70, 701–734 <https://www.zaoerv.de/70_2010/70_2010_4_a_701_734.pdf> accessed 12 Mar 2022.

Brack N, Coman R, Crespy A, 'Sovereignty Conflicts in the European Union' (2019) Les Cahiers du Cevipol vol.4, 3–30 <https://www.cairn.info/revue-les-cahiers-du-cevipol-2019-4-page-3.htm> accessed 31 Nov 2021.

Bragyova A, Gárdos-Orosz F, 'Vannak-e megváltoztathatatlan normák az Alaptörvényben?' [Are there unamendable provisions at the Fundamental Law?] (2016) Állam- és Jogtudomány vol. 3, 35–63 <http://real.mtak.hu/43468/1/2016_03_BragyovaA_GardosOroszF.pdf> accessed 19 Mar 2022.

Burján E, Szentgáli-Tóth B, 'A Cursory Glance on the Hungarian Administrative Justice System After Two Main Reform Attempts' (2015) Dublin Law & Politics Review, 1–15 <http://real.mtak.hu/116981> accessed 28 Oct 2021.

Chronowski N, A Vincze, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján' [Self-identity and European integration – the Constitutional Court looking for identity] (2017) Jogtud Köz vol. 3, 117–132 <http://real.mtak.hu/id/eprint/100617> accessed 19 Mar 2022.

Cloots E, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) Neth J Leg Philos vol. 2, 82–98 <https://www.doi.org/10.5553/NJLP/.000049>.

Csink L, 'Az Alaptörvény identitása – Honnan hová?' [The identity of the Fundamental Law: from where to where?] (2015) Acta Univ Szeged vol. 78, 134–141 <http://acta.bibl.u-szeged.hu/45269/1/juridpol_078_134-141.pdf> accessed 19 Mar 2022.

Czapliński W, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' (2011) ERA Forum vol. 12, 97–204 <https://www.doi.org/10.1007/s12027-011-0206-z>.

Drinóczi T, 'Az alkotmányos identitásról. Mi lehet az értelme az alkotmányos identitás alkotmányjogi fogalmának?' [From constitutional identity: what might be the advantages of

constitutional identity?] (2016) MTA Law Working Papers 3(15), 1–42 <http://real.mtak.hu/121445/> accessed 19 Mar 2022.

Drinóczi T, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) Ger Law J 21(2), 105–130 <https://www.doi.org/10.1017/glj.2020.1>.

Drinóczi T, 'Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján' [Again the constitution-making power, from the constitution-amending power and from unconstitutional constitutional amendments on the ground of the Fundamental Law] (2015) Jogtud Köz 70(7–8), 361–378 <https://matarka.hu/klikk.php?cikkmutat=2250631&mutat=http://real-j.mtak.hu/1901/32/jk1578.pdf> accessed 19 Mar 2022.

Dudzik S, Półtorak N, 'The Court of the Last Word. Competences of the Polish Constitutional Tribunal in the Review of European Law' (2012) Yearb Pol Eur Stud 15, 225–258 <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.cejsh-e4e3acc9-c00c-44ea-ae46-0b38fad00a88> accessed 19 Mar 2022.

Fejes Z, 'Constitutional Identity and Historical Constitution Clause in the Hungarian Fundamental Law and Its Effects on Constitutional Interpretation' in Z Szente, F Mandák, Z Fejes (eds) *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan 2015) 25–44.

Jacobsohn GJ, *Constitutional Identity* (HUP 2010).

Jovanović M, 'Sovereignty – Out, Constitutional Identity – In: The 'Core Areas' of Controversy of EU Membership' (2015) Acta Jur Hung vol. 56, 249–267 <https://doi.org/10.1556/026.2015.56.4.2>.

Kelemen RD, Pech L, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) Camb Yearb Eur Leg Stud vol. 21, 59–74 <https://doi.org/10.1017/cel.2019.11>.

Kéri V, Pozsár-Szentmiklósy Z, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről' [The ruling of the Constitutional Court from the interpretation of Article E) of the Fundamental Law'] (2017) JeMa vol. 1–2, 5–15, <https://jema.hu/article.php?c=469> accessed 19 Mar 2022.

Konstadinides T, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) Camb Yearb Eur Leg Stud vol. 13, 195–218 <https://www.doi.org/10.5235/152888712801753031>.

Kukorelli I, 'Az Alaptörvény és az Európai Uni' [The fundamental law and the European Union] (2013) Pro Bono Publico 1(1), 4–11 <https://folyoirat.ludovika.hu/index.php/ppbmk/article/view/3129/2379> accessed 19 Mar 2022.

Kustra-Rogatka A, 'Constitutional Identity as Implied Limits of Constitutional Amendment Powers. The Case of Poland' (2019) TSP-W vol. 15, 39–53 <http://dx.doi.org/10.12775/TSP-W.2019.003>.

Miąsik D, Szwarc M, 'Effectiveness of EU Directives in National Courts – Judicial Dialogue Continues: The Court of Justice's Judgment in C-545/17 Pawlak' (2019) PYIL vol. 39, 267–284 <https://doi.org/10.24425/pyil.2020.134485>.

Mihálíková V, 'National and Constitutional Identity in the Case-Law of Constitutional Courts of the Visegrad Group' (2020) Stud Iurid Cass 8(1), 38–50 <https://doi.org/10.33542/SIC2020-1-04>.

Minkkinen P, 'Political Constitutionalism Versus Political Constitutional Theory: Law, Power, and Politics' (2013) ICON 11(3), 585–610 <https://doi.org/10.1093/icon/mot020>.

Polzin M, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent

Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) ICON 14(2), 411–438 <https://doi.org/10.1093/icon/mow035>.
Popławski K, 'Introductory Parts to the Constitutions of Visegrad Group Countries. Their Relevance, Constitutional Identity and Relation Towards European Constitutional Identity' (2019) Central European Papers 7(1), 25–50 <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-beb43450-9f00-408b-a665-88e3610a679b> accessed 19 Mar 2022.
Poplzin M, *Verfassungsidentität* (Mohr Siebeck 2018).
Preshova D, 'Battleground or Meeting Point? The Respect for National Identities in the European Union – Article 4(2) The Treaty on the European Union' (2012) Croat Yearb Eur Law Policy vol. 8, 267–298 <https://hrcak.srce.hr/clanak/139309> accessed 19 Mar 2022.
Rezler P, 'The Copenhagen Criteria: Are They Helping or Hurting the European Union?' (2011) Touro Law Rev vol. 14, 390–411 <https://www.tourolaw.edu/ilr/uploads/articles/v14_2/5.pdf> accessed 19 Mar 2022.
Rosenfeld M, *The Identity of the Constitutional Subject* (Routledge 2010).
Soltys A, 'The Obligation to Interpret National Law in Accordance with the European Law in the Jurisprudence of Polish Constitutional Court – Focus on Limits' (2017) EJPM vol. 1, 51–62 <https://wpia.uwm.edu.pl/czasopisma/sites/default/files/uploads/EJPM/2017/1/52-63.pdf> accessed 14 Oct 2021.
Stumpf I, 'Sovereignty, Constitutional Identity and European Law' (2020) Hung Rev 11(3), 35–46 <https://hungarianreview.com/article/20200515_sovereignty_constitutional_identity_and_european_law/> accesed 7 Nov 2021.
Sulyok M, 'Nemzeti és alkotmányos identitás a nemzeti alkotmánybíróságok gyakorlatában' [National and constitutional identity in the case law of national constitutional courts] in MA Jakó (ed), *Nemzeti identitás és alkotmányos identitás az Európai Unió és a tagállamok viszonylatában* (SZTE-ÁJK 2014) 44–62, <http://acta.bibl.u-szeged.hu/63836/> accessed 19 Mar 2022.
Sulyok T, Deli G, 'A nemzeti identitás az Alkotmánybíróság gyakorlatában' [National identity at the case law of the Constitutional Court] (2019) AB Szem vol. 1, 57–59.
Suteu S, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021), <https://www.doi.org/10.1093/oso/9780198858867.001.0001>.
Śledzińska-Simon A, 'Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland' (2015) ICON 13(1), 124–155 <https://doi.org/10.1093/icon/mov007>.
Śledzinska-Simon A, Ziółkowski M, 'Constitutional Identity in Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?' in C Calliess, G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019) 243–267, <https://www.doi.org/10.1017/9781108616256.012>.
Szente Z, 'Történeti alkotmány és a Szent Korona az új Alaptörvényben' [Historical constitution and Holy Crown in the Fundamental Law] (2011) Közjogi Szemle vol. 3, 1–13.
Tatham AF, *Central European Constitutional Courts in the Face of EU Membership. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013).
Tatham AF, 'A case of 'Friendliness is next to Stateliness'? The Migration of Constitutional Ideas on Euro-Conform Interpretation of National Law' (2013) Revija za evropsko parvo 15(1), 5–37 <http://scindeks.ceon.rs/article.aspx?artid=1450-79861301005T> accessed 19 Mar 2022.
Trócsányi L, 'Nemzeti alkotmányok, európai integráció és alkotmányos identitás' [National

constitutions, European integration and constitutional identity] (2017) Acta Univ Szeged vol. 1, 319–328 <http://acta.bibl.u-szeged.hu/45281/1/juridpol_078_319-328.pdf> accesssed 19 Mar 2022.

Tuleja P, 'The Polish Constitutional Tribunal' in A von Bogdandy, P Huber, C Grabenwarter (eds), *The Max Planck Handbooks in European Public Law. Vol 3: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 619–672, <https://www.doi.org/10.1093/oso/9780198726418.003.0012>.

Várnay E, 'Az Európai Bíróság ítélete a Magyarország kontra Szlovákia ügyben' [The judgement of the European Court of Justice in the case Hungary v. Slovakia.] (2013) JeMa vol. 4, 80–91 <https://jema.hu/article.php?c=283> accessed 19 Mar 2022.

Vincze A, 'Előzetes döntéshozatal és alkotmánybíráskodás' [Request for preliminary ruling and constitutional review] (2018) Alkotmánybírósági Szemle vol. 1, 22–30.

Voßkuhle A, *Verfassungsgerichtsbarkeit und europäische Integration* (Bundesverfassungsgerichts 2012), <https://www.vfgh.gv.at/downloads/verfassungsgerichtsbarkeit_und_europaeische_integration_(hup.pdf> accessed 3 Nov 2021.

Wendel M, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) Eur Const Law Rev 10(2), 263–307 <https://doi.org/10.1017/S1574019614001187>.

Legal acts

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483.

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] JoL C 115.

Fundamental Law of Hungary (prior to the Ninth Amendment, adopted on 15 December 2020), CDL-REF(2021)046, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e> accessed 20 Mar 2022.

Article R(3) of the Fundamental Law of Hungary of 25 April 2011, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54412e794> accessed 19 Mar 2022.

Judgments

Judgement of the ECJ C-6/64 EU:C:1964:66.

Judgement of the EJC C-11/70 EU:C:1970:114.

Judgment of Second Senate of 15 December 1970 BVerfGE 30 [1970].

Judgment of Second Senate of 12 October 1993 BVerfGE 89 [1993].

Judgement of the Polish Constitutional Tribunal of 24 February 1997, K 19/96 (1997) OTK 6.

Judgement of the Polish Constitutional Tribunal of 5 January 1999, K 27/98 (1999) OTK 1.

Judgement of the Polish Constitutional Tribunal of 28 April 1999, K 3/99 (1999) OTK 73.

Judgement of the Polish Constitutional Tribunal of 12 January 2000, P 11/98 (2000) OTK 3.

Judgement of the Polish Constitutional Tribunal of 8 May 2000, SK 22/99 (2000) OTK 107.

Judgement of the Polish Constitutional Tribunal of 28 June 2000, K 25/99 (2000) OTK 141.

Judgement of the Polish Constitutional Tribunal of 10 July 2000, SK 12/99 (2000) OTK 143.

Judgement of the Polish Constitutional Tribunal of 5 June 2001, K 18/00 (2001) OTK 118.
Judgement of the Polish Constitutional Tribunal of 29 November 2001, P 8/01 (2001) OTK 268.
Judgement of the Polish Constitutional Tribunal of 28 January 2003, K 2/02 (2003) OTK-A 4.
Judgement of the Polish Constitutional Tribunal of 27 May 2003, K 11/03 (2003) OTK-A 43.
Judgement of the Polish Constitutional Tribunal of 19 February 2003, P 11/02 (2003) OTK-A 12.
Judgement of the Polish Constitutional Tribunal of 21 April 2004, K 33/03 (2004) OTK-A 31.
Judgement of the Polish Constitutional Tribunal of 27 April 2004, P 16/03 (2004) OTK-A 36.
Judgement of the Polish Constitutional Tribunal of 31 May 2004, K 15/04 (2004) OTK-A 47.
Judgement of the Polish Constitutional Tribunal of 12 January 2005, K 24/04 (2005) OTK-A 3.
Judgement of the Polish Constitutional Tribunal of 31 January 2005, P 9/04 (2005) OTK-A 9.
Judgement of the Polish Constitutional Tribunal of 27 April 2005, P 1/05 (2005) OTK-A 42.
Judgement of the Polish Constitutional Tribunal of 30 May 2005, P 14/04 (2005) OTK-A 47.
Judgement of the Polish Constitutional Tribunal of 22 June 2005, K 18/04 (2005) OTK-A 49.
Judgement of the Polish Constitutional Tribunal of 19 December 2006, P 37/05 (2006) OTK-A 177.
Judgement of the Polish Constitutional Tribunal of 2 June 2007, K 41/05 (2007) OTK-A 72.
Judgement of the Polish Constitutional Tribunal of 17 June 2007, P 16/06 (2007) OTK-A 79.
Judgement of the Polish Constitutional Tribunal of 7 November 2007, K 18/06 (2007) OTK-A 122.
Judgement of the Polish Constitutional Tribunal of 12 February 2008, P 62/07 (2008) OTK-A 17.
Judgement of the Polish Constitutional Tribunal of 10 June 2008, P 15/08 (2008) OTK-A 105.
Judgement of the Polish Constitutional Tribunal of 15 November 2008, P 57/07 (2008) OTK-A 178.
Judgement of Second Senate 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09 [2009] BVerfGE 123.
Judgement of the Polish Constitutional Tribunal of 18 February 2009, KP 3/08 (2009) OTK-A 9.
Judgement of the Polish Constitutional Tribunal of 16 July 2009, KP 4/08 (2009) OTK-A 112.
Judgement of the Polish Constitutional Tribunal of 28 October 2009, KP 3/09 (2009) OTK-A 138.
Judgement of the ECJ C-208/09 EU:C:2010:806.
Ruling of the Hungarian Constitutional Court, 143/2010.(VII.14.) [2010] ABH 698.
Judgement of the Polish Constitutional Tribunal of 13 April 2010, P 35/09 (2010) OTK-A 39.
Judgement of the Polish Constitutional Tribunal of 1 June 2010, P 38/09 (2010) OTK-A 53.
Judgement of the Polish Constitutional Tribunal of 15 July 2010, K 63/07 (2010) OTK-A 60.
Judgement of the Polish Constitutional Tribunal of 10 November 2010, K 32/09 (2010) OTK-A 108.
Judgement of the Polish Constitutional Tribunal of 1 December 2010, SK 50/07 (2010) OTK-A 130.
Judgement of the ECJ C-391/09 EU:C:2011:291.
Ruling on the Hungarian Constitutional Court, 61/2011.(VII.13.) [2011] ABH 290.
Judgement of the ECJ C-364/10 EU:C:2012:630.
Judgement of the ECJ C-393/10 EU:C:2012:110.
Ruling of the Hungarian Constitutional Court, 33/2012.(VII.17.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0033_2012.pdf> accessed 19 Mar 2022.
Ruling of the Hungarian Constitutional Court, 45/2012.(XII.29.) [2012], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_0045_2012.pdf> [accessed 19.03.2022].

Judgement of the EJC C-202/11 EU:C:2013:239.
Ruling of the Czech Constitutional Court on the constitutionality of the Lisbon Treaty, ÚS 29/09 [2013], <https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf> accessed 6 Oct 2021.
Ruling of the Hungarian Constitutional Court, 13/2013.(VI.17.) [2013] ABH.
Ruling of the Hungarian Constitutional Court, 28/2013.(X.9.) [2013] ABH 865.
Judgement of the ECJ C-58/13 EU:C:2014:2088.
Decision of Zweiten Senats of 14 January 2014 [2014] BVerfGE 134.
Ruling of the Hungarian Constitutional Court, 7/2014.(III.7.) [2014] ABH.
Ruling of the Hungarian Constitutional Court, 23/2015.(VII.7.) [2015] ABH 548.
Ruling of the Hungarian Constitutional Court, 3072/2015.(IV.23.) [2015] ABH 1616.
Judgement of the ECJ T-529/13 EU:T:2016:282.
Judgement of the ECJ C-438/14 EU:C:2016:401.
Judgement of the ECJ C-51/15 EU:C:2016:985.
Ruling of the Hungarian Constitutional Court, 2/2016.(II.8.) [2016] ABH.
Ruling of the Hungarian Constitutional Court, 3130/2016.(VI.29.) [2016] ABV 16.
Decision of Second Senate of 18 July 2017 [2017] BVerfGE 146.
Ruling of the Hungarian Constitutional Court, 22/2016.(XII.5.) [2017], <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf> accessed 19 Mar 2022.
Ruling of the Hungarian Constitutional Court, 12/2017.(VI.19.) [2017], <https://hunconcourt.hu/uploads/sites/3/2018/11/12_2017_en_final.pdf> accessed 19 Mar 2022.
Judgement of the ECJ C-673/16 EU:C:2018:385.
Ruling of the Hungarian Constitutional Court, 2/2019.(III.5.) [2019] ABH 28-62.
Ruling of the Hungarian Constitutional Court, 15/2019.(IV.17.) [2019] ABH. Ruling of the Constitutional Court, 19/2019.(VI.18.) [2019], <https://hunconcourt.hu/uploads/sites/3/2019/12/19_2019_eng_final.pdf> accessed 19 Mar 2022.
Ruling of the Hungarian Constitutional Court, 11/2020.(VI.3.) [2020] ABH 1118-1131.
Ruling of the Hungarian Constitutional Court, 22/2020.(VIII.4.) [2020] ABH 2048.
Judgement of the Polish Constitutional Tribunal of 28 January 2020, Kpt 1/20 [2020] OTK-A 60.
Judgement of the Polish Constitutional Tribunal of 20 April 2020, U 2/20 [2020] OTK-A 61.
Judgement of the Polish Constitutional Tribunal of 15 June 2021, P 7/20 (2021) OTK-A 49.
Judgement of the Polish Constitutional Tribunal of 22 October 2021, K 1/20 (2021) OTK-A 4.
Judgement of Polish Constitutional Tribunal of 7 October 2021, K 3/21 (2021) OTK-A 65.
Ruling of the Hungarian Constitutional Court, 33/2021.(XII.22.) [2021] ABH.

Official documents

'Parliamentary questions, Question for written answer E-001444-19 to the Commission Rule, 130, Csaba Molnár (S&D)', <https://www.europarl.europa.eu/doceo/document/E-8-2019-001444_EN.html> accessed 19 Mar 2022.
Commission Working Document of 20 July 2021, 2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland SWD(2021) 722 final, <https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_poland_en.pdf> accessed 9 Oct 2021.

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Contemporary Central & East European Law

Repair of procurement damage: discussion on the basis of the Supreme Court's Resolution of 25 February 2021 (III CZP 16/20)

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Abstract

The text discusses the judgement of Supreme Court's resolution regarding compensation for damages resulting from violations of public procurement laws by contracting authorities. The resolution clarifies that contractors can seek damages without first obtaining rulings from appeal or complaint procedures. The absence of specific regulations in both previous and current legislation regarding compensation claims further underscores the importance of this ruling. The text examines the implications of the ruling on the public procurement system, emphasizing the need for alignment with EU directives and consideration of civil law liability for damages. Author also suggests the necessity of legislative amendments to address the legal gap and ensure effective remedies for aggrieved contractors, echoing similar practices in other European countries.

Keywords

public procurement, compensation, tort liability, harmonization of law with the EU

1. Introduction

The goal of any bidder participating in a public procurement procedure is to win the contract. However, sometimes they cannot achieve this goal as a result of actions or omissions of the contracting authority that violate the provisions of the Public Procurement Law of 11 September 2019.[1] In this situation, the aggrieved contractor may be interested in compensation for the damage that resulted from the contractor's failure to obtain a contract that they fully counted on (had a real interest in obtaining).

The above issue was the subject of the titular resolution of the Supreme Court of 25 February 2020 (ref. III CZP 16/20)[2]. The question addressed to the Supreme Court was whether it is possi-

1 Ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych [Public Procurement Law of 11 September 2019] [2019] JoL 2019; hereinafter referred to as the 'PPL'.

2 Judgment of the PSC III CZP 16/20 [2020], <https://www.sn.pl/sprawy/SitePages/Zagadnienia_prawne_SN.aspx?ItemSID=1355-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne&Rok=2020> accessed 15 Dec 2023.

ble for a contractor to seek damages without first establishing a violation of the PPL in an appeal or complaint procedure. The question was formulated as follows: 'Does the recovery of damages by a contractor whose bid was not selected as a result of a violation by the contracting authority of the provisions of the Act of 29 January 2004[3] [...] require that the violation of the provisions of this Act be first established by a legally valid ruling of the National Board of Appeals or a legally valid court ruling issued after recognising a complaint against the ruling of the National Board of Appeals?'. In esponse, the Supreme Court issued the following resolution: 'A claim for damages by a contractor whose offer was not selected because the contracting entity violated the provisions of the Act of 29 January 2004 [...] does not require that a violation of the provisions of this Act be first established by a final ruling of the National Board of Appeals or a final court ruling issued after recognising a complaint against a ruling of the National Board of Appeals'.

The subject of this article assesses whether the ruling of the Supreme Court is correct. Although this ruling was made under the previous legislation (before the so-called 'big amendment' to the Public Procurement Law of 11 September 2019), it still remains relevant. Neither the previous nor the current legislation contain specific regulations on compensation claims of participants in a public tender against its organiser (the contracting entity).

2. Resolution of the Supreme Court

In the factual case that the ruling referred to, the contractor brought action against the public procurer and demanded payment of compensation for damage caused by unlawful actions and omissions in the public procurement procedure, i.e. a *de facto* inability to select his bid as the most favourable one and to obtain the contract.

In the public procurement procedure, the contractor appealed twice to the National Board of Appeals (NAC), demanding that the actions by the contracting authority – the unlawful discontinuance of the procedure – be corrected and challenging the selection of a competitive bid. As for the second appeal, which was filed by the plaintiff company demanding that its bid be selected as the most advantageous, the appeal proceedings were discontinued following a decision to withdraw the appeal.

The court of first instance dismissed the claim for damages on the grounds that the plaintiff, in asserting their claim, should present a prejudication in the form of a decision of the NAC or a court adjudicating a complaint against a ruling of this body. In turn, the plaintiff's withdrawal of the appeal resulted in the proceedings being discontinued without a substantive ruling (prejudication).

When reviewing the appeal, the second-instance court decided to refer the above-mentioned legal issue to the Supreme Court in connection with the requirement that a violation of the PPL by the contracting authority must first be established.

The appeals court pointed out that the PPL does not include provisions for claims for damages. According to the court, 'the public procurement law was enacted pursuant to implementation of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures for the award of public contracts. Article 2(6) of Directive 89/665/EEC allowed for the possibility of stipulating that where compensation is sought for an unlawful

3 Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych [Public Procurement Law of 29 January 2004] [2019] JoL 1843 [consolidated text].

decision, the decision in question must first be annulled by an authority with the competent powers with the guarantee that any unlawful measures taken by the review body, if any, or any failure in the exercise of the powers conferred on it may be subject to judicial review'. The court's doubts were caused by a loophole in the PPL, which, although it contains regulations pertaining to legal protections that offer the possibility of correcting various defective actions or omissions of the contracting authority, does not eliminate all forms of harm that a contractor may suffer when participating in a tender procedure. Nor does the PPL require that confirmation of the contracting authority's violation of the provisions of this law be obtained by any substantive ('adjudicatory') body prior to asserting a claim for damages.

In ruling on the issue, the Supreme Court noted that legal regulations in special laws, of which the PPL Act is ndoubtedly one, must contain such explicit provisions in order for them to temporarily exclude court action, such as in cases for damages for violating the procedures stipulated in those laws; temporal inadmissibility of court action cannot be subject to extensive interpretation.

Since there is no unambiguous statutory regulation in the PPL that excludes, even temporarily, the admissibility of court proceedings, there are no grounds, in the view of the Supreme Court, for rejecting a suit for damages against the contracting authority brought by a bidder, even if the bidder has not exhausted the remedies available under the PPL against the contracting authority's violation of the provisions of that law. Thus, it is not possible to infer from judicial interpretation alone the requirement to exhaust the appeal procedures before the NAC or the public procurement court as a condition for taking legal action for damages against the contracting authority. This would constitute a restriction of the exercise of the right to a court that is guaranteed by the Constitution (Art. 45(1) PPL in conjunction with Art. 31(3) of the Polish Constitution[4]). The need for the contractor to obtain a preliminary ruling from the NAC should be regarded in the same way.

In addition to this constitutional limitation, the Supreme Court argued that there is no procedural provision in the Polish legal system that would make the possibility of pursuing a civil claim regarding a violation of public procurement regulations conditional on the prerequisite that a relevant arbitration board, by way of a legally binding decision or a legally valid award – or a court, as part of a judicial review of a ruling issued by such an arbitration board – finds that there has been a breach of those regulations.

Such a procedural provision could apply as a result of the implementation of the provision of Article 2(5) of Directive 89/665/EEC, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007. It stipulates that 'the Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers'.

The said ruling of the Supreme Court, despite the unequivocal answer to the question, does not necessarily dispel all doubts regarding the contracting authority's liability for damages; in fact it adds to those doubts. The Supreme Court, citing one of the German Federal Court's rulings,[5] indicated that its conclusion 'does not mean, however, that the contractor's failure to take advantage of the system of legal remedies under the Public Procurement Law has any relevance in a proceeding before a common court against the contracting authority for compensation for damages caused by actions by the contracting authority in the public procurement

4 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Polish Constitution of 2 April 1997] [1997] JoL 78, 483.

5 Judgment of the German Federal Court X ZR 124/18 [2019], <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=edd18be659e623bfccb2e2317ff9649a&nr=101051&pos=0&anz=1> accessed 15 Dec 2023.

procedure that are inconsistent with the provisions of that law, or by its failure to take actions that the contracting authority was obliged to take. This issue may prove to be important for the assessment of the conditions for civil law liability for damages as well as the determination of the amount of damage'.

3. Liability for damages in EU public procurement law

The matter of the indemnity liability of a public procurer for violation of procedural rules is regulated by EU legislation. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of appeal procedures for the award of public contracts[6] explicitly indicates that 'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (c) award damages to persons harmed by an infringement'. Subsequently, paragraph 6 of this provision says that 'Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers'. In turn, the second sentence of paragraph 7 indicates that except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

The aforementioned provisions of the directive establish a certain minimum standard for a route to compensation from the contracting authority, which means that Member States can retain or introduce more far-reaching measures. The principle of procedural autonomy of Member States entitles them to introduce a national procedural rule that would regulate in detail the right to award damages to contractors for unlawful acts or omissions of contracting authorities. The Polish legislative body, despite dozens of different amendments to the Public Procurement Law, has not exercised the authority to regulate the matter in question.

4. Consequences of the Supreme Court's ruling for the public procurement system

The ruling of the Supreme Court deserves full approval. The *de lege lata* absence in the Public Procurement Law of an unambiguous statutory regulation excluding, even temporarily, the admissibility of a court route to seek damages from the contracting authority, even if only in connection with the requirement to use the legal remedies available under the PPL due to the contracting authority's violation of the provisions of that law, does not give grounds to reject a suit for damages. The opposite reasoning would constitute a restriction of the constitutionally guaranteed right to a court.

Section IX of the PPL Act governs legal protection measures. According to these regulations, legal remedies include an appeal and a complaint to the court. An appeal is heard by the National Appeals Chamber, while a complaint may be filed against rulings of the NAC and the decision

6 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of appeal procedures for the award of public contracts [2007] OJ EU L 335/31.

of the NAC president to dismiss an appeal. The omplaint is heard by the District Court in Warsaw: the public procurement court. Parties and participants in the complaint procedure are also entitled to file a cassation complaint.

The NAC is a specialised quasi-judicial body. This was confirmed, among other things, by the Court of Justice of the European Union in its judgment of 13 December 2012 (C-465/11)[7], in which the Court stated that 'the Krajowa Izba Odwoławcza [NAC], which is a body established by the Act on public procurement, has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities, and whose operation is governed by Articles 172 to 198 of that law, does constitute a court or tribunal, within the meaning of 267 TFEU[8], in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings.'. The NAC has jurisdiction over three types of cases:

(1) the adjudication of appeals against the contracting authority's actions in the contract award procedure, tender, system of qualifying contractors or the failure to perform an action to which the contracting authority is obliged under the Act, against draft provisions of a public procurement contract and the failure to award a contract under the Act, in spite of the fact that the contracting authority was obliged to do so;
(2) the adjudication of motions to lift the prohibition on the conclusion of a contract;
(3) the adoption of resolutions containing an opinion on the contracting authority's objections to the outcome of prior review and summary review.

Only the District Court in Warsaw – the Public Procurement Court – has jurisdiction to hear the complaint (Art. 580(1) of the PPL Act). According to the explanatory memorandum to the PPL, a single court specialised and appointed to hear public procurement complaints is expected to help reduce the time it takes to hear cases and ensure the highest quality of court rulings.

As has already been noted, there is no specific legal regulation in the PPL Act that guarantees the right to claim damages from the contracting authority – the organiser of the tender – for violations of the procedural requirements set forth in the Act (the normatively defined jurisdiction of the NAC and the public procurement court does not include adjudication of claims for damages). Nevertheless, the NAC as a first-instance body and the procurement court as a second-instance body have the power to assess whether the contracting authority's actions or omissions are in accordance with the procedural requirements of the PPL Act, both during the public procurement procedure (NAC) and after its completion, including the signing of the contract (NAC or court). According to Art. 554(3)(3) of the PPL Law, 'when granting the appeal, the Chamber may, if the contract is concluded in the circumstances permitted by the law, declare the infringement of the provisions of the Act'. The same power applies to the Public Procurement Court (see Article 588(2), sentences 1 and 2 of the PPL Law: 'If the complaint is taken into account, the court amends the contested decision and decides on the substance of the case and, in other cases, gives a ruling. The provisions of Article 553 to Article 557 and Article 563 to Article 567 shall apply accordingly.'

Therefore, should the contractor's failure to take advantage of special appeal and complaint procedures involving a specialised quasi-judicial public procurement authority or court in a specific public procurement procedure have no bearing on the effectiveness of claims for damages

7 Judgment CJEU C-465/11 EU:C:2012:801.
8 Treaty on the Functioning of the European Union OJ EU C 326/47 [2012].

that are subsequently brought against the contracting authority? This question is justified because, as cited above, the Supreme Court has itself clearly stated that a contractor's failure to avail itself of legal remedies under the Public Procurement Law 'may prove important with regard to the assessment of the prerequisites for civil liability for damages as well as the determination of the amount of damages'.

In one of its rulings, the Supreme Court, in reference to the issue of returning the bid bond in a tender procedure, indicated that '[t]he return of the bid security is possible only if it is established that the contractor cannot be accused of any negligence as provided for in Article 46 Section 4a of the Public Procurement Law. Given that the proceedings are conducted under a special procedure regulated by the Public Procurement Law and the appeal is filed by the participants with the National Board of Appeals, contrary to the suggestions in the cassation appeal, there is no basis whatsoever for excluding matters involving the retention of the bid security by the ordering party from the regulations of the Public Procurement Law. In view of this, in accordance with Article 198a of the PPL, it is only after the National Board of Appeals issues a ruling that the competence of the ordinary court comes into play. If it were to be considered that a common court could rule instantly in cases involving the return of a bid security, this would not only be inconsistent with the aforementioned regulations, but would in fact lead to a perversion of the design of the legal remedies provided for in the Public Procurement Law. A common court would have to replace the National Board of Appeals and interpret the prerequisites set forth in Article 46(4a) of the Public Procurement Law independently. Meanwhile, legal remedies in the public procurement process are designed in such a way that whether the law has been violated and a participant in the process has suffered damage is to be decided in the first instance not by a common court, but by a special body that specialises in the complex issues of public procurement. Therefore, it is unacceptable to allow public procurement cases to be adjudicated immediately by a common court. To do so would be to substitute the ruling of a specially appointed body for that court'[9]. According to the Supreme Court, in order for there to be full compliance with the requirements of the PPL, it is first necessary for a specialist body to rule on the legality of actions taken in the public procurement process, and only secondarily for a common court to rule.

In the law underlying the ruling under discussion, as well as in the current law, the only regulation that provides a legal basis for a contractor's claim for damages is the provision of Art. 261 of the PPL Act (under the previous law, it was Article 93(4)), which stipulates that in the case where a procurement proceeding is conducted for reasons attributable to the contracting authority, contractors who submitted tenders that are not eligible for rejection are entitled to a claim for reimbursement of the reasonable costs of participation in the proceeding, in particular the costs of preparing the tender. The aforementioned legal basis is insufficient to meet the minimum standard under the irective, since, according to the wording of the Council Directive of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), 'it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'[10].

9 The ruling PSC IV CSK 115/14 [2014].

10 Council Directive of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) [1989] OJ EU L 395/33.

In the absence of a specific regulation, the legal basis for a claim for damages against the contracting authority must be based on the general provisions of civil law, as evidenced by the provisions of Art. 8(1) of the PPL. However, this is not an optimal solution, if only due to the need to take into account the specifics of public procurement. For example, basing a claim for damages on the provisions of Art. 471 of the Civil Code[11] *in fine* and Art. 415 of the Civil Code requires proof of a culpable action of the defendant (the contracting authority), whilst the principle in EU law is that it is impossible to make a claim for damages dependent on the premise of the fault of the contracting authority.

Apart from the above limitation, there is also the problem of defining the type of damage that would be eligible for compensation for a breach of the public procurement law, i.e. whether the possibility of claiming damages should cover only the costs incurred (actual damage) of participation in the proceedings, or the lost profit from the contract (lost profits).[12] In a recent opinion dated 7 December 2023, Advocate General of the Court of Justice of the EU Anthony Michael Collins indicated in the Ingsteel case (C-547/22[13]) that it is up to the national laws of the Member States to determine the conditions under which a national court may rule on a claim for damages brought by a bidder unlawfully excluded from a public procurement procedure. According to the Advocate General, 'these conditions include the burden of proof and standard of proof, causation and the calculation of the amount that can be awarded. The laws of the Member States governing them must comply with the principles of equivalence and effectiveness. The principle of effectiveness implies that a national court cannot invoke a practice that prevents a bidder unlawfully excluded from a public procurement procedure from claiming damages for the loss of a chance to win that contract'.

A claimant for damages must demonstrate that they have suffered harm and that this harm is the result of a violation of the Act by the contracting authority (in other words, there is a sufficient causal link between the harm and the contracting authority's violation of the PPL Act).

This means that the bidder must prove that the contracting authority performed or omitted to perform a certain action in violation of the Act, which had a direct impact on the bidder's inability to obtain the contract.[14] Whether this condition was fulfilled (whether the contracting authority's actions were unlawful) can be assessed by the court hearing an action for damages, with a *de facto* omission of the appeal-complaint path of the PPL, if the plaintiff has not previously used it. This means that the settlement of disputed issues in the field of public procurement, including the assessment whether the contracting authority's actions or omissions are correct, can be carried out bypassing the adjudicating bodies that specialise in this area.

For this reason, a contractor's failure to avail themselves of legal remedies under the PPL should

11 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Civil Code of 23 April 1964] [2023] JoL 1610 [consolidated text].

12 The concept of damage and the issue of estimating damage are not covered by the body of EU directives; thus, Member States have full autonomy in regulating this matter. See the opinion of Advocate General P. Cruz Villalón C-568/08 EU:C:2013:325.

13 The opinion of Advocate General Collins EU:C:2023:967.

14 For example, German rulings clearly state that in an action for damages, the plaintiff must prove that it is the plaintiff who absolutely should have received the contract in question. See, for example, the judgment of the Federal Court of Justice XIII ZR 20/19 [2021], <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=126099&pos=20&anz=833> accessed 15 Dec 2023. In practice, this will only be possible if the only criterion for the award of the contract is the price and the plaintiff is able to demonstrate that they submitted a valid bid with the lowest bid price, or if there are other non-price criteria that can be objectively met by individual bidders.

have a direct impact on the assessment of the prerequisites for civil law liability for damages on the part of the contracting authority, as well as the determination of the amount of damages. This omission should be considered a contribution to the occurrence or increase of the damage by the injured party (the bidder; see Art. 362 of the Civil Code).

In fact, it is difficult to imagine that the assessment of the bidder's legal situation would not change with the assumption that the bidder, being aware of the existence of legal remedies in the procurement procedure ignores it for some reason, hoping that in future (during the statute of limitations period for its claims) they will be able to demand verification of the legality of the contracting authority's actions in a compensation lawsuit.

5. Conclusion

The Supreme Court resolution in question, although substantively accurate, showed that the Polish public procurement legal system has for years contained a legal loophole resulting in ineffective remedies. According to the preamble to Directive 89/665, 'in certain Member States, the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation'.

In view of the above, it would be advisable to propose a *de lege ferenda* motion to make a possible claim for damages by a bidder against a contracting authority conditional on prior exhaustion of the appeal path defined in the specific regulations of the public procurement law. The use of the legal remedies envisaged by the law, inherent in the process of public procurement, would make it possible to assess whether and to what extent the contracting authorities violated the tender procedures and what impact this had on the winning of the contract by the claiming bidder. Such legislative tendencies are found in other European countries.[15]

References

List of legislative acts

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Civil Code of 23 April 1964] [2023] JoL 1610 [consolidated text].

Council Directive of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) [1989] OJ EU L 395/33.

Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Polish Constitution of 2 April 1997] [1997] JoL 78, 483.

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of appeal procedures for the award of public contracts [2007] OJ EU L 335/31.

15 See, for example, the regulations of the Austrian Procurement Act of 2018 [2018] BVergG 65, which indicates in Section 373 that: '(2) An action for damages is permitted only if the competent procurement control authority has previously determined that: 1. the contract was not awarded to the bidder who submitted the lowest price or the technologically and economically most advantageous bid due to a violation of this Federal Law, relevant regulations or directly applicable Union law'.

Treaty on the Functioning of the European Union OJ EU C 326/47 [2012].
Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych [Public Procurement Law of 29 January 2004] [2019] JoL 1843 [consolidated text].
Austrian Procurement Act of 2018 [2018] BVergG 65.
Ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych [Public Procurement Law of 11 September 2019] [2019] JoL 2019.

Judgement

Judgment CJEU C-465/11 EU:C:2012:801.
The ruling PSC IV CSK 115/14 [2014].
Judgment of the German Federal Court X ZR 124/18 [2019], <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=edd18be659e623bfccb2e2317ff9649a&nr=101051&pos=0&anz=1> accessed 15 Dec 2023.
Judgment of the PSC III CZP 16/20 [2020], <https://www.sn.pl/sprawy/SitePages/Zagadnienia_prawne_SN.aspx?ItemSID=1355-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne&Rok=2020> accessed 15 Dec 2023.
The judgment of the Federal Court of Justice XIII ZR 20/19 [2021], <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=126099&pos=20&anz=833> accessed 15 Dec 2023.

Other documents

The opinion of Advocate General P. Cruz Villalón C-568/08 EU:C:2013:325.
The opinion of Advocate General Collins C-547/22 EU:C:2023:967.

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The social objectives of EU public procurement law – evolution or revolution*

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Abstract
The article traces the evolution of the goals of public procurement procedures in European Union law. It examines EU secondary legislation along with its interpretation in the case law of the Court of Justice of the European Union (CJEU) from the 1970s onwards. Firstly, the article presents the EU law from the 1970s to the 1990s, when the coordination of public procurement procedures in the EU focused almost exclusively on economic objectives, such as opening up procurement to competition and ensuring the free movement of goods and the provision of services. Secondly, it examines the shift observed in the 2004 directives and relevant CJEU case law which started viewing procurement procedures as a tool for pursuing non-economic goals, such as social objectives, though this was only moderately reflected in EU law at the time. The final part of the article discusses the provisions of the current 2014 directives. The conclusions highlight a gradual shift in EU public procurement goals, evolving from purely economic objectives to include other goals, such as social objectives.

Keywords
European Union Law, CJEU Case Law, EU Secondary Legislation, Economic Goals

1. Introduction

EU laws aimed at coordinating public procurement procedures originate from the fundamental freedoms of the internal market, the free movement of goods, persons, services and capital, as well as the resulting principles of non-discrimination, equal treatment and transparency. However, member states often failed to uphold these principles, thus necessitating intervention by the EU legislature. Consequently, the EU adopted procurement directives[1] to address these issues. The Union's efforts focused on two main objectives: increasing transparency and combating discrimination.[2]

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1 European Commission, Completing The Internal Market: White Paper from the Commission to the European Council COM (85) 310 final, 5 and 23.

2 C McCrudden, *Buying Social Justice Equality, Government Procurement, and Legal Change* (Oxford University Press 2007), 105.

The first Public Procurement Directive dates back to the 1970s. Ensuring the proper functioning of the internal market in the field of public procurement required successive legislative interventions and deeper coordination. Subsequent phases of regulation not only expanded its scope and refined its provisions but also incorporated increasingly diverse solutions and objectives, which extended beyond purely market-oriented goals to include additional aims, such as social objectives.

In this context, it should be noted that there is no legal definition of public procurement specifically using social criteria. The literature[3] and documents of EU institutions use such terms as sustainable procurement,[4]strategic procurement,[5] social procurement[6] and socially responsible procurement.[7] Sustainable procurement and strategic procurement encompasses green procurement,[8] social procurement[9] and innovative procurement.[10] In other words, the goals of sustainable development policy address social, environmental and innovative issues.[11] These

3 Earlier literature employs such terms as 'horizontal', 'secondary' or 'collateral clauses', with an emphasis on their secondary nature in public procurement, particularly in relation to social or environmental aspects. For further insights, refer to works such as S Williams-Elegbe, *Public Procurement and Multilateral Development Banks Law*, Practice and Problems (Hart Publishing 2019), 143; S Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) Journal of Public Procurement 10(2), 149–186; S Arrowsmith, 'The Objective of Public Procurement Systems and Regulatory Provisions' in S Arrowsmith, S Treumer, J Fejo, L Jiang (eds), Public Procurement Regulation: An Introduction, 15, <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> accessed 30 Feb 2024.

4 The term 'sustainable procurement' is used, for instance, in the following sources: R Caranta, 'Sustainable Public Procurement in the EU' in R Caranta, M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 15–51; B Sjåfjell, A Wiesbrockn (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015); E. Fisher, 'The Power of Purchase: Addressing Sustainability through Public Procurement' (2013) European Procurement & Public Private Partnership Last Review vol. 8, 2

5 The term 'strategic procurement' is used, for example, in Report from the European Commission implementation and best practices of national procurement policies in the Internal Market COM(2021) 245 final, 8; European Commission, 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' (2017) European Procurement & Public Private Partnership Law Review 12(3), 219.

6 The term 'social procurement' has been used, for example, in C Barnard, To Bodily Go: Social Clauses in Public Procurement' (2017) Industrial Law Journal 46(2), 208–244; C McCrudden, 'Buying Social Justice: Equality and Public Procurement' (2007) Current Legal Problems 60(1), 123.

7 The term 'socially responsible public procurement' is used, for example, in Report from the European Commission implementation and best practices of national procurement policies in the Internal Market COM(2021) 245 final, 8; European Commission, 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' (2017) European Procurement & Public Private Partnership Law Review 12(3), 220; R Caranta, 'Towards Socially Responsible Public Procurement' (2022) ERA Forum vol. 23, 149–164.

8 Green Public Procurement means 'a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured'; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 July 2008 public procurement for a better environment COM(2008) 400, 4.

9 Innovation procurement involves acquiring new, innovative, or improved products or services to meet specific innovation policy objectives. For further insights into innovation procurement and its role in addressing sustainability challenges, refer to the following sources: J Yeow, E Uyarra, S Gee, 'Closing the Loop: Examining the Case of the Procurement of a Sustainable Innovation' in C Edquist, NS Vonortas, JM Zabala-Iturriagagoitia, J Edler (eds), *Public Procurement for Innovation* (Edward Elgar Publishing 2015) 237; Report from the European Commission implementation and best practices of national procurement policies in the Internal Market COM(2021)245 final, 8.

10 Report from the European Commission implementation and best practices of national procurement policies in the Internal Market COM(2021)245 final, 8.

11 Ibid., 8.

goals can be set at the national regional, EU or international level.[12] Social or socially responsible procurement, on the other hand, is defined as procurement that includes "at least one social issue for the purpose of achieving social objectives."[13]

The purpose of this article is to delineate social objectives as a constituent aspect of the coordination of public procurement procedures within the European Union's internal market, drawing upon EU secondary legislation and corresponding case law from the Court of Justice of the European Union (CJEU). The analysis takes an evolutionary approach, starting with the first EU acts on public procurement coordination adopted in the early 1970s. The packages of directives from the 1970s,[14] the 1980s[15] and the 1990s[16] are initially examined together, reflecting the limited consideration given to social objectives during the initial two decades of EU-level procedural coordination. Subsequent attention is directed towards the incorporation of social objectives in the 2000 package of directives, marking a discernible shift in this regard.[17] The third part of the article outlines the current regulatory framework established by the 2014 directives.[18]

12 Ibid.

13 Ibid., 10.

14 Commission Directive 70/32/EEC of 17 December 1969 on the provision of goods to the State, to local authorities, and other official bodies [1970] OJ L 13, 1–3; Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches [1971] OJ L 185, 1–4; Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [1971] OJ L 185, 5–14; Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1976] OJ L 13, 1–14.

15 Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC [1988] OJ L 127, 1–14; Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts [1989] OJ L 210, 1–21.

16 Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors [1990] OJ L 297, 1–48; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors [1992] OJ L 76, 14–20; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209, 1–24; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199, 1–53; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1993] OJ L 199, 54–83; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, [1993] OJ L 199, 84–138.

17 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors [2004] OJ L 134, 1–113; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts [2004] OJ L 134, 114–240. Please note that another directive in this legislative package is outside the scope of the analysis in this publication, namely Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts, and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216, 76–136.

18 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94, 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94, 243–374. Due to its limited scope, another directive in this legislative package is outside the scope of the analysis: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94, 1–64.

2. Objectives of public procurement coordination during the initial regulatory stage: 1970s–1990s

The directives governing the coordination of procedures for the award of public contracts by the then Member States of the European Communities incorporated a foundational level of compliance with the freedoms of the internal market, notably the freedom of movement of goods and the freedom to provide services.[19] Directives 71/304/EEC and 71/305/EEC underscored that facilitating the freedom to provide services, fostering equal treatment of contractors and effective competition in public procurement necessitated not only the elimination of internal barriers, but also the coordination of national procurement procedures. This coordination was to be grounded in non-discriminatory specifications, a suitable degree of transparency and objective criteria for participation in the procurement process.

Thus, the objectives of the first directives on the coordination of public procurement procedures were essentially market-driven and concerned ensuring adherence to cross-border freedom to provide services as well as fostering effective competition in the public procurement market. The integration of social objectives was evidenced in the adoption of measures authorising contracting authorities in Member States to exclude contractors for non-payment of social security contributions[20] and imposing an obligation to scrutinise abnormally low tenders.[21] Moreover, the European Commission stressed that while social issues such as combating unemployment, ensuring fair working conditions and non-discrimination on the basis of gender were not explicitly addressed by Directive 71/305/EEC, they were not prohibited either. This indicated that the regulation of such matters was permissible and left to the discretion of individual Member States.[22]

However, it soon became clear that the directives from the 1970s had a negligible impact and failed to significantly open up the procurement market to intra-EU competition.[23] Member states frequently flouted the directives, intentionally dividing contracts and disregarding public procurement procedures.[24] To counteract this, the European Commission set a timetable for finalising efforts to establish the internal market by 1992.[25] In outlining the barriers to achieving this goal, the Commission pointed out that the substantial contribution of public procurement to the EU GDP, coupled with entrenched protectionist tendencies, remained among the primary obstacles hindering the completion of the internal market.[26] Only a mere 4% of procurement fell under the directives and intra-EU competition, and contracts continued to predominantly be awarded to local contractors.[27]

The European Parliament, in turn, pointed out that changes to Community public procurement law should also aim to reduce regional disparities and promote employment in

19 S Arrowsmith, 'EC Regime on Public Procurement' in KV Thai (ed), *International Handbook of Public Procurement* (Routledge 2009) 258.

20 Article 23(e) of Directive 71/305/EEC; Article 20(1)(3) of Directive 77/62/EEC.

21 Article 29(5) of Directive 71/305/EEC; Article 25(5) and (6) of Directive 77/62/EEC.

22 Public procurement: Regional and social aspects (Communication from the Commission) COM (89)400 final, 11.

23 Opinion of the Economic and Social Committee on the proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public work contracts [1987] OJ C 319, 55.

24 Ibid., 55.

25 European Commission, *Completing the Internal Market: White Paper from The Commission to The European Council* COM/85/310 final, 3–4.

26 Ibid., 23–24.

27 Ibid., 5 and 23.

underprivileged areas and those affected by declining industries.[28] The Commission echoed this sentiment to some extent, affirming that while the directives sought to integrate public procurement into the internal market and ensure equitable treatment of contractors, the internal market should take into account economic and social cohesion while playing a role in their achievement.[29] Initially, Directive 88/295/EEC amended Directive 77/72/EEC with the goal of completing the internal market by the end of 1992 and introducing effective competition in the supply market. Subsequently, Directive 89/440/EEC amended Directive 71/305/EEC concerning construction works contracts, also citing the need to finalise the internal market and ensure effective competition. Alongside expanding the scope of Community procurement procedures, enhancing transparency in their award procedure and clarifying abnormally low prices in tenders, solutions were introduced to enhance transparency regarding protection requirements and employment conditions applicable in member states, incorporating them into tenders.

Under Article 22a of Directive 77/72/EEC, introduced at the time, Member States were allowed to request that contract documentation include information on where to obtain details regarding employment protection and working conditions obligations applicable in the country where the works are carried out. In contrast, Article 1(18) of Directive 89/440/EEC mandated that the applicable employment protection and working conditions regulations be included in the tenders. Although there were limited changes to the inclusion of social objectives in the 1980s package of amending directives, the European Commission did not rule out the possibility of using procurement to achieve social objectives, as demonstrated by the issuance of a communication on social and regional criteria in public procurement.[30]

Challenges in the functioning of the internal market persisted in public procurement throughout the 1990s, even two decades after the adoption of the initial directives. Consequently, the European Commission ordered the Cecchini Report to delineate the costs of internal market fragmentation, the potential benefits of full execution, as well as to point the way forward for EU law.[31] In terms of public procurement, the analysis revealed widespread protectionist practices, evidenced by the scarcity of instances where contractors from other Member States were selected, despite substantial international trade.[32] Thus, the EU took action along two main lines: expanding coordination to include sectoral and services procurement, and clarifying and consolidating existing legislation.

As part of the first of the aforementioned strategies, Directive 90/531/EEC was initially implemented, soon replaced by Directive 93/38/EEC, which encompassed the coordination of public procurement procedures in the water, energy, transport and telecommunications sectors. Their goal was still to remove restrictions on the free movement of goods and the provision of services.[33] Additionally, Directive 92/50/EEC was enacted with the aim of eliminating practices that hinder competition and obstruct the participation of contractors from other Member States in public service contracts. Notably, both directives also incorporated provisions on the inclusion of clauses related to employment protection and working conditions in tenders,[34] as well as provisions allowing

28 Public procurement: regional and social aspects (Communication from the Commission) COM (89)400 final, 3.
29 Ibid.
30 Ibid.
31 European Commission, *Research on the 'Cost of Non-Europe': Basic Findings* (Office for Official Publications of the European Communities 1988) 3 and 12.
32 Ibid., 3.
33 Recitals 1–9 of Directive 93/38/EEC.
34 Article 28(1) and (2) of Directive 92/50/EEC; Article 29 of Directive 93/38/EEC.

for the exclusion of a contractor for failure to pay social security contributions[35] and the obligation to scrutinise tenders with abnormally low prices.[36]

On the other hand, the second approach entailed the adoption of directives aimed at coordinating public procurement regulations and enhancing their clarity, thereby fostering greater uniformity in the solutions they encompassed.[37] Directive 93/36/EEC was instrumental in consolidating supply regulations, while Directive 93/37/EEC consolidated procedures for construction works contracts. These directives maintained a focus on promoting effective competition and facilitating the free movement of goods, as well as on solutions enabling contractors from across the EU to access public contracts effectively.[38] Additionally, they clarified provisions on the exclusion of contractors for failure to pay mandatory social security contributions[39] and the requirement to scrutinise tenders with abnormally low prices.[40]

Concurrently, the Commission elucidated its stance on the issue of social publicprocurement and pointed out that that the directives did not permit the introduction of social criteria as selection criteria, as these pertain to the financial and economic situation or technical capabilities of the contractor, nor as award criteria, as these pertain to the economic characteristics of the supplies, works or services covered by the contract.[41] However, the utilisation of social criteria as award criteria in proceedings falling below the thresholds for application of the directives was allowed, provided it did not discriminate against contractors from other Member States.[42]

The analysis reveals that the initial stage of public procurement regulation primarily focused on achieving an effective internal market. The social dimension of the directives' provisions is minimal and evident in only three aspects: provisions on abnormally low prices, the exclusion of contractors for failure to pay social security contributions and the possibility of requiring tenders to include obligations related to employment protection legislation and labor conditions. The social nature of these provisions arises from the fact that they are not essential for selecting the most favourable tenders; for example, excluding a contractor for failing to meet social obligations related to other contracts, especially private law contracts, is not a necessary criterion in this respect.

Changes in European Communities legislation during the 1970s–1990s were driven not only by the European Commission's deliberations but also by CJEU case law. Initially, the CJEU adopted a conservative stance on achieving social objectives through public contract awards under the directives. In the *Beentjes* judgment,[43] where the CJEU ruled on the applicability of the criterion of employing the long-term unemployed, it stated that the purpose of Directive 71/305/EEC is to ensure the development of effective competition and to uphold the freedom of establishment and the provision of services in the award of public contracts.[44] However, the CJEU also ruled that this criterion is not, in principle, incompatible with EU law, provided it is

35 Article 29(e) of Directive 92/50/EEC; Article 31(2) of Directive 93/38/EEC.
36 Article 37 of Directive 92/50/EEC; Article 34(5) of Directive 93/38/EEC.
37 S Arrowsmith, *The Law of Public Procurement and Utilities Procurement: Regulation in the EU and UK* (Sweet&Maxwell 2014) 184.
38 Particularly in terms of transparency and selection.
39 Article 20(1)(e) of Directive 93/36/EEC; Article 24(c) of Directive 93/37/EEC.
40 Article 27 of Directive 93/36/EEC; Article 30(4) of Directive 93/37/EEC.
41 European Commission, Green Paper – Public Procurement In The European Union: Exploring The Way Forward COM (96) 583 final, 40.
42 Ibid.
43 Judgment of the CJEU C-31/87 EU:C:1988:422.
44 Ibid., paras. 11, 21.

mentioned in the contract announcement and does not violate the prohibition of discrimination, which would occur if only local contractors could meet it. [45] Despite this ruling, it is difficult to view the CJEU's position as an unconditional endorsement of social procurement, since it fundamentally prioritises traditional EU law objectives of non-discrimination and treaty freedoms.[46]

The CJEU took a similarly conservative position in the *Nord-Pas-de-Calais* judgment,[47] in which it ruled on the possibility of using an employment criterion based on national guidelines to combat unemployment and promote employment as one of the award criteria in public procurement.[48] The European Commission and the Advocate General gave a narrow interpretation of the Bentjees judgment and took the position that such a criterion could only be a condition for the performance of the contract.[49] The CJEU, meanwhile, ruled that the purpose of Directive 93/37/EEC is to develop effective competition by ensuring equal treatment of contractors from other Member States, including allowing them to respond to the notice under comparable conditions as national contractors.[50] The CJEU reiterated, as it had in the *Beentjes* judgment, that the directives did not (at that time) preclude the use of criteria related to social policies against unemployment provided that they adhered to the Treaty principles, including the principle of non-discrimination arising from the freedom to provide services.[51] The CJEU further held that while such a criterion was not inherently incompatible with Directive 93/37/EEC, its application had to comply with the provisions of the Directive, particularly those concerning notices.[52]

The *La Cascina* judgment[53] also confirmed the CJEU's view that the Directive on the coordination of public procurement procedures primarily serves economic objectives. In this case, concerning exclusion based on failure to pay social security contributions and taxes, the Court held that Directive 92/50/EEC does not mandate the adoption of all exclusion grounds in national law and can be implemented less stringently, but cannot be expanded to include new grounds for exclusion.[54] This interpretation can be understood as giving priority to market-oriented goals over social objectives.

In the *Rüffert* judgment,[55] the CJEU examined the compatibility with EU law of a public procurement procedure that required compliance with minimum wage provisions of collective bargaining agreements applicable only to works contracts in a specific area. While the CJEU acknowledged that avoiding a threat to the financial equilibrium of the social security system could be considered a legitimate objective of general interest, it found these requirements to violate the principle of proportionality because they were not universally applicable and therefore unsuitable for achieving the intended objective.[56]

It is also worth noting how the understanding of the term "most advantageous offer" has evolved through various cases. In the *SIAC Construction* judgment, the CJEU ruled that although,

45 Ibid., paras. 30–31.
46 R Caranta, M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010), 20.
47 Judgment of the CJEU C-225/98 EU:C:2000:494.
48 Opinion of AG Alber in case C-225/98 EU:C:2000:121, paras. 35–37.
49 Ibid., paras. 36, 46–48.
50 Judgment of the CJEU C-225/98 EU:C:2000:494, paras. 34.
51 Ibid., paras. 49–50.
52 Ibid., paras. 51.
53 Judgment of the CJEU C-226/04 EU:C:2006:94, paras. 22.
54 Ibid., paras. 23.
55 Judgment of the CJEU C-346/06 EU:C:2008:189, paras. 29.
56 Ibid., paras. 39–43.

in principle, the goal of EU coordination of the public procurement market was to eliminate barriers to the freedom to provide services, it was permissible under EU directives (at that time) to select the tender with the lowest final cost instead of the one with the lowest price,[57] provided that equal treatment of contractors, transparency and objectivity of the procedure were ensured.

In another judgment, *EVN and Wienstrom*, which dealt with the environmental objectives of public procurement, the CJEU addressed the compatibility with EU law of using criteria for awarding public contracts based on the generation of electricity from renewable energy sources.[58] The referring court pointed out the lack of a definition for the term "economically most advantageous tender" (employed in the EU directive) and questioned whether criteria with no objective economic value could be used.[59] The Court considered that the EU and its Member States were committed to environmental protection and reducing greenhouse gas emissions, which justified the use of such criteria and the considerable weight given to them.[60] Finally, in the *Sintesi* judgment, the CJEU held that while the directives aimed to foster genuine competition, a national law requiring the use of the lowest price criterion constituted an incompatible restriction of the contracting authority's freedom to tailor the criteria to the specific characteristics of the contract.[61]

Summarising the analysis of secondary law and CJEU case law on the coordination of public procurement procedures in the EU internal market, we can see a gradual shift toward including objectives beyond the original goals of opening procurement to competition and promoting the freedom to provide cross-border services. The opinions of the European Commission and the resulting proposals for changes in secondary legislation, alongside CJEU case law, highlight the conservative stance of EU institutions. The use of social criteria in excluding contractors and selecting the most advantageous offer has been more "tolerated" than actively promoted in EU law (as long as they do not violate established common rules in the internal market).

3. Objectives of coordination of public procurement in the second stage of regulation – the 2004 package of directives

In the late 1990s, the European Commission finally began recognising social objectives as goals to be pursued through the awarding of public procurement contracts. It issued documents urging Member States to align their national and EU social policy objectives with public procurement procedures.[62] Additionally, the Commission emphasised that while public procurement serves internal market objectives, it can also advance other goals, such as social policy objectives.[63]

The need for reform in public procurement law within the internal market was still very present. By 1996, public procurement was identified as the sector with the most pressing issues, ranging from challenges in directive implementation to deficiencies in national measures.[64]

57 Judgment of the CJEU C-19/00 EU:C:2001:553, paras 32, 45.
58 Judgment of the CJEU C-448/01 EU:C:2003:651.
59 Ibid., paras. 30.
60 Ibid., paras. 40–43.
61 Judgment of the CJEU C-247/02 EU:C:2004:593, paras. 35–37 and 40–42.
62 Communication from the Commission of 11 March 1998 public procurement in the European Union COM(98) 143 final, 3 and 28–29.
63 Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement [2001] OJ C 333, 4.
64 European Commission, Green Paper – Public Procurement In The European Union: Exploring The Way Forward COM(96) 583 final, 7.

Protectionist tendencies persisted, with approximately 85% of procurers failing to adhere to notice requirements, leading the Commission to initiate 39 proceedings for lack of or incorrect directive implementation.[65] Consequently, the Commission undertook further drafting efforts to bolster the coordination of procurement procedures. However, by this point, social objectives had gained increased prominence. In its drafts of the new directives, the Commission aimed to establish a genuine internal market that ensured principles of equal treatment, non-discrimination and transparency, while explicitly acknowledging the potential use of social criteria in contract performance.[66]

The 2004 package of directives (Directive 2004/17/EC and Directive 2004/18/EC) aimed to simplify and clarify rules while incorporating pertinent case law from the Court of Justice of the European Union (CJEU), particularly regarding social and environmental aspects.[67] This statement marks a significant milestone as it represents the first direct reference within the directives to the pursuit of non-economic objectives, such as social goals, through public procurement. Firstly, social goals were integrated into the provisions on the description of the subject of the contract. This inclusion mandated that technical specifications consider accessibility criteria for individuals with disabilities.[68]

Secondly, the regulation of excluding a contractor from the procedure due to failure in meeting social security obligations[69] was clarified. Furthermore, it was now understood that failure to comply with regulations on equal treatment in employment and labour,[70] including gender equality in the workplace,[71] may be considered a serious ethical violation warranting exclusion from the proceedings.[72]

Thirdly, the EU law introduced the option of granting reserved contracts. This entailed limiting participation rights in specific public procurement procedures to sheltered workshops or within sheltered labour programmes, where a portion of the employees consists of persons with disabilities or those excluded from the labor market.[73] Consequently, competition restrictions in favour of social objectives, such as combating unemployment and social exclusion, were permitted.

Fourthly, with regard to contract performance conditions, it was now permissible to impose

65 European Commission, Communication from the Commission to the European Parliament and the Council, The Impact and Effectiveness of the Single Market (Office for Official Publications of the European Communities 1996) 15; European Commission, Green Paper – Public Procurement In The European Union: Exploring the way forward COM(96) 583 final, 5.

66 Amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts [2002] OJ C 203E, 210; Amended proposal for a European Parliament and Council Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2002] OJ C 203E, 184.

67 Recital 1 of Directive 2004/18/EC and Recital 1 of Directive 2004/17/EC.

68 Recital 29 and Article 23(1) of Directive 2004/18/EC; Recital 42 and Article 34(1) of Directive 2004/17/EC; Annex III(1)(a) and (b) of Directive 2009/81/EC.

69 Article 45(2)(d) and (e) of Directive 2004/18/EC; Article 53(3) of Directive 2004/17/EC; Article 39(2)(d) and (f) of Directive 2009/81/EC.

70 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, 16–22.

71 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39, 40–42.

72 Recital 43 of Directive 2004/18/EC; Recital 45 of Directive 2004/17/EC; Recital 46 of Directive 2009/81/EC.

73 Recital 28 and Article 19 of Directive 2004/18/EC; Recital 39 and Article 28 of Directive 2004/17/EC; Article 14 of Directive 2009/81/EC; Recital 35 of Directive 2009/81/EC.

certain requirements justified by social considerations. These included the employment of excluded, unemployed or disabled persons, as well as adherence to the provisions of the International Labor Organization Convention, even though it was not part of national law.[74] Member States also became empowered to enforce labor protection provisions or employment conditions applicable at the site of contract performance.[75]

Last but not least, the EU legislator was reluctant to introduce social aspects in the provisions concerning award criteria. The possibility, as mentioned in the recitals, of using criteria aimed at meeting social requirements was not included in the directives' provisions, unlike environmental aspects.[76] Additionally, the 2004 directives elucidated the requirement to request clarification in case of suspicion concerning an abnormally low price in a tender, particularly regarding compliance with employment protection and working conditions.[77]

During the period under review, the Court of Justice sought to strike a balance between the completion of the internal market (ensuring, among other things, the free movement of goods and services) and the growing need to utilise public procurement to achieve other development policy objectives. In the *Consorzio Stabile Libor Lavori Pubblici* judgment, the Court affirmed, on the one hand, that it is in the EU's interest to open up procurement to the broadest possible competition, but, on the other hand, it also allowed for the possibility of justifying national rules by the general interest considerations, as long as the rules were proportionate to the intended purpose.[78] For this reason, the CJEU deemed the requirement to provide a declaration of no outstanding social security contributions compatible with EU law. Indeed, the requirement was justified by a general-interest objective, which was to ascertain that the tenderer is reliable, diligent and trustworthy, and that its conduct towards its own employees is proper[79] as well as proportionate, given the clear definition in national law of the minimum amount of arrears which risked exclusion.[80]

Following this, in the *Bundesdruckerei* judgment, the CJEU stated that minimum wage requirements, as social considerations, could constitute special conditions attached to the contract performance if they were outlined in the notice or specification and were in line with EU law. [81] Simultaneously, to avoid undue burden, these requirements must originate from the laws of the country where the contract will be executed, not from the contracting country.[82] Additionally, in the *Regiopost* judgment, the CJEU ruled that requirements to comply with remuneration provisions can be justified by the objective of employee protection, provided they stem from a mandatory statutory provision that is universally binding on the EU for all public contracts.[83]

One pivotal case that solidified the acceptance of integrating broad social objectives into public procurement is the *Max Havelaar* ruling, which revolved around the requirement for a

74 Recital 33 and Article 26 of Directive 2004/18/EC; Recital 44 and Article 38 of Directive 2004/17/EC; Recital 35 of Directive 2009/81/EC.
75 Article 27 of Directive 2004/18/EC; Article 39 of Directive 2004/17/EC; Article 24 of Directive 2009/81/EC.
76 Recital 46 and Article 53(1) of Directive 2004/18/EC; Recital 55 and Article 55(1) of Directive 2004/17/EC.
77 Article 55(1)(d) of Directive 2004/18/EC; Article 57(1)(d) of Directive 2004/17/EC; Article 49(1)(d) of Directive 2009/81/EC.
78 Judgment of the CJEU C-358/12 EU:C:2014:2063, paras. 29–31.
79 Ibid., paras. 32.
80 Ibid., paras. 40–41.
81 Judgment of the CJEU C-549/13 EU:C:2014:2235, paras. 28.
82 Ibid., paras. 24–17 and 30.
83 Judgment of the CJEU C-115/14 EU:C:2015:760, paras. 70, 75.

fair trade label and an environmental label.[84] Despite the previously discussed declarations on social criteria, the European Commission argued that the directive opposes requiring labels and that they were not relevant to the contract's subject matter.[85] However, the Advocate General did not agree with the objections to the use of labels, noting that most contracting authorities would not be qualified to define fair trade independently, and imposing labels could risk market fragmentation.[86] The CJEU upheld the possibility of requiring social labels, provided that transparency requirements were met. Highlighting that Directive 2004/18/EC was to grant EU contractors access to public contracts of interest to them, the Court found that the transparency requirements were breached as the criteria behind the labels were not specified, and as presenting alternative evidence of compliance was not allowed.[87]

The case law of the CJEU on the implementation of non-market objectives, proved to be insufficiently clear to provide a firm basis for regulation in this area in the directives.[88] Consequently,it was emphasised in the legal writing that the second stage of coordination of public procurement has not lived up to the task of clarifying all doubts related to the application of social criteria in public procurement.[89]

4. Goals of coordination of public procurement in the third stage of coordination – the 2014 package of directives

In the years leading up to the adoption of the 2014 package of directives, the European Commission had already clearly articulated that the internal market was not an end in itself, but an instrument to achieving other goals, including social objectives.[90] For this reason, the measures taken to modernise the internal market, also in the area of public procurement, were intended, among other things, to promote demand for products and services in line with the principles of social responsibility.[91]

In its proposals for the adoption of the new package of directives, the Commission, based on its previous analysis, concluded that the main objectives of the public procurement directives in facilitating the exercise of internal market freedoms in the sector had been achieved.[92] However, it found instances of inadequate implementation or application, which resulted in the risk of

84 Judgment of the CJEU C-368/10 EU:C:2012:284, paras. 94.
85 Ibid., paras. 45–46.
86 Opinion of AG Kokott in case C-368/10 EU:C:2011:840, paras. 91.
87 Judgment of the CJEU C-368/10 EU:C:2012:284, paras. 52 and 113.
88 R Caranta, M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 11.
89 Ibid., 27.
90 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 27 October 2010 towards a single market act for a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another COM (2010) 608 final, 4.
91 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 13 April 2011 single market act twelve levers to boost growth and strengthen confidence 'working together to create new growth' COM (2011) 206 final, 22.
92 Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on public procurement COM (2011) 896 final, 3; Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on procurement by entities operating in the water, energy, transport and postal services sectors COM (2011) 895 final, 2.

abuse and inefficient management of public funds.[93] Considering this, the European Commission identified two complementary goals of the new legislation: to enhance the efficiency of public spending, ensuring the best value for public money and to optimise public procurement to support social goals,[94] among other objectives. Furthermore, it emphasised the necessity to bolster demand for environmentally and socially sustainable services, goods and construction works.[95]

Indeed, within the Europe 2020 Strategy, which sets the direction of EU policies for the next decade, the European Commission has acknowledged public procurement as an instrument for spending public funds efficiently and contributing to the achievement of the current goals. Simultaneously, it has upheld the obligation to respect classic principles of EU procurement law, such as the principle of non-discrimination.[96] In essence, while EU public procurement endeavours to open the market to effective intra-EU competition, it can also play a role in supporting areas such as employment.[97] This dual function is evident in the recitals of the adopted directives, which first underscore the principles of the single market[98] and subsequently indicate that public procurement is to serve the implementation of the Europe 2020 Strategy.[99]

This trend in the evolution of EU procurement law is affirmed by the Commission's preparation of a guide on the use of social criteria in public procurement[100] alongside the proposals for the adoption of the 2014 directives. In the subsequent edition of the handbook, the Commission highlighted that procurement can contribute to various social outcomes, such as employment promotion, upskilling, ensuring adequate working conditions, fostering social inclusion, promoting accessibility and facilitating ethical trading. [101] Additionally, reference was made to the potential utilisation of procurement in post-pandemic COVID-19 national recovery plans as a tool for enhancing social inclusion and territorial cohesion.[102]

On one hand, the 2014 directives, namely the Classical Directive 2014/24/EU, the Utilities Directive 2014/25/EU and the Concessions Directive 2014/23/EU, comprehensively regulate procedures crucial for the proper operation of the internal market for public procurement. In the

93 Commission staff working paper executive summary of the impact assessment of 21 April 2021 accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors SWD(2021) 151 final, 2–4.

94 Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on public procurement COM (2011) 896 final, 3; Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on procurement by entities operating in the water, energy, transport and postal services sectors COM (2011) 895 final, 2.

95 Commission staff working paper executive summary of the impact assessment of 21 April 2021 accompanying the document Proposal for a Directive of the European Parliament and of the Council on public procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors SWD(2021) 151 final, 11.

96 Communication from the Commission of 3 March 2012 Europe 2020 A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final, 24.

97 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 27 October 2010 towards a single market act for a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another COM (2010)608 final, 16.

98 Recital 1 of Directive 2014/24/EU; Recital 1 of Directive 2014/23/EU; Recital 1–2 Directive 2014/25/EU.

99 Recital 2 of Directive 2014/24/EU; Recital 3 of Directive 2014/23/EU; Recital 4 of Directive 2014/25/EU.

100 European Commission, Social Issues in Purchasing: A Guide to Integrating Social Issues in Public Procurement (Office for Official Publications of the European Communities 2011).

101 Ibid., 4.

102 Ibid.

procurement regulations, there is a strong emphasis on equal treatment and non-discrimination of economic operators, on contracting authorities taking transparent and proportionate actions, as well as on avoiding the artificial narrowing of competition.[103] On the other hand, the 2014 package of directives contains numerous provisions on social objectives, such as ensuring fair trade origin of products, promoting gender equality in the workplace, enhancing women's participation in the labor market, adhering to International Labour Organization conventions, facilitating employment opportunities for disadvantaged individuals and offering training programmes for the unemployed.[104]

Firstly, EU regulations governing the coordination of public procurement procedures entail a broad mandate for Member States to guarantee that contractors or subcontractors performing public contracts comply with relevant environmental, social and labor laws stemming from national, EU and international regulations. These provisions are listed in the Directive's Annex and are also rooted in collective bargaining agreements.[105] However, the EU law has not specified what measures are to be employed for implementing these obligations.[106]

Secondly, the directives offer provisions for excluding contractors who fail to meet these requirements[107] and also reference the obligations concerning the duty to assess and reject abnormally low tenders. [108] Thirdly, social objectives can be integrated by imposing suitable conditions for contract performance, which should be directly relevant to the contract's subject matter. These conditions may encompass initiatives like promoting employment among women and disadvantaged groups or ensuring compliance with International Labour Organization conventions.[109] Furthermore, the CJEU case law has confirmed the feasibility of incorporating social labels into technical specifications or contract performance conditions as stipulated in the directives.[110]

The directives also attribute special importance to social objectives concerning accessibility and combating the exclusion of individuals with disabilities, in line with the provisions of the United Nations Convention on the Rights of Persons with Disabilities.[111] Contracting authorities are mandated to consider accessibility criteria for individuals with disabilities and adopt designs accessible to all users.[112] This requirement is reiterated in various contexts, including electronic communication methods,[113] adherence to relevant standards114 and even the potential exclusion of contractors.[115]

103 Article 18(1) of Directive 2014/24/EU; Article 36(1) of Directive 2014/25/EU; Article 30(2) in connection with Article 3(1) of Directive 2014/23/EU.

104 Recitals 96–101 of Directive 2014/24/EU; Recitals 102–104 of Directive 2014/25/EU; recitals 64–66,70 of Directive 2014/23/EU.

105 Recital 105 and Article 18(2) of Directive 2014/24/EU; Recital 110 and Article 36(2) of Directive 2014/25/EU; Recital 72 and Article 30(3) of 2014/23/EU.

106 M Margaret, 'Horizontal Social Clause in Light of New Legal Regulations in Public Procurement' (2016) Annals of Administration and Law: theory and practice 16(2), 326.

107 Article 57(4)(a) of Directive 2014/24/EU; Article 80(1) of Directive 2014/25/EU; Article 38 (7)(c) of Directive 2014/23/EU.

108 Recital 103 and Article 69(1)(d) and (3) of Directive 2014/24/EU; Recitals 108 and 84(1), (2)(d) and (3) of Directive 2014/25/EU.

109 Recitals 97–98 and Article 70 of Directive 2014/24/EU; Recitals 102–103 and Article 87 of Directive 2014/25/EU.

110 Recital 97 and Article 43(1) of Directive 2014/24/EU; Article 61 of Directive 2014/25/EU.

111 Recital 3 of Directive 2014/24/EU; Recital 5 of Directive 2014/25/EU; Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2009] OJ 23, 35.

112 Article 42(1) of Directive 2014/24/EU; Article 60 of 2014/25/EU; Article 36(1) of Directive 2014/23/EU.

113 Recital 53 of Directive 2014/24/EU; Recital 64 of Directive 2014/25/EU.

114 Article 62(1) of Directive 2014/24/EU; Article 81(1) of Directive 2014/25/EU.

115 Recital 101 Directive 2014/24/EU; Recital 106 Directive 2014/25/EU.

Simultaneously, mandatory exclusion criteria are established in cases involving final decisions or judgments related not only to failure to pay taxes or social security contributions, but also convictions for offenses related to child labor or other forms of human trafficking.[116]

Fourthly, for the first time, it was explicitly stated that the selection of the most economically advantageous offer can be based on price or cost-effectiveness, which may include considerations of quality-to-price ratio estimated with regard to social criteria.[117]

Finally, attention should be drawn to special provisions enabling the pursuit of social objectives, namely, the concept of reserved contracts. These contracts allow sheltered workshops, which provide the social and professional integration of individuals with disabilities or disadvantaged persons, to compete for public contracts under conditions tailored to their needs. This provision acknowledges that certain entities may face challenges in securing contracts through standard competitive processes, thus warranting Member States to reserve specific procedures exclusively for them.[118] Although this regulation prioritises social objectives over opening up procurement to competition, it is imperative that the treatment of contractors under reserved contracts remains non-discriminatory, in accordance with the overarching principles of the Directive.

In terms of case law based on the 2014 Directive, the *Conacee* case is particularly noteworthy. This case involved procurement reserved for sheltered workshops, and the Court concluded that the relevant provision of the Directive aims to achieve the social policy objective of employment.[119] This conclusion remained intact despite the CJEU's concurrent finding that the principle of equal treatment is the basis of public procurement legislation.[120] Accordingly, the Court stated that this provision allows Member States to establish additional conditions, subject to their compliance with the principles of equal treatment and proportionality.[121]

Moreover, the Advocate General stressed that this provision derives from an amendment of the European Parliament and allows the Member States to use public procurement to integrate or reintegrate individuals who cannot normally work, which is in line with the broader objective of guaranteeing equal opportunities for all.[122] The Advocate General also noted that the decision to introduce reserved contracts into national law serves a dual purpose: to ensure equal treatment of these contractors and to implement social and employment policies.[123] This case illustrates that both the Court and the Advocate General recognise the multifaceted objectives of the Procurement Directives, i.e. their primary pro-market objective and the additional goals set by certain provisions of the Directive, which also encompass social objectives.

116 Article 57(1)(f) and (2) of Directive 2014/24/EU; Article 80(1) of Directive 2014/25/EU; Article 38(4)(f) and (5) of Directive 2014/23/EU.

117 Article 67(1) and (2) of Directive 2014/24/EU; Article 82(1) and (2) of Directive 2014/25/EU.

118 Recital 36 and Article 20(1) of Directive 2014/24/EU; Recital 51 and Article 38(1) of Directive 2014/25/EU; Article 24 of Directive 2014/23/EU. The condition is that at least 30% of the employees of sheltered workshops must be individuals with disabilities or disadvantaged persons.

119 Judgment of CJEU C-598/19 EU:C:2021:810, paras. 27.

120 Ibid., paras. 37.

121 Judgment of the CJEU C-598/19 EU:C:2021:810, paras. 46.

122 Opinion of AG Tanchev in case C-598/19 EU:C:2021:349, paras. 56 and 59.

123 Ibid., paras. 70.

5. Conclusions

The above analysis shows that the EU lawmakers' approach to public procurement regulation has evolved through successive attempts to clarify the provisions of the directives and achieve a functional internal market. Initially, the directives minimally regulated social criteria, leaving the potential use of procurement for social purposes to the discretion of Member States.

However, persistent problems over more than 20 years in creating an internal market, along with the limited opening of national markets to contractors from other Member States motivated the EU lawmakers to implement further reforms to counteract this by enhancing coordination in public procurement procedures. This effort, coupled with an increasing number of infringement proceedings, led to a greater emphasis on applying a market-oriented interpretation of the directives. In the Court's case law, a cautious approach to using social criteria has emerged, with the proviso of respecting market-based treaty principles in each case. There have even been opinions suggesting a conflict between the different goals of the public procurement system.[124]

Over the years, non-binding documents have highlighted the potential of using public procurement to achieve social policy goals. Gradually, more social objectives have been recognised as attainable through procurement. This evolution is apparent in the increasing inclusion of social criteria in the directives, transforming what was once a mainly unregulated matter into an aspect of growing importance alongside market-oriented goals.[125] Public procurement is now being used to achieve EU social objectives in ways that are no longer optional.[126] This ongoing shift in the relationship between social goals and public procurement regulation continues to develop. Similarly, ensuring accessibility for users with disabilities has transitioned from being a welcomed addition to a required standard.

It is clear from the above that the directives prioritise ensuring the proper functioning of the internal market, while also pursuing or allowing – to varying degrees –objectives related to sustainable development, including social objectives. In light of current EU policy trends, it can be concluded that these objectives are primarily complementary rather than conflicting. Balancing market values with social values should not lead to the exclusion of either. This conclusion corresponds with the view that the coordination of public procurement rules seeks not only to ensure the proper functioning of the EU internal market, but also to achieve the main goals of sustainable development policy which include social issues.[127]

124 S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) Cambridge Yearbook of European Legal Studies vol. 14, 39. See also K Jaehrling, 'The State as a 'Socially Responsible Customer'? Public Procurement between Market-making and Market-embedding' (2015) European Journal of Industrial Relations 21(2), 149–164; EK Sarter, 'The Legal Framework of Contracting: Gender Equality, the Provisions of Services and European Public Procurement Law' (2015) Wagadu: A Transnational Journal of Women's and Gender Studies vol. 13, 55–83.

125 In a report on the functioning of public procurement in member states, the Commission stressed the importance it now attaches to its use for sustainable development objectives, pointing out that 'more stringent implementation of strategic procurement considerations is key for supporting an inclusive recovery, promoting a just transition and strengthening socio-economic resilience in line with the European Green Deal as new growth strategy for the EU'. Report from the Commission implementation and best practices of national procurement policies in the Internal Market COM(2021) 245 final, 12.

126 S Williams, 'Coordinating Public Procurement to Support EU Objectives – A First Step? The Case of Exclusions for Serious Criminal Offences' in S Arrowsmith, P Kunzlik (eds), Social and Environmental Policies in EC Procurement Law (Cambridge University Press 2009) 497.

127 C Barnard, 'To Bodily Go: Social Clauses in Public Procurement' (2017) Industrial Law Journal 46(2), 211.

References

Literature

Arrowsmith S, 'EC Regime on Public Procurement' in KV Thai (ed), *International Handbook of Public Procurement* (Routledge 2009) 55–107.

Arrowsmith S, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) *Journal of Public Procurement* 10(2), 149–186.

Arrowsmith S, 'The Objective of Public Procurement Systems and Regulatory Provisions' in S Arrowsmith, S Treumer, J Fejo, L Jiang (eds), *Public Procurement Regulation*: *An Introduction*, 4–19, <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> accessed 30 Feb 2024.

Arrowsmith S, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) Cambridge Yearbook of European Legal Studies vol. 14, 1–47.

Arrowsmith S, *The Law of Public Procurement and Utilities Procurement: Regulation in the EU and UK* (Sweet & Maxwell 2014).

Barnard C, 'To Bodily Go: Social Clauses in Public Procurement' (2017) Industrial Law Journal 46(2), 208–244

Barnard C, 'To Bodily Go: Social Clauses in Public Procurement' (2017) Industrial Law Journal 46(2), 208–244.

Caranta R, 'Sustainable Public Procurement in the EU' in R Caranta, M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 15–51.

Caranta R, 'Towards Socially Responsible Public Procurement' (2022) ERA Forum vol. 23, 149–164.

Caranta R, Trybus M (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010). Caranta R, Trybus M (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010).

European Commission, 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' (2017) European Procurement & Public Private Partnership Law Review 12(3), 219–223.

European Commission, *Communication from the Commission to the European Parliament and the Council, The Impact and Effectiveness of the Single Market* (Office for Official Publications of the European Communities 1996).

European Commission, *Research on the 'Cost of Non-Europe': Basic Findings* (Office for Official Publications of the European Communities 1988).

European Commission, *Social Issues in Purchasing: A Guide to Integrating Social Issues in Public Procurement* (Office for Official Publications of the European Communities 2011).

Fisher E., 'The Power of Purchase: Addressing Sustainability through Public Procurement' (2013) European Procurement & Public Private Partnership Last Review vol. 8, 2–7.

Jaehrling K, 'The State as a 'Socially Responsible Customer'? Public Procurement between Market-making and Market-embedding' (2015) European Journal of Industrial Relations 21(2), 149–164.

Margaret M, 'Horizontal Social Clause in Light of New Legal Regulations in Public Procurement' (2016) Annals of Administration and Law: theory and practice 16(2).

McCrudden C, 'Buying Social Justice: Equality and Public Procurement' (2007) Current Legal Problems 60(1), 121–147.
McCrudden C, *Buying Social Justice Equality, Government Procurement, and Legal Change* (Oxford University Press 2007).
Sarter EK, 'The Legal Framework of Contracting: Gender Equality, the Provisions of Services and European Public Procurement Law' (2015) Wagadu: A Transnational Journal of Women's and Gender Studies vol. 13, 55–83.
Sjåfjell B, Wiesbrockn A (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015).
Williams S, 'Coordinating Public Procurement to Support EU Objectives – A First Step? The Case of Exclusions for Serious Criminal Offences' in S Arrowsmith, P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) 479–498.
Williams-Elegbe S, *Public Procurement and Multilateral Development Banks Law, Practice and Problems* (Hart Publishing 2019).
Yeow J, Uyarra E, Gee S, 'Closing the Loop: Examining the Case of the Procurement of a Sustainable Innovation' in C Edquist, NS Vonortas, JM Zabala-Iturriagagoitia, J Edler (eds), *Public Procurement for Innovation* (Edward Elgar Publishing 2015) 235–262.

List of legislative acts

Commission Directive 70/32/EEC of 17 December 1969 on the provision of goods to the State, to local authorities, and other official bodies [1970] OJ L 13/1.
Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches [1971] OJ L 185/1.
Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts [1971] OJ L 185/5
Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.
Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1976] OJ L 13/1.
European Commission, Completing The Internal Market: White Paper from the Commission to the European Council COM (85) 310 final.
Opinion of the Economic and Social Committee on the proposal for a Council Directive amending Directive 71/305/EEC concerning the coordination of procedures for the award of public work contracts [1987] OJ C 319/55.
Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC [1988] OJ L 127/1.
Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts [1989] OJ L 210/1.
Public procurement: regional and social aspects (Communication from the Commission) COM (89)400 final.
Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors [1990] OJ L 297/1.

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors [1992] OJ L 76/14.
Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1.
Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199/1.
Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1993] OJ L 199/54
Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors, [1993] OJ L 199/84.
European Commission, Green Paper – Public Procurement In The European Union: Exploring The Way Forward COM (96) 583 final.
Communication from the Commission of 11 March 1998 public procurement in the European Union COM(98) 143 final.
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement [2001] OJ C 333/27.
Amended proposal for a European Parliament and Council Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2002] OJ C 203E/184.
Amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts [2002] OJ C 203E/210.
Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors [2004] OJ L 134/1.
Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts [2004] OJ L 134/114.
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 July 2008 public procurement for a better environment COM(2008) 400.
Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts, and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216/76.
Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2009] OJ 23/35.
Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 27 October 2010 towards a single

market act for a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another COM (2010) 608 final.
Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 13 April 2011 single market act twelve levers to boost growth and strengthen confidence 'working together to create new growth' COM (2011) 206 final.
Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on procurement by entities operating in the water, energy, transport and postal services sectors COM (2011) 895 final.
Proposal for a Directive of the European Parliament and of the Council of 20 December 2011 on public procurement COM (2011) 896 final.
Communication from the Commission of 3 March 2012 Europe 2020 A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final.
Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.
Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.
Commission staff working paper executive summary of the impact assessment of 21 April 2021 accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors SWD(2021) 151 final.
Report from the European Commission implementation and best practices of national procurement policies in the Internal Market COM(2021) 245 final.

List of Judgements and Judical Decisions

Judgment of the CJEU C-31/87 EU:C:1988:422.
Opinion of AG Alber in case C-225/98 EU:C:2000:121.
Judgment of the CJEU C-225/98 EU:C:2000:494.
Judgment of the CJEU C-19/00 EU:C:2001:553.
Judgment of the CJEU C-448/01 EU:C:2003:651.
Judgment of the CJEU C-247/02 EU:C:2004:593.
Judgment of the CJEU C-226/04 EU:C:2006:94.
Judgment of the CJEU C-346/06 EU:C:2008:189.
Opinion of AG Kokott in case C-368/10 EU:C:2011:840.
Judgment of the CJEU C-368/10 EU:C:2012:284.
Judgment of the CJEU C-358/12 EU:C:2014:2063.
Judgment of the CJEU C-549/13 EU:C:2014:2235.
Judgment of the CJEU C-115/14 EU:C:2015:760.
Opinion of AG Tanchev in case C-598/19 EU:C:2021:349, paras. 56 and 59.
Judgment of CJEU C-598/19 EU:C:2021:810, paras. 27.

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The impact of a company ownership structure on managing airport functions

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Abstract
This study analyses the problems of privatisation in the aviation industry by comparing airport ownership structures. In the context of the global perspective, this study focuses on airports located in the EU. Due to the supremacy of EU law over national legal systems, these airports function in a comparable legal environment. The analysis considered the following as main airport functions: investment capacity, environmental impact, public service provision, and ensuring security. The EU law refers to all entities regardless of their ownership structure and location. Moreover, public financing is submitted to provisions concerning state aid. This article shows that ownership structure does not influence airport functions. There are several regulations granting this, and the case study of ECJU rulings has proved that these regulations are effective. Their effectiveness for the future, if the participation of private capital increases, should be the subject of further auditing. From this study arises the question of the effects of possible deregulation of the aviation market. This study can potentially help aviation industries look at ownership issues, specifically those of airports, through the perspective of regional, public welfare, and local economy. This changes the motivation of airports as nodes of global commute from a local perspective. It is also a voice in the discussion about the consequences of possible privatisation in the aviation market.

Keywords
airports, privatisation, aviation market, competition

1. Introduction

This article used the public debates over the privatisation of airports, centred around France, to discuss the process of privatisation in the aviation industry. Keeping the global perspective in context, it focuses on the cases in the EU to understand the conflicts in various methods of ownership structures.

Currently, there are several parallel processes of privatisation happening in Europe, but the literature in this field is insufficient. Therefore, the research question is whether these changes pose a risk of creating safety hazards or environmental risks, lead to non-realisation of public interest, or violate fair competition rules.

This study can potentially help aviation industries look at the ownership issues, specifically of airports, through the perspective of regional, public welfare, and local economy. This changes the motivation of airports as nodes of a global commute from a local perspective.

2. Material and methods

First, the study primarily analysed EU law concerning the aviation market. The acts were grouped into four categories: general, airport functioning,[1] airport financing and state aid,[2] environment and public information,[3] and the latest updates resulting from the Covid-19 pandemic.[4] The impact of these regulations was analysed in the case study based on rulings by the Court of Justice of the European Union (CJEU). The jurisprudence analysed for this study consisted of cases with the keyword 'airport'. The ten judgements – most relevant and most impactful on EU policy towards airports were chosen for further analysis. They were inter alia the landmark judgement regarding the activities concerning airport infrastructure,[5] public access to airport connected decision-making process,[6] incompatible with common market state aid and infringements of competition.[7]

Second, I have monitored the current discussion concerning ongoing processes of privatisation. In these discussions, I considered different points of view represented by the Airports Council International (ACI) and the International Air Transport Association (IATA). Policy briefs on

1 Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 Sept 2008 on Common rules for the operation of air services in the Community [2008] OJ L 293.

2 Communication from the Commission 2005/C 312/01 Community guidelines on the financing of airports and start-up aid to airlines departing from regional airports [2005] OJ C 312/1; Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] OJ C 99/3.

3 Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] OJ L 124; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17; Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

4 Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic [2020] OJ L 165/1; Commission delegated regulation (EU) 2020/2114 of 16 Dec 2020 amending Regulation (EC) No. 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to the selection of ground handling service provider [2020] OJ L 426/1; Commission delegated regulation (EU) 2020/2115 of 16 Dec 2020 amending Regulation (EC) No. 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences [2020] OJ L 426/4.

5 Judgement of CJEU T-128/98 EU:T:2000:290.

6 Judgement of CJEU C-182/10 EU:C:2012:82, 80; Judgement of CJEU in joined cases C-128/09 to C-131/09, C-134/09 and C-135/09 EU:C:2011:319.

7 Judgement of CJEU T-165/15 EU:T:2018:953; Judgement of CJEU T-165/16 EU:T:2018:952; Judgement of CJEU T-818/14 EU:T:2018:33; Judgement of CJEU T-8/18 EU:T:2020:182; Judgement of CJEU T-716/17, EU:T:2020:181; Judgement of CJEU T-607/17 EU:*T*:2020:180.

privatisation questions[8] and reports[9] gave an overview of the ACI's attitude towards privatisation. On the other hand, IATA's attitude can be analysed in the resolution of airport privatisation.[10]

A rich political and social debate, in which main arguments were presented by François Ecalle[11] and Bernard Perret,[12] has flared up in France as a result of the attempt to privatise Groupe ADP. Managing certain French airports shows that the ownership structures of the airport's operator should not be underestimated. An analysis of the ownership structure was aimed at indicating trends. To set the frames for this article, I analysed the structure of the world's ten biggest airports, the ten biggest airports in the EU, and all Polish airports as a reference. All Polish airports are in public hands-state's or municipal, while the rest of the analysed airports have different ownership structures. The list of the biggest world and EU airports was created on the basis of the lists published by the Airport Council International[13] and the Port Authority of New York and New Jersey[14] and based on the number of passengers per year. The data from 2019 were taken into consideration since it was the last year before the COVID-19 pandemic which resulted in serious disruptions in air traffic.

2.1. The world's biggest airports

Among the world's biggest airports, four are in the USA: Hartsfield-Jackson Atlanta International (ATL), Los Angeles (LAX), Chicago O'Hare International (ORD), and Dallas/Fort Worth (DFW). Two are in Europe: London Heathrow (LHR) and Paris Charles De Gaulle (CDG). The rest are in Asia: Beijing Capital International, China (PEK), Dubai in the United Arab Emirates (DXB), Haneda Airport, Japan (HND), and Shanghai, China (PVG). In the largest USA airports, cities own them or they are municipally-owned enterprises. Ownership of Asian airports is more complicated: in China, the ownership is split among different public companies, which is held in the state's hands. This is the case of PEK, which is operated by Beijing Capital International Airport Co., Ltd., whose shares are divided between its parent company Capital Airports Holding Company (56.61%) and public investors (43.39%). In the case of PVG, operated by Shanghai International Airport Services Co. Ltd., the joint venture is divided between Shanghai International Airport Co. Ltd., Shanghai Airport Authority, Hong Kong Airport Services Ltd., and Air China, which are owned by several public shareholders.

A similarly complex situation is in Japan, where HND is divided into Domestic and International Passenger Terminals. The international terminal is operated by Tokyo International Air Terminal Corporation (TIAT), whose shares are owned by thirteen other companies with a complicated shareholders structure. One of TIAT's major shareholders is Japan Airport Ter-

8 'Privatization can provide a viable solution to global airport infrastructure gap. New ACI World policy brief provides guidance for governments and policy makers' (2018), <https://aci.aero/2018/06/19/privatization-can-provide-a-viable-solution-to-global-airport-infrastructure-gap> accessed 29 Apr 2020; 'Policy Brief. Creating fertile grounds for private investment in airports' (2018), <https://store.aci.aero/form/policy-brief-creating-fertile-grounds-for-private-investment-in-airports> accessed 03 May 2020.

9 O Jankovec, 'Of Airport Privatization and Airline Fantasies' (2018) ACI World Report News and Events from the Voice of the World's Airports 18 – 19, <https://aci.aero/news/aci-world-report> accessed 9 May 2020.

10 Resolution on airport privatization and corporatization' (2018), <https://www.iata.org/contentassets/008e4f88f59941c0b6df782d-16d1b75c/resolution-airport-privatization-agm2018.pdf> accessed 1 Jun 2020.

11 F Ecalle, 'Faut-il privatiser Aéroports de Paris?'[Should Aéroports de Paris be privatized?] (2020), <https://www.fipeco.fr/fiche/Faut-il-privatiser-A%C3%A9roports-de-Paris-%3F> accessed 11 Nov 2022.

12 B Perret, 'Pourquoi privatiser ADP?'[Why privatize ADP?] (2019), <https://esprit.presse.fr/tous-les-numeros/le-sens-de-l-ecole/881> accessed 11 Nov 2022.

13 'Top 30 European Airports 2019', <https://www.aci-europe.org/44-industry-data/40-airport-traffic.html> accessed 11 March 2020.

14 'Number of Passengers, Worldwide 2020' (2020) *Airport Traffic Report*, 30, <https://www.panynj.gov/content/dam/airports/statistics/statistics-general-info/annual-atr/ATR_2020.pdf> accessed 11 March 2020.

minal Co., Ltd., which operates the Haneda Airport Domestic Terminal and has a complex shareholder structure comprised of eleven major shareholders and 3,248,108 shares of treasury stock (which are not included in the calculation of the shareholding ratio). Some shareholders own stock in both terminals, but the actual proportions of private and public ownership demand further examination of this structure.

However, there are no doubts in the case of DXB, which is fully owned by the Emirate of Dubai, and HKG which is fully owned by the Chinese government.

2.2. The main airports in the European Union

Among the ten world's biggest airports there are two European airports, LHR and CDG. Heathrow Airport Holdings Limited is privately managed on behalf of its shareholders.[15] CDG, like Paris Orly (the 10th biggest airport in Europe) and many airports in France, are operated by Groupe Aéroports de Paris (ADP). Most shares in ADP (50.6%) are owned by the state. The remaining shares are divided between institutional shareholders (21.90%), VINCI (8%), Dutch Royal Schiphol Group (8%), and Crédit Agricole Assurances/Predica (5.10%). The individual shareholders and employees represent less than 6% of shares. The relationship between ADP and Royal Schiphol Group-which operates the third biggest airport in Europe (AMS) Amsterdam–is worth discussing. While the Royal Schiphol Group owns 8% of ADP shares, ADP owns 8% of the Royal Schiphol Group, a publicly owned company (69.77% of shares are owned by the State of Netherlands, 20.03% by the Municipality of Amsterdam, and the remaining 10.2% by the Municipality of Rotterdam). The second shareholder of ADP is VINCI, the major shareholder (50.01%) of Gatwick Airport Limited. VINCI is controlled by institutional investors from all over the world (North America 22.90%, France 17.10%, United Kingdom 11.70%, the rest of Europe 15.70%, and the rest of the world 5%) and employees who own 8.30% of shares. The two biggest Spanish airports, Madrid (MAD) and Barcelona (BCN) – 5th and 6th largest respectively in Europe – are operated by Aena SME S.A., which is controlled by ENAIRE, a public business entity attached to the Ministry of Public Works (51%). The remaining shares (49%) are in the free market. The biggest German airports, Frankfurt (FRA) and Munich (MUC) – (the 4th and 7th largest in Europe – are operated by entities controlled by the State and Municipality. The Dublin Airport (DUB), which is operated by the fully state-owned Dublin Airport Authority, also has a similar situation. Among the ten biggest European airports,[16] only the airport in Rome is fully private since the operating enterprise, Aeroporti di Roma S.p.A. is controlled by Atlantia S.p.A. (99.38%). A total of 45.76% of their shares are in the free market held by Europeans (42.40%) and non-Europeans (37.30%), and the controlling package is held by Sintonia S.p.A., which is controlled by Edizione S.p.A.

2.3. Airports in Poland

All Polish international and main regional airports are publicly owned either by state, regional, or municipal companies. The main company managing airports is the Polish Airport State Enterprise (PLL). It has shares in ten out of thirteen airports, and in four of them, PLL is a unique or majority shareholder. The distribution of shares is shown in the table.

15 The shares are divided as follows: 25% FGP Topco Limited (the company is fully owned by Ferrovial S.A), 20% Qatar Investment Authority, 12.62% Caisse de dépôt et placement du Québec, 11.20% GIC Asset Management, 11.18% Alinda Capital Partners of United States, 10% China Investment Corporation, which is a state-owned investment fund, 10% Universities Superannuation Scheme.

16 See fn 13.

Table 1. Polish airports ownership structure

Airport	Shareholder	Volume of shares
Chopin Airport in Warsaw	PLL	100%
International Cracow Jana Pawła II Airport	PLL Małopolskie voivodeship Municipality of Zabierzów	76.19% 22.73%
Szczecin-Goleniów Airport	PLL Zachodniopomorskie voivodeship Municipality of Szczecin	48.94% 20.62% 35.04%
Poznań-Ławica Airport z o.o.	PLL Municipality of Poznań Wielkopolskie voivodeship	39% 37% 24%
Wrocław Airport S.A.	Municipality of Wrocław Dolnośląskie voivodeship PLL	49.25% 31.01% 19.74%
Gdańsk Airport S.A.	Municipality of Gdańsk Pomorskie voivodeship PLL Municipality of Gdynia Municipality of Sopot	33.63% 32.85% 29.09% 2.23% 2.19%
Rzeszów-Jasionka Airport S p. z o.o.	Podkarpackie voivodeship PLL	55.46% 44.65%
Mazowiecki Airport Warszawa-Modlin Sp z.o.o	Mazowieckie voivodeship Military Property Agency PLL Municipality of Nowy Dwór Mazowiecki	35% 32.04% 28.28% 4.48%
Katowice-Pyrzowice Airport	Weglokoks S.A. Śląskie voivodeship Municipality of Katowice PLL	42.49% 34.88% 4.89% 17.30%
Mazury Airport in Olsztyn	PLL Energopoltrade S.A. Municipality of Szczytno	33.53% 21.76% 20.74%
Łódz Władysław Reymont's Airport Sp z o.o.	Municipality of Łódź Łódzkie voivodeship	95.51% 4.49%
Airporty Bydgoszcz S.A.	Kujawsko-Pomorskie voivodeship Municipality of Bygdoszcz	71.42% 22.92%
Zielona Góra Airport/Babimost Sp z.o.o	Lubuskie voivodeship	100%

Sources ▷

Sources: Business group (2020), <https://www.polish-airports.com/en/business-group.html> accessed 11 March 2020; Nadzór właścicielski [Corporate governance] (2020), <https://www.krakowairport.pl/pl/lotnisko,c94/firma,c96/o-spolce,c97/nadzor-wlascicielski,a285.html> accessed 11 March 2020; Port lotniczy Szczecin-Goleniów sp. z o.o. [Szczecin-Goleniów Airport Ltd.] (2020), <http://bip.rbip.wzp.pl/artykul/port-lotniczy-szczecin-goleniow-sp-z-oo> accessed 12 March 2020; Informacje o podmiocie i organach spółki [Information about the entity and the company's governing bodies] (2020), <https://www.airport-poznan.com.pl/pl/bip/informacje-o-podmiocie-i-organach-spolki> accessed 12 March 2020; Wrocław Airport. Władze spółki [The shareholders of Wrocław Airport Co.] (2020), <http://airport.wroclaw.pl/lotnisko/spolka/> accessed 12 March 2020; Władze spółki [Managment Board] (2020), <https://www.airport.gdansk.pl/lotnisko/wladze-spolki-p29.html> accessed 12 March 2020; Struktura i własności [Structure and properties] (2020), <https://bip.rzeszowairport.pl/3/struktura-i-wlasnosci> accessed 12 March 2020; Struktura własnościowa [Ownership structure] (2020), <https://www.modlinairport.pl/lotnisko/struktura-wlasnosciowa> accessed 11 March 2020; O firmie. [About Company] (2020), <https://www.gtl.com.pl/pl/ofirmie> accessed 11 March 2020; Port Lotniczy "Mazury" sp. z o.o. [Mazury Airport Ltd.] (2020), <http://www.krs-online.com.pl/msig-1627-21597.html> accessed 11 March 2020; Moje lotnisko. O firmie [About Airport. About Company] (2020), <https://www.airport.lodz.pl/pl/moje-lotnisko/o-firmie> accessed 15 March 2020; Port Lotniczy Bydgoszcz S.A. [Bydgoszcz Airport SA] (2020), <https://bip.plb.pl/?cid=91> accessed 15 March 2020; Wykaz spółek, w których udziały bądź akcje posiada województwo lubuskie [List of companies in which the Lubuskie Voivodeship holds shares] (2020) <https://bip.lubuskie.pl/system/obj/46644_wykaz_spolek_BIP_30.01-2020.pdf> accessed 15 March 2020.

3. Theory

3.1. Global trends of airport ownership structures

Almost 75% of total European passenger traffic is handled by airports governed by the private sector or public-private partnerships. But on the same time, as was shown before, only two of ten biggest European airports are managed by private entities. A similar ownership structure is in Latin America, the Caribbean Region, and Mexico region, where 60% of their traffic is handled by the airports governed by the private sector or public-private partnership. In contradiction, nearly all airports in the USA are owned by state or local governments.[17]

Notably, 55% of all the world's airports are managed by companies which are themselves shareholders of more than one airport and create the airport network.[18] For example, ADP has shares in 125 airports in 50 countries and Vinci Airports owns shares in 52 airports in 11 countries. The airports managed by such companies handle an annual traffic volume of 3.7 billion passengers, which is 42% of global passenger traffic.[19] Especially small, regional airports may benefit from this because 94% of loss-making airports around the world handle fewer than one million passengers and half of all small airports are operated by airport networks.[20] The operator is, therefore, able to recover costs, generate returns for shareholders, ensure sustainable operation, and facilitate the sharing of best practices.[21]

17 'Airports' license to invest is a prerequisite for decarbonisation' (2019), <https://www.aci-europe.org/media-room/209-airports-license-to-invest-is-a-prerequisite-for-decarbonisation.html> accessed 30 Apr 2020.

18 'Policy brief on airport networks. Airport networks contribute to sustainability of global communities' (2019), <https://aci.aero/news/2019/11/06/airport-networks-contribute-to-sustainability-of-global-communities> accessed 9 May 2020.

19 Ibid.

20 Ibid.

21 Ibid.

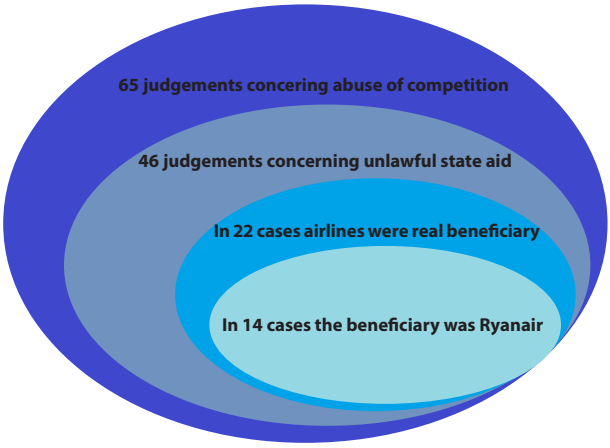
3.2 Main airports' functions and vulnerability to the changes in ownership structure

3.2.1 Economic growth of the region

Aviation supports between 6.1[22] to 62.6 million jobs globally[23] and almost 1.2 billion jobs related to the entire aviation sector.[24] It also generates 3.5% of the global Gross Domestic Product (GDP), with a $2.7 trillion economic impact.[25] Airports impact regional trade, tourism, and foreign investment,[26] which could be one reason why local authorities want an airport in their region, even when it does not seem economically feasible. In Europe, this is especially visible in the outermost regions (e.g., the Azores), areas affected by economic crisis (e.g., Charleroi), or less developed regions (e.g., Rzeszów-Jasionka).

The case study of the CJEU judgements shows the willingness of local authorities to support an airport with regard to local or regional considerations rather than market considerations and ex-ante profitability prospects which are often the source of law infringement in the EU. In the years 1994-2021, there were over 100 cases concerning airports presented before the CJEU and more than half of them concerned abuse of competition (see Graph 1).

Graf 1. Analysis of ECJ cases concerning airports



Sources: Summary prepared by author, based on the data provided by European Court of Justice. The list of cases which were analyzed to prepare the graph was result of the following searching criteria: "Case status – All cases"; "Court – Court of Justice"; "Documents - Documents published in the ECR – Judgements, Documents not published in the ECR – Judgements, From – 1994 – 2021"; "Text – Airport(s), Airline(s)"; "Period or date – Date of delivery"; "Subject-matter – Competition, Consumer protection, Internal market – Principles, Transport". InfoCuria Case -law. Search form, <https://curia.europa.eu/juris/recherche.jsf?language=en> accessed 2 Feb 2022.

22 'The impact of COVID-19 on the airport business: preliminary assessment' (2020) 23, <https://aci.aero/wp-content/uploads/2020/03/200323-COVID-19-Impact-on-Airport-Business-Presentation.pdf> accessed 29 Apr 2020.

23 See fn 17.

24 See fn 22, 23.

25 See fn 17.

26 'Policy Brief. Creating fertile grounds for private investment in airports', 5, <https://store.aci.aero/form/policy-brief-creating-fertile-grounds-for-private-investment-in-airports> accessed 3 May 2020.

In most cases, the airport concerned was a little regional airport as Pau-Pyrénées Airport[27] and the Altenburg-Nobitz.[28] The first is the only airport in the region, distanced from other airports in Bordeaux and Toulouse by about 200 km, and the second is a small regional airport, situated about 90 km from the larger Leipzig airport. As the case study show, the public ownership regarded as the possibility to get direct support from public financing without shareholders' remuneration is no longer adequate due to the European Union's State Aid rules.

3.2.2. Security

Due to repeated terrorist threats and incidents, airports in close cooperation with state governments, regulators, and international organisations are working on improving their security policies. They are implementing innovations such as smart security pilots, automated screening lanes, central image processing, queuing management, assistance from canines to detect explosives, and more. From the ACI report, we can learn that these have already been implemented in American airports such as ATL, LAX, Harry Reid International Airport, Las Vegas (LAS), ORD, and John F. Kennedy, Jr. International Airport, New York City, (JFK).[29] Moreover, globally available special programmes promote safety and security among airports (APEX, Smart Security, etc.).[30] Activities such as air traffic control, police, customs, and firefighting, are safeguarding civil aviation against acts of unlawful interference, and investments in the infrastructure and equipment necessary to perform those activities are considered the state's responsibility. It is regarded as an exercise of official powers of a non-economic nature,[31] regardless of the ownership structure.

3.2.3. High-Volume investment activity

The ACI World estimates that in the last five years, airports with private sector participation invested 14% more than their public counterparts and 12% more than the global average.[32] In this regard, airport privatisation not only meets the level of investment, which is critical to the global economy and connectivity but also is a source of revenue and a way to reduce public debt without depending on taxpayers.[33]

Despite this, most regions have a vertical integration between airports, airlines, and public financing. This approach is compatible with budgetary constraints, fiscal discipline, and stringent state aid rules adopted in the EU, where privatisation introduces higher transparency in financing airports.

In the EU, there are several examples of airports developed with public funds. One of them is Charleroi Bruxelles-Sud (CRL), where the July 2000 agreement funded the construction of a new passenger terminal for EUR 113.74 million, including subsidies. From 2000 to 2013, traffic at CRL increased from approximately 200,000 passengers to nearly 7 million, with Ryanair's

27 Judgement of CJEU T-165/15.

28 Ibid.

29 A Gittens, 'Civil Aviation International AVSEC Standard and Recommended Practices. Conferences' (2018), 4, <https://aci.aero/news/2018/03/16/civil-aviation-international-avsec-standard-and-recommended-practices-conferences-angela-gittens-director-general-aci-world> accessed 3 May2020.

30 Ibid.

31 Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] 35.

32 'Privatization can provide a viable solution to global airport infrastructure gap'.

33 'Time for airlines to come to terms with the 'user pays' principle & end their double-speak on capacity' (2018), 1, <https://www.aci-europe.org/media-room/> accessed 2 May 2020.

share amounting to 70-80%. The aid granted by the authorities was subsequently subjected to the Commission Decision 2004/393/EC and finally CJEU judgement T-818/14[34] which concluded that the subsidies were actually granted to Ryanair rather than CRL and therefore constituted state aid. The subsidies granted to Ryanair were found to be 'discriminatory, unlawful under Belgian law and contrary to the principle of proportionality'.[35] The Commission drew a distinction between investments and services of an economic nature and those regarded as of a non-economic nature (subsidies to fire protection and security). While the measure's non-economic nature could not be regarded as state aid, the ones considered to be of economic nature were subject to examination. The Commission applied the market economy operator test and concluded that under similar circumstances, a private operator seeking a return on investment would not have participated in such operations. Although the aid for CRL was granted to facilitate regional development and had a positive impact on its economy and employment, it was necessary to forego all social, regional, and sectoral policy considerations in favour of the requirements of a private operator test. From an economic point of view, the CRL's prospects were insufficient to justify the investment. Moreover, the aid significantly distorted competition by affecting the increase of passenger numbers at the Brussels-National Airport.[36] More importantly, according to Point 119 of the Guidelines on State Aid to Airports and Airlines, to be eligible for operating aid, the traffic of the airport cannot exceed 3 million passengers.[37] As a result, the Commission concluded that only the measures implemented before 3 April 2014 were compatible with the internal market, while those implemented after that date were not.[38] This was confirmed by the CJEU Judgement on 25 January 2018, and the referred aid was to be recovered.[39] If we take into consideration that the distortion of competition was between two Belgian Airports, both staying in public hands[40] it may look controversial and the question if the Commission's intervention was needed arises. The main concern is what kind of rights exactly were secured here and if there is a real competition between the entities held in public hands.

On the other hand, there are situation when there is only one beneficiary of the aid but due to the fact it is open to other participants of the market it is still considered legal and not to the benefit of the airline as was in case T-894/16[41].

That breakthrough judgement, which considered the activities of developing and managing airport infrastructure[42] as an economic activity, came from Aéroports de Paris.[43] As the court stated: Regulation No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, which is specific in nature, applies only to activities directly relating to the supply of air transport services. Activities that do not directly

34 Judgement of CJEU T-818/14.

35 Commission Decision (EU) 2004/393 of 12 Febr 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi [2004] OJ L137/47, points 239–266.

36 Commission Decision C (2014) 6849 final of 1 Oct 2014 concerning measures, concerning measures SA. 14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair C (2014) 6849 final, <https://ec.europa.eu/competition/state_aid/cases/132112/132112_1834484_1762_2.pdf> accessed 8 Marz 2021.

37 Communication from the Commission 2014/C 99/03 Guidelines on State aid to airports and airlines [2014] 119.

38 Commission Decision C (2014) 6849 final.

39 Judgement of CJEU T-818/14.

40 On 1st April 2021 the public share in SOWAER managening CRL was 51,68% and BSCA shares on 31 Dec 2021 were owned in 48,32% by Belgian Airports (Groupe SAVE) and SOAWER 35,87%.

41 Judgement of CJEU T-894/16 EU:T:2019:508, point 40.

42 Except these which normally fall under State responsibility, in the exercise of its official powers as a public authority – author note.

43 Judgement of CJEU, T-128/98.

relate to such services fall within the scope of Regulation No 17, which is general in nature.[44]

The Commission explained that applying the regulation concerning State aid is possible if the beneficiary is engaged in economic activity. If an airport engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 87(1) of the EC Treaty, and the Treaty rules on State aid will therefore apply.[45] Competition need not be distorted; the mere fact that aid is liable to affect trade and distort competition is enough to determine that the state aid was incompatible with EU rules. The Commission elaborated detailed guidelines for the air transport sector.[46] This approach was confirmed in Cases T-8/18 EasyJet Airline Co. Ltd v Commission, T-716/17 Germanwings GmbH v Commission, and Case T-607/17 Volotea SA v Commission, 13 May 2020.[47] Important role of the national courts should be highlighted here. As the article 108(3) has direct effect individuals can invoke it before the national court (even if the project of aid was not notified to the Commission) which should provide adequate protection for those harmed by the infringement (remedies available include preventing the payment of unlawful aid, recovery, interest, damages, and interim measures.[48]

3.2.4. European regulations concerning public service obligations

As in the Commission Decision 2004/393, the 'airport always fulfils a public function, which explains its general submission to certain types of regulations even if it belongs to and/or is managed by a private company. Private airport managers can be subject to this regulation and their fee-fixing powers are often contained within the framework of national regulators' instructions because of their monopolistic position. The airports' position of strength in relation to their users can thus be controlled by the national regulators who fix fee levels that must not be exceeded, known as 'price caps'. Asserting that a private airport is free to fix its fees without being subject to certain forms of regulation is in any case inaccurate'.[49] The framework of the obligations required from the air service operator is pointed out in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on Common rules for the operation of air services in the Community. According to this act, chargeable transport services in the EU can be granted only by undertakings with the licence to carry air passengers, mail, and/or cargo for remuneration. To obtain the licence, the establishment must fulfil certain requirements, inter alia the principal place of business located in an EU Member State, and/or nationals of Member States must own (directly or indirectly) and effectively control more than 50% of the undertaking. Access to routes is also regulated, thus limiting the possibility to operate intra-community air services to entitled carriers.[50]

The regulation also provides principles for public service obligations. If it is vital for the economic and social development of the region, Member States may impose a public service

44 Ibid point 1.
45 Communication from the Commission 2005/C 312/01, point 3.2.1 (30); Communication from the Commission 2014/C 99/3, 30.
46 Ibid11.
47 Judgement of CJEU T-8/18, points 228-229; Judgement of CJEU T-607/17, points 155-156; Judgement of CJEU T-607/17, point 184.
48 Opinion of Advocate General Mengozzi on 27 June 2013, C-284/12 EU:C:2013:442. point 13–14, 16.
49 Commission Decision (EU) 2004/393, point 156.
50 Regulation (EC) No 1008/2008/, Art. 3.

obligation of operating on a certain route.[51] To ensure that the obligation is imposed only to the necessary extent, there are several rules to follow. There is a demand of informing the Commission and consult the Member State concerned, the airport and the air carriers operating the route in question. The obligation itself should not extent the necessary minimum and set in a transparent and non-discriminatory way. The abovementioned rules refer to all airport service providers, without distinction, if they are in public or private. The main problem is lack of precision of the term 'minimum provision' what constitutes the cause of disputes between parties.

3.2.5. Environmental protection policy

European Union takes special care about the natural environment issues and pay very great attention to the environment protection, inter alia significant reduction of the CO_2 emission. Also other questions as landscape and animal protection, noise emission levels and emissions are in details regulated. All of the regulation concerning environment are subject to public supervision as EU law guarantees public scrutiny on decisions having a significant influence on the environment, personal health, and well-being of its citizens. It considers the opinions and concerns of the public, according to inter alia Directive 2003/35/EC, which provides public participation in drawing up plans and programmes relating to the environment,[52] Directive 2011/92/EU, on the assessment of the effects of certain public and private projects on the environment, and the Convention on access to information, public participation in decision-making, and access to justice in environmental matters (then called Aarhus Convention).[53] It confirms the value of the environment protection and the validity of the former acts concerning environmental policies. It also guarantees the access to environmental information, regulates the collection and dissemination of environmental information and assures public participation in decisions on specific activities (inter alia construction of the airport whose runway is at least 2100 m), plans, programmes and policies relating to the environment, the preparation of executive regulations and/or generally applicable legally binding normative instruments.[54] Additionally, in Case 82/10, the CJEU confirms that even if the project was adopted by a specific legislative act, the legislative process must have fulfilled the requirement of public participation in the decision-making process, by inter alia preparatory documents or parliamentary debates.[55] Public and judicial control are relevant, even if the project is realised in the public interest. According to the CJEU judgement in Case 275/09, in complex, multi-stage projects the assessment of the environmental effects should be completed either in the consent procedure or when the operating permit is to be granted.[56]

51 Ibid Art. 16.
52 Directive 2003/35/EC, points 17–25.
53 Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] 4–20.
54 Ibid Art. 6, Annex I, point. 8.
55 Judgement of CJEU C-182/10, 58.
56 Judgement of CJEU C-275/09 EU:C:2011:154, point 39.

3.3. Influence of COVID-19 on the airport industry

3.3.1. Public aid during the COVID-19 pandemic

The COVID-19 pandemic put the financial sustainability of the airport industry under serious threat. Unprecedented declines in aircraft movements and passenger traffic hindered airports' ability to meet their operating costs and their fixed capital expense obligations. Governments had to ensure that airport operators facing short-term liquidity problems had access to finance, whether through government loans or support on loan premia.[57]

3.3.2. Public service regulations during the COVID-19 pandemic

Special emergency measures were undertaken due to the COVID-19 pandemic. On 28 May 2020,[58] Regulation 008/2008 of the European Parliament and of the Council was amended by adding article 24a according to which Member States could (without Commission agreement) refuse, limit, or impose conditions on the traffic if this action was necessary to address the pandemic threat. Such action had to respect the principles of proportionality and transparency and be based on objective and non-discriminatory criteria. The Commission and other Member States must be informed, without delay, of such action.[59] Additional amenities were introduced by the Commission delegated Regulation 2020/2114 of 16 December 2020 regarding the selection of ground handling service providers and by the Commission delegated Regulation (EU) 2020/2115 of 16 December 2020 regarding operating licences till. These special measures predicted till 31 December 2021 were designed to help to avoide the continued liquidity problems of Union air carriers and was important from the point of view of their further functioning.

4. Results and discussion

4.1. Global organisations' attitudes towards the privatisation of airports

The world's biggest organisations operating in the air transport sector – ACI, IATA, and International Civil Aviation Organization (ICAO)–claim a neutral position regarding airport ownership. They agree there is no one-size-fits-all model, and local governments are better positioned to see where the private sector is likely to add the most value to their airports.[60]

The ACI argues that privatisation may finance infrastructure investments, and in return increase airport capacity[61] – a move that was successful in many countries such as Greece).[62]

57 A Gittens, 'COVID-19: Economic policy responses to the global health crisis' (2020) 1, <https://blog.aci.aero/covid-19-economic-policy-responses-to-the-global-health-crisis/> accessed 27 Apr 2020.

58 Regulation (EU) 2020/696.

59 Regulation (EC) No 1008/2008, Art. 21a.

60 'Privatization can provide a viable solution to global airport infrastructure gap' 1; A Gittens, 'Airport infrastructure development must keep pace with air service growth' (2019), 1, <https://aci.aero/news/2019/09/10/airport-infrastructure-development-must-keep-pace-with-air-service-growth> accessed 9 May 2020; D Reece, T Robinson, 'Airport ownership and regulation' (2016) *IATA Guidance Booklet Infrastructure*, <https://www.iata.org/en/pressroom/pr/2016-11-29-01/> accessed 15 Jun 2020.

61 A Gittens (2020) 1; O Jankovec.

62 A Gittens, 'Meeting global air service demand requires a coordinated global response', <https://aci.aero/news/2018/12/03/meeting-global-air-service-demand-requires-a-coordinated-global-response> accessed 9 May 2020.

Nevertheless, the IATA highlights that other privatisation outcomes have not truly met expectations,[63] and there are other ways to finance investment and increase capacity and effectiveness.[64] It seems that, despite the declaration of neutrality versus ownership structure, representatives of the airports' interest are in favour of privatisation, while airline representatives prefer leaving airports as publicly-owned entities.

4.2. Does ownership structure influence an airport's functioning?

The airports play a critical role in ensuring sustainable economic growth in cities, countries, and regions; create employment; and pay a large amount of local, provincial, and national taxes around the world what make them one of the most important part of the infrastructure. There is a tendency, caused by the pressure of environmental lobby, to substitute them by the high-speed trains where possible, but as for now, the aviation seems the most critical for many regions sector of transport.

The analysis shows the EU's tendency is to treat airports as all other businesses. The airport engaged in economic activities, regardless of its legal status or financing source, constitutes an undertaking within the meaning of Article 87(1). Its turnover which institutes the economic activity consist of revenues from two primary sources: aeronautical and non-aeronautical activities. The financial and transparency requirements applying to it are similar as those applying to all other enterprises. Nevertheless, in some cases (for example in remote regions), the overall management of the airport can be considered as services of general economic interest[65]. The airports, similarly as all public enterprises (which beside activity in general economic, public or national interest are exercising the economic activity) must fulfil additional requirements (for example more complex accountancy) to obtain the sufficient level of financial transparency of its relation with the State. It entail additional costs and airport as such is high-cost activity.

The benefits from having the airport in the region often lead authorities to financially support them, what often turns out to be incompatible with the internal market public aid regulations. The case study of the CJEU rulings shows that all cases of state aid are thoroughly monitored and limited regardless of the airport's ownership structure. The forms of the aid differs, and the most common are – reduction of the landing charges and financial support for the investment. Regardless the form, the real beneficiary of the aid may be the airport (as in Case T-894/1666) or the airline (as in Case T-818/1467). As the analysed CJEU rulings has shown if the real aid beneficiary was the airline, in most cases it was the low-cost, private airline and the competition among airlines was in most cases distorted. In cases where the competition was distorted between airports, it is sometimes questionable, especially if two, competing airports are situated in one country (or even region) and both are held in public hands (as was in Case T-894/16). In this case it seems that it is rather the question of regional policy, especially as one is a busy airport in the city center serving regular airlines and the other is in suburbia and serving low cost airlines. The target of these airports is different both when it comes to the airlines and passengers.

The provisions of the Guidelines on State Aid to airports and airlines from 2014 (and their previous version from 2005) which regulate those questions are not sufficiently precise (due to the large number of exceptions). The tools implemented there does not seem efficient (for example due to very

63 'Infrastructure, Taxes & Charges, Consumer Protection, Security Top Agenda at AACO' (2016) <https://www.iata.org/en/pressroom/pr/2016-11-29-01/> accessed 15 Jun 2020.

64 See fn 10, 2.

65 Communication from the Commission 2014/C 99/03, point 34.

66 Judgement of CJEU T-894/16, point 40.

67 Judgement of CJEU T-818/14.

long transitional period) to provide the satisfactory level of transparency in the aviation market. This reflects in the large number of the cases before CJEU. The improvement in this field is necessary to provide sustainability to the aviation market. Last, but not least, the Commission has no powers of compulsion in relation to the recipients of the aid and for this reason the central role of the national courts should be strengthen. It seems even more important if we take into consideration the length of the procedures which is on average 10 years or more between the adoption of the measures questioned by Commission and the final judgement.

On the other hand, also the airport in private hands may benefit from other than their own source of revenues. Especially airports which are part of the airport network managed by the international company (as for example ADP or Vinci). It let the airport which cannot offer to their passengers the large range of airlines and connections, to take the advantage of the significant economies of scale (as happens for example in case of smaller French airports).

Airports are critical infrastructure important for national security and gathering public services. The legislation adopted in the EU sufficiently secures the realisation of public service and refers to all entities concerned, no matter whether publicly or privately owned. Thus, in ensuring the realisation of public service, there is no threat resulting from privatising the establishment governing the airport. The same refers to national security as the same level of security must be granted to both publicly and privately managed airports. However, privately owned airports managed by big, international companies may benefit from the higher level of investment in this field (hi-tech innovative solutions are more accessible for small airport which is a part of a network than the similar airport governed by local, public authority). In such airports it is also easier to implement best practices.

When it comes to environmental issues, there are many provisions governing environmental policies of the EU, which must be obeyed by both public and private enterprises, and by EU citizens and governments. In this context, it seems irrelevant whether the airport is in public or private ownership. Public participation in the decision-making processes is common and granted, as well as the access to information. The airport has significant environmental impact on the surroundings and that is why its construction was listed as one of the activities demanding public consultancy and involvement in decision-making process by the Aarhus Convention.[68] The public authority must take public opinion into due account in decision-making, inform of the final decisions and its justification. Theinfringement of this obligation gives the right to challenge public decisions. Unfortunately, it does not make such decision void. The effectiveness and the real causative power of public will is then doubtful. What is more, as important countries as USA and Canada and many smaller which didn't sign it or has signed it with reservations, the Convention influence for the world's environmental policy is questionable. Moreover, practical implementation of its resolutions to different national legal systems may pose problems or even be impossible. Fortunately, not numerous cases before the CJEU concerning environmental rules breach by the airports suggest that the awareness of the airports managing entities in this field is satisfactory, what does not mean that their activity does not cause environmental damage.

5. Conclusions

This research focused on EU airports as those operating in a similar legal environment. Because the law in the Member States must be consistent with supreme EU law, the main provisions the concerning functioning of the airports are common. This is what made their situation comparable.

68 Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] Annex 1, point 8.

EU regulations refer to all entities, regardless of the ownership structure. This leads to the conclusion that the ownership structure is irrelevant to how an airport functions. The increasing involvement of the private sector will lead to an audit if the existing regulatory framework remains efficient and effective in the future. These questions remain, however: how would the deregulation influence the situation of the airport, and to what level is deregulation possible and safe?

On the contrary, airports not situated in an EU Member State are not subject to EU limitations which means they can possibly benefit from unlimited public financing if it is in accordance with local regulations. The influence of public financing in such cases may be the subject of further research. What is more, it leads to the question, what influence (if any) would it have on the airports deprived of public financing?

This study can potentially help aviation industries look at airport ownership issues from the perspective of regional, public welfare, and local economies. This changes the motivation of airports as nodes of global commute, from a local perspective. This study is also part of the discussion about the consequences of possible privatisation in the aviation market.

References

Online Sources

'Airports' license to invest is a prerequisite for decarbonisation' (2019), <https://www.aci-europe.org/media-room/209-airports-license-to-invest-is-a-prerequisite-for-decarbonisation.html> accessed 30 Apr 2020.

Business group (2020), <https://www.polish-airports.com/en/business-group.html> accessed 11 March 2020.

Ecalle F, 'Faut-il privatiser Aéroports de Paris?' [Should Aéroports de Paris be privatized?] (2020), <https://www.fipeco.fr/fiche/Faut-il-privatiser-A%C3%A9roports-de-Paris-%3F> accessed 11 Nov 2022.

Gittens A, 'Airport infrastructure development must keep pace with air service growth' (2019), 1, <https://aci.aero/news/2019/09/10/airport-infrastructure-development-must-keep-pace-with-air-service-growth> accessed 9 May 2020.

Gittens A, 'Civil Aviation International AVSEC Standard and Recommended Practices. Conferences' (2018), 4, <https://aci.aero/news/2018/03/16/civil-aviation-international-avsec-standard-and-recommended-practices-conferences-angela-gittens-director-general-aci-world> accessed 3 May2020.

Gittens A, 'COVID-19: Economic policy responses to the global health crisis' (2020), 1, <https://blog.aci.aero/covid-19-economic-policy-responses-to-the-global-health-crisis/> accessed 27 Apr 2020.

Gittens A, 'Meeting global air service demand requires a coordinated global response', <https://aci.aero/news/2018/12/03/meeting-global-air-service-demand-requires-a-coordinated-global-response> accessed 9 May 2020.

InfoCuria Case-law. Search form, <https://curia.europa.eu/juris/recherche.jsf?language=en> accessed 2 Feb 2022.

Informacje o podmiocie i organach spółki [Information about the entity and the company's governing bodies] (2020), <https://www.airport-poznan.com.pl/pl/bip/informacje-o-podmiocie-i-organach-spolki> accessed 12 March 2020.

'Infrastructure, Taxes & Charges, Consumer Protection, Security Top Agenda at AACO' (2016), <https://www.iata.org/en/pressroom/pr/2016-11-29-01/> accessed 15 Jun 2020.

Jankovec O, 'Of Airport Privatization and Airline Fantasies' (2018) ACI World Report News and Events from the Voice of the World's Airports 18–19, <https://aci.aero/news/aci-world-report> accessed 9 May 2020.

Moje lotnisko. O firmie [About Airport. About Company] (2020), <https://www.airport.lodz.pl/pl/moje-lotnisko/o-firmie> accessed 15 March 2020.

Nadzór właścicielski [Corporate governance] (2020), <https://www.krakowairport.pl/pl/lotnisko,c94/firma,c96/o-spolce,c97/nadzor-wlascicielski,a285.html> accessed 11 March 2020.

'Number of Passengers, Worldwide 2020' (2020) Airport Traffic Report 30, <https://www.panynj.gov/content/dam/airports/statistics/statistics-general-info/annual-atr/ATR_2020.pdf> accessed 11 March 2020.

O firmie. [About Company] (2020), <https://www.gtl.com.pl/pl/ofirmie> accessed 11 March 2020.

Perret B., 'Pourquoi privatiser ADP?'[Why privatize ADP?] (2019), <https://esprit.presse.fr/tous-les-numeros/le-sens-de-l-ecole/881> accessed 11 Nov 2022.

'Policy Brief. Creating fertile grounds for private investment in airports' (2018), <https://store.aci.aero/form/policy-brief-creating-fertile-grounds-for-private-investment-in-airports> accessed 03 May 2020.

'Policy brief on airport networks. Airport networks contribute to sustainability of global communities' (2019), <https://aci.aero/news/2019/11/06/airport-networks-contribute-to-sustainability-of-global-communities> accessed 9 May 2020.

Port Lotniczy "Mazury" sp. z o.o. [Mazury Airport Ltd.] (2020), <http://www.krs-online.com.pl/msig-1627-21597.html> accessed 11 March 2020.

Port Lotniczy Bydgoszcz S.A. [Bydgoszcz Airport SA] (2020), <https://bip.plb.pl/?cid=91> accessed 15 March 2020.

Port lotniczy Szczecin-Goleniów sp. z o.o. [Szczecin-Goleniów Airport Ltd.] (2020), <http://bip.rbip.wzp.pl/artykul/port-lotniczy-szczecin-goleniow-sp-z-oo> accessed 12 March 2020.

'Privatization can provide a viable solution to global airport infrastructure gap. New ACI World policy brief provides guidance for governments and policy makers' (2018), <https://aci.aero/2018/06/19/privatization-can-provide-a-viable-solution-to-global-airport-infrastructure-gap> accessed 29 Apr 2020.

Reece D., Robinson T., 'Airport ownership and regulation' (2016) IATA Guidance Booklet Infrastructure, <https://www.iata.org/en/pressroom/pr/2016-11-29-01/> accessed 15 Jun 2020.

Struktura i własności [Structure and properties] (2020), <https://bip.rzeszowairport.pl/3/struktura-i-wlasnosci> accessed 12 March 2020.

Struktura własnościowa [Ownership structure] (2020), <https://www.modlinairport.pl/lotnisko/struktura-wlasnosciowa> accessed 11 March 2020.

'The impact of COVID-19 on the airport business: preliminary assessment' (2020), <https://aci.aero/wp-content/uploads/2020/03/200323-COVID-19-Impact-on-Airport-Business-Presentation.pdf> accessed 29 Apr 2020.

'Time for airlines to come to terms with the 'user pays' principle & end their double-speak on capacity' (2018), 1, <https://www.aci-europe.org/media-room/> accessed 2 May 2020.

'Top 30 European Airports 2019', <https://www.aci-europe.org/44-industry-data/40-airport-traffic.html> accessed 11 March 2020.

Władze spółki [Managment Board] (2020), <https://www.airport.gdansk.pl/lotnisko/wladze-spolki-p29.html> accessed 12 March 2020.
Wrocław Airport. Władze spółki [The shareholders of Wrocław Airport Co.] (2020), <http://airport.wroclaw.pl/lotnisko/spolka/> accessed 12 March 2020.
Wykaz spółek, w których udziały bądź akcje posiada województwo lubuskie [List of companies in which the Lubuskie Voivodeship holds shares] (2020) <https://bip.lubuskie.pl/system/obj/46644_wykaz_spolek_BIP_30.01-2020.pdf> accessed 15 March 2020.

List of legislative acts

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156.
Commission Decision (EU) 2004/393 of 12 Feb 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (notified in Number C (2004) 516 [2004] OJ L 137/47.
Convention on access to information, public participation in decision-making and access to justice in environmental matters – Declarations [2005] OJ L 124.
Communication from the Commission 2005/C 312/01 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports [2005] OJ C312/1.
Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 Sept 2008 on Common rules for the operation of air services in the Community [2008] OJ L 293.
Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.
Communication from the Commission 2014/C 99/03 Guidelines on State Aid to airports and airlines [2014] OJ UE C 99/03.
Commission Decision C (2014) 6849 final of 1 Oct 2014 concerning measures, concerning measures SA. 14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair C (2014) 6849 final, <https://ec.europa.eu/competition/state_aid/cases/132112/132112_1834484_1762_2.pdf> accessed 8 Marz 2021.
Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic [2020] OJ L 165/1.
Commission delegated regulation (EU) 2020/2114 of 16 Dec 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to selection of ground handling service provider [2020] OJ L 426/1.
Commission delegated regulation (EU) 2020/2115 of 16 Dec 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences [2020] OJ L 426/4.

List of judgements, judicial decisions and opinions

Judgement of CJEU T-128/98 EU:T:2000:290.
Judgement of CJEU in joined cases C-128/09 to C-131/09, C-134/09 and C-135/09 EU:C:2011:319.
Judgement of CJEU C-275/09 EU:C:2011:154.
Judgement of CJEU C-182/10 EU:C:2012:82.
Opinion of Advocate General Mengozzi on 27 June 2013, C-284/12 EU:C:2013:442.
Judgement of CJEU T-818/14 EU:T:2018:33.
Judgement of CJEU T-165/15 EU:T:2018:953.
Judgement of CJEU T-165/16 EU:T:2018:952.
Judgement of CJEU T-894/16 EU:T:2019:508.
Judgement of CJEU T-607/17 EU:*T*:2020:180.
Judgement of CJEU T-716/17 EU:T:2020:181.
Judgement of CJEU T-8/18 EU:T:2020:182.

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Contemporary Central & East European Law

Green marks and local economic development

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Abstract
Both municipalities and local entrepreneurs can take advantage of 'green marks' (or 'environmental' marks). European citizens are increasingly interested in purchasing environmentally friendly goods or services. Protection of the environment is also of crucial importance for cities and local entrepreneurs. Both municipalities and local entrepreneurs should consciously take advantage of various types of 'green' guarantee signs or 'quality' signs. Firstly, signs supervised by the European Union – like the 'ecolabel', EU organic production logo or EMAS – should be distinguished. 'Green' marks could be also created and registered as guarantee (certification) marks by municipalities or entrepreneurs themselves. The aim of the article is to present a way to protect 'green marks'. It was necessary to ask certain questions: Is the protection of individual trade marks dedicated to designations of quality? What kind of signs are protected as a common mark or certification mark? What is the role of green guarantee marks? The basic research method for this article was analysis of EU law and practice in the protection of green marks.

Keywords
green marks, local economic development, guarantee marks, certification marks

1. Introduction

Protection of the wellbeing of natural environment is one of the objectives of EU policy[1] as well as a crucial factor in urban planning or economic development in various areas, including cities. This is important in the context of compliance with the obligations incumbent on EU Member States and their local government units. This being said, labelling could politicise products[2] and services.

1 J Belson, *Certification and Collective Marks: Law and Practice* (Edward Elgar Publishing 2017).
2 M Micheletti, *Political Virtue and Shopping: Individuals, Consumerism and Collective Action* (Palgrave Macmillan 2003) 89–99.

The quality or composition of the products or the way in which a particular service is rendered is becoming more and more important for European citizens. 'Surrounded by organic, non-GMO, fair trade, low carbon footprint, dolphin-friendly, energy-efficient product messages, our purchasing choices have become morally and ethically complex'[3]. For example, European citizens themselves are increasingly interested in purchasing environmentally friendly goods or services. This can be an incentive for tourists, urging them to use a locally offered service or to purchase a product bearing a location-specific quality mark.

Urban and urban/rural communes are also involved in developing solutions to implement the principle of sustainable development, and they may be beneficiaries of various competitions or rankings to promote environmental protection[4]. This kind of competition could also serve as marketing for cities and for local entrepreneurs. It might be also a possibility to create a kind of 'green mark' that helps to identify a territory with specific characteristics.

Therefore, both municipalities and local entrepreneurs should consciously take advantage of various types of 'green guarantee signs', the use of which is supervised by the European Union; they should also create their own marks, which can be protected as guarantee (certification) marks.

2. How to develop local economies with intellectual property rights (for example, 'green' trade marks)?

There are some tools to develop local economies, including effective intellectual property. Intellectual property can strengthen competitiveness. Local economic development can be optimised by intellectual property as well. Good management of IP could be a part of economic assets which are also important in local development. Local trade marks (or other local brands) could be effectively used by local government units. Local marks (especially some 'quality' trade marks like 'green' trade marks) are a kind of tool to stimulate demand. Such signs could create positive images and communicate certain product attributes. Thanks to these signs, potential buyers can learn more about the branded good or service.

Concerning the role of intellectual property for local economic development, local government could stimulate the development of intellectual property assets. This applies to local entrepreneurs as well. This kind of asset has tremendous economic value. For example, trade marks could be licensed. Urban and urban/rural communities, and some local entrepreneurs, can receive additional revenue from licensing their trade mark.

To create different 'green' local marks it is important to focus on the potential of the locality. This could be a local food or local tourism. Consumers are looking for added value and some differentiation in the tourism market. This is one of the factors behind the birth of ecological tourism that has been observed over the last decade. Ecotourism, agrotourism or therapeutic tourism have caused the need to create some labels. For local communities, it is also a way to differentiate themselves from other cities, countries and regions. There are examples of regions or towns that use signs (registered as trade marks) to differentiate themselves from other regions or towns, such as the New York City logo. Nevertheless, it is not a 'green' trade mark. Perhaps in the near future this kind of sign will be more popular.

3 L Miller, 'Ethical Consumption and the Internal Market' in D Leczykiewicz, S Weatherill (ed), *The Images of the Consumer in EU Law Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 279–304.

4 See e.g. the 'Eco Miasto' competition that has been held each year for 7 years by the French Embassy in Poland, among others. More information was available at 'O projekcie' [About project], <http://www.eco-miasto.pl/o-projekcie/> accessed 12 Feb 2023, though the website is no longer available.

Large and small localities should act to implement sustainable development principles. From time to time, they do so in cooperation with local businesses. This stimulates local economic development. The actual system of protection of different trade marks could be very helpful in creating an interesting form of cooperation between the local government and local business.

Even if local governments and/or local entrepreneurs have not yet created their own 'green' marks, they could use some 'quality' marks that have been created by the European Union (such as the EU organic logo or ECOLABEL). If they create their own 'green' marks these could be registered as certification marks or guarantee marks. This paper does not characterise geographical indications protected by the European Union legal regime, such as protected geographical indication, protected designation of origin or traditional speciality guaranteed. However, they could also be quite useful in supporting marketing strategies of municipalities and local entrepreneurs. In some regions (like in the region of Bordeaux) it is a key tool in marketing.

3. EU 'GREEN' MARKS

The history of labelling is long. It is very important in the consumer protection discourse of the EU[5]. The system of labelling covered by European Union law creates a kind of 'mechanism for the protection of consumer's ethical interests'[6] and economic interests as well. It was very important also for internal market policy. That is why some European Union marks were created a long time ago. Among the marks established by the EU to indicate certain characteristics of products or services related to its environmental protection policy, the following should be distinguished: the EU organic production logo, the 'ecolabel' and EMAS.

a) EU organic production logo

The EU organic production logo was established in 1991 by Council Regulation (EEC) No. 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs. This logo was created because of the rising demand on the market for organically produced agricultural products and foodstuffs. This sign signals to purchasers that the products have been produced organically.

The new symbol of the EU organic production logo was introduced by Commission Regulation (EU) No. 271/2010 of 24 March 2010 amending Regulation (EC) No. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007, as regards the organic production logo of the European Union[7]. The symbol currently in force was selected as part of a competition organised by the European Commission (Recital 5 Regulation 271/2010). Thus, the EU organic production logo was changed. Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No. 834/2007[8] provides rules for using the organic production logo of the European Union on the territory of European Union Member States.

5 L Miller 294.

6 Ibid. 298.

7 Commission Regulation 271/2010 of 24 March 2010 Regulation 2010/271 – Amendment of Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards the organic production logo of the EU [2010] OJ L 84/19.

8 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L 150/1.

The manner of using the EU organic logo is described in Annex V to Regulation 2018/848. The symbol that can be used to distinguish some ecological products is also shown in Annex V. Designers creating an industrial model of packaging must not interfere with the appearance of the EU labelling of an organic product. The European Union legislature allows the use of this symbol in black and white, but only where the use of the colour version is impossible. When designing an industrial design for food product packaging that contains the organic production logo, the logo being placed should have certain dimensions imposed by the European Union legislature.

b) ECOLABEL

Another 'green mark' is the EU Ecolabel. 'Ecolabels ... are generally part of retailers' supply chain management and corporate social responsibility schemes'[9]. The EU Ecolabel is a mark given to products that meet higher environmental standards. It is broadly known as the 'European flower'. This mark was established in 1992[10]. Currently, the legal basis for awarding the label is Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel[11]. The EU Ecolabel criteria are based on the eco-efficiency of the products to be marked and take into account the latest EU strategic goals for the environment. They define the environmental requirements to be met by a product in order to bear this marking (Article 6 (2) Regulation 66/2010). The form of the EU Ecolabel is presented in Annex II to Regulation 66/2010 and must not be changed. This label can be applied not only to food products, but also in the tourism sector[12]. This option is currently used by many European hotel service providers[13].

In recent years the European Union 'has focused on environmental labelling, however, because of the spectacular development of ecolabels'[14]. The success of this 'green mark' is very visible. The number of licences issued has gradually increased since 1992, thanks to the fact that the majority of EU citizens 'are willing to pay more for products if they were produced under certain social and environmental standards'[15].

c) EMAS

The Eco-Management and Audit Scheme (EMAS) is an example of an 'environmental' mark that is directly related to the very activities of various organisations (of both economic operators and non-profit institutions). This mark confirms that the organisation concerned has met the most

9 O De Schutter (ed), *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Bloomsbury Publishing 2015) 127.

10 The Ecolabel as an ecological mark was introduced by Council Regulation (EC) 880/92 of 23 March 1992 on a Community eco-label award scheme on a Community [1992] OJ L 99/1. Later on, this regulation was replaced by Regulation (EC) 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L 237/1. For more on the historical aspects of the functioning of the ecological label, see N Valderyron, 'Sécurité alimentaire' in C Bluman (ed), *Politique Agricole commune et politique commune de la pêche* (Éditions de l'Université de Bruxelles 2011) 356.

11 Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (Text with EEA relevance) [2010] OJ L 27/1.

12 'Ecolabel for ecofriendly tourist accommodation', available at <http://ec.europa.eu/ecat/hotels-campsites/en> accessed 8 Feb 2023.

13 For a list of hotels that use the mark of 'ecolabel', see <http://ec.europa.eu/ecat/hotels/en/lista> accessed 8 Feb 2023.

14 O De Schutter (ed) 124.

15 Ibid. 151.

stringent environmental requirements[16]. The EMAS is also an environmental management system and an audit programme for various types of organisations[17]. It is governed by Regulation (EC) No. 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No. 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC[18].

During the years-long operation of the EMAS system, its positive aspects have been identified[19]. It has been noted that this instrument can increase the efficiency of the use of resources, which has a significant impact on the environment[20]. It is also a tool which can be used to improve the effects of environmental activities (Recital 8 Regulation 1221/2009). This logo can be 'an appealing communication and marketing tool' (Recital 15 Regulation 1221/2009). It is an instrument for nurturing a culture of sustainable development and efficient management of available resources and energy in organisations, whilst offering the prestige of being a company that operates in accordance with the idea of sustainable development[21].

The EMAS logo is defined in Annex V to Regulation 1221/2009. Apart from the graphic mark, a verbal mark should be used: 'EMAS Verified environmental management'. According to Annex V Paragraph 2 Regulation 1221/2009, the logo may be used either in three colours, in black, in white, or in greyscale.

The logo may not be used on the very products or their packaging, nor is it permissible to use it in a way that may create confusion with environmental product labels (Article 10(4)(b) Regulation 1221/2009)22. To be able to use the EMAS logo, the organisation in question must undergo the registration process. When placing the mark, for example on products or company materials, the logo must be accompanied by the organisation's registration number (Article 10 Regulation 1221/2009). The application of the EMAS label is governed by Annex V Regulation 1221/2009.

4. Certification (guarantee) marks in European Union law

As a result of the European Commission's evaluation of the functioning of the trade mark protection system in the Member States of the European Union, the European Union legislature

16 For more information in Polish, see 'Co to jest EMAS'[What is EMAS?], <https://emas.gdos.gov.pl/co-to-jest-emas> accessed 8 Feb 2023.

17 T Bojar-Fijałkowski, 'Odpowiedzialność prawna organizacji z certyfikowanym systemem EMAS' [Legal Liability of an Organization with a Certified EMAS system] in E Zębek, M Hejbudzki (ed), *Odpowiedzialność za środowisko w ujęciu normatywnym* [The Enivronmental Responsibility in Normative Terms] (Katedra Prawa Międzynarodowego Publicznego WPiA UWM 2017) 235–250.

18 Regulation (EC) 1221/2009 of the European Parliament and the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No. 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L 342, 1–45; hereinafter referred to as Regulation 1221/2009.

19 See Ibid. Paragraph 4 of Regulation 1221/2009.

20 See Communication from the Commission of 16 July 2008 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan COM/2008/0397 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0397> accessed 15 Dec 2023.

21 The above-mentioned argumentation is available at <https://emas.gdos.gov.pl/co-to-jest-emas> accessed 8 Feb 2023.

22 It constituted a problem under the previously applicable rules governing the use of the logo in question. See paragraph 15 of Regulation 1221/2009.

has recently issued another (third) directive to approximate the Member States' laws on the legal protection of trade marks[23]. Additionally, the EU legislature has issued a new regulation governing the protection of trade marks registered with an EU agency: the European Union Intellectual Property Office in Alicante (Spain)[24]. Both legal acts introduced the possibility to protect certification (guarantee) trade marks. In a report presented in 2011 by the Max Planck Institute for Intellectual Property and Competition Law, it was noted that certification or guarantee marks were protected in many European Union Member States and that the lack of uniform legal regulation concerning this normative category of trade marks made it difficult to use them within the EEA.

As claimed by the European Union legislature, the introduction of a new category of trade marks was supposed to enable certification institutions or organisations to use the mark as a sign for goods and services that meet the requirements for certification[25]. Certification marks are defined as signs 'principally indicia of conformity of goods or services to particular standards, stipulated by the proprietor of the mark'[26]. In general, these characteristics are so-called 'quality characteristics'[27]. This article does not outline the problem of using trade marks 'which may be construed as a nutrition or health claim' (Art. 1(3) Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods), which is broadly discussed in the literature[28].

a) EU certification marks

Apart from the above-mentioned guarantee marks (such as the EU organic production logo) administered by the European Union, since 1 October 2017, it is also possible to register certification marks with the EUIPO. Protection is granted to a sign as an EU certification mark when it is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services (Article 83(1) Regulation 2017/1001). Geographical origin cannot be subject to certification (Article 83(1) Regulation 2017/1001). Therefore, it is not possible to effectively register as an EU certification mark a sign which indicates the geographical origin of the goods or services rendered[29]. However, it is possible to create a mark which will indicate other features or attributes of the goods or services.

23 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336, 1–26 (hereinafter referred to as Directive 2015/2436). For more on the first step of the harmonisation, see C Gielen, 'Harmonisation of trade mark law in Europe: The first trade mark harmonisation. Directive of the European Council' (1992) European Intellectual Property Review 14(8), 262–269.

24 J Belson 32–33.

25 See Recital 27 of Regulation (EU) 2015/2424 of the European Parliament and the Council of 16 December 2015 amending Council Regulation (EC) No. 40/94 on the Community trade mark, and repeating Commission Regulation (EC) No. 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade marks and Designs) (Text with EEA relevance) [2015] OJ L 341, 21–94.

26 J Belson 30.

27 N Pacaud, B Fontaine, 'Rencontre du troisième type: la marque de certification de l'Union européennee' (2017) Propr Ind Propriété industrielle 11(28).

28 N Courtelis, PY Corre, 'The Legal Regime of Community Trademark 'construed as a Nutritious or Health Claim' (2008) European Food and Feed Law Review 3(1), 33; E Skrzydło-Tefelska, 'Oświadczenia żywieniowe i zdrowotne w prawie Unii Europejskiej a znaki towarowe' [Nutrition and Health Claims in European Union Law and Trademarks] (2019) Europejski Przegląd Sądowy [The European Judical Review] 2(125), 8.

29 G Tritton, *Tritton on Intellectual Property in Europe* (Sweet & Maxwell 2020) 512.

Such a mark may be specific to a particular place (whether be it a city or a local business). This may have a particular impact on the image of the area, as well as on economic operators active in the area.

One example of a mark which can be registered as an EU certification mark is a sign which makes it possible to identify this category of trade mark. 'An EU certification mark shall be an EU trade mark... if it is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not so certified' (Art. 83(1) Regulation 2017/1001).

Both natural and legal persons are entitled to apply for EU certification marks (Article 83(2) Regulation 2017/1001). The term *legal person* covers also any institution, body or entity of public law. Therefore, the EU certification mark may even be registered by an international organisation. For example, the EU organic logo was registered to the European Union as an EU certification mark. The greyscale logo has been just registered as number 0179961474, while the colour logo was declared for protection as an EU certification mark (application no. 01805852). The EU certification marks[30]. registered so far include many marks also registered to various non-profit organisations. Also, nothing prevents a city submitting an application to register a mark.

The exclusive right granted to EU certification marks applies to the whole area of the European Union. In many situations, the registration rightsholder within a specific category of trade mark does not need such broad protection. Then an interesting alternative is to register a guarantee mark only in the territory of the Republic of Poland (or in another country that could be interested for a rightsholder).

Since 1 October, 2017 about 396 signs have been filed with the EUIPO as EU certification marks. 74 signs were registered as EU certification trade marks (from 1 October 2017 to 10 April 2020). Different signs have been registered by the EUIPO, some of which distinguish goods or services certified by the proprietor of the mark in respect of protecting the environment[31].

b) Guarantee marks

Directive 2015/2436 introduced uniform protection of guarantee marks within the EEA (Article 28(1) Directive 2015/2436). The Polish legislature, by the Act of 20 February 2019 amending the Law on Industrial Property (LIP)[32], introduced the possibility of protecting guarantee marks in the meaning of Directive 2015/2436. Before the introduction of this act, the protection of common guarantee trade marks existed. As noted in a report presented in 2011 by the Max Planck Institute for Intellectual Property and Competition Law, protection for certification marks (so-called guarantee marks) functioned in many European Union Member States (not only in Poland). However, the lack of uniform legal regulations concerning this normative category of trade marks made it difficult to protect them within the EEA. That is why the European Union legislature issued a new directive to approximate the Member States' laws on certification (guarantee) trade marks.

30 As of 26 March 2020 the EUIPO has issued decisions on registering 74 signs as EU certification marks and between 1 October 2017 and 26 March 2020 a total of 247 signs were filed with the EUIPO for registration as certification marks.

31 See EU certification mark No. 017996233 (rightsholder: Green Brands Organisation GmbH), <https://euipo.europa.eu/eSearch/#details/trademarks/017996233> accessed 15 Dec 2023 or EU certification trade mark No. 017961474 (rightsholder: the European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/017961474> accessed 15 Dec 2023.

32 Act of 20 February 2019 on Amendments to the Act on Industrial Property, WIPO Lex PL105.

A very important rule is that if the protection of the guarantee (certification) mark (in accordance with Directive 2015/2436) is not introduced, this prevents the conversion of an EU certification mark application, or an EU certification mark already registered, into a national guarantee mark application or a national exclusive right to a guarantee mark (Article 93 Regulation 2017/1001). Concerning the protection of guarantee (certification) marks, the European Union legislature has given some freedom to the Member States to establish more specific rules. For example, the protection of trade marks that designate the geographical origin of the good or service is left up to each EU Member State (Art. 28(4) Directive 2015/2436). In Poland, unlike an EU certification mark, a guarantee mark registered by the Patent Office of the Republic of Poland may also indicate the geographical origin of the good or service (Article 136 LIP). This makes it possible to protect those designations which directly indicate the origin of a product or service from a given locality or region. Such designations may therefore be used by cities or regions to promote products manufactured in a given location, showing or perhaps having other features or properties related to sustainable development. This may also provide an incentive for local businesses to manufacture their goods in compliance with certain environmental standards (more than usual).

5. Other EU designations of 'green marks'

Before the last amendment of the EU trade mark law, the so-called 'marks of quality' (including 'green marks' or 'environmental' marks) were registered as individual trade marks or collective trade marks in the Office of the Harmonisation of the Internal Market (OHIM; currently it is the European Union Intellectual Property Office [EUIPO]). EU certification marks can be registered in the EUIPO as of 1 November 2017.

The EU collective trade mark is another kind of trade mark available for protection in the EUIPO (OHIM) before Regulation 2017/1001 entered into force. Any mark to be registered as an EU collective mark must distinguish the goods and/or services of the members of association which is the proprietor of the mark from those of other undertakings (Art. 74(1) Regulation 2017/1001). One of the differences between the EU collective mark and the EU certification mark concerns the possibility of registering marks that 'designate the geographical origin of the goods or services' (Art. 74(2) Regulation 2017/1001; in accordance with Art. 28(4) Directive 2015/2436, certification [guarantee] trade marks registered in some European Union Member States can also designate the geographical origin of the goods or services).

Some famous signs protected by special EU regime – geographical indications registered by the European Commission – are also registered as collective marks registered by the EUIPO, for example, protected geographical indication (PGI) protected under the trade mark no. 1269024[33], protected designation of origin (PDO) registered under the trade mark no. 1269025[34] and Traditional Specialities Guaranteed (TSG) protected under trade mark no. 1268381[35]. These signs are protected as EU collective marks. The proprietor of each one is the European Union, represented by the European Commission.

33 EU certification mark No. 1269024 (rightsholder: Shenzhen Bolinhuayu Technology Co., Ltd), <https://euipo.europa.eu/eSearch/#details/trademarks/W01269024> accessed 15 Dec 2023.

34 EU certification mark No. 1269025 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/W01269025> accessed 15 Dec 2023.

35 EU certification mark No. 1268381 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/W01268381> accessed 15 Dec 2023.

Another EU collective mark that had been registered by the European Union was a logo dedicated for EU organic production. It was filed with the Office of the Harmonization of the Internal Market (currently the EUIPO) on 27 May 2010 and registered on 7 September 2012 (trade mark no. 009136714[36]). The registration of the above mentioned trade mark was, invalidated. The sign is now protected as an EU certification mark (trade mark no. 017961474[37]).

Collective marks were protected at the national level before the last harmonisation of trade mark laws. However, in Directive 2015/2436 (Recital 35 Directive 2015/2436) it was remarked that collective trade marks are a useful instrument for promoting goods or services with certain characteristics. In accordance with Art. 29(1) Directive 2015/2436, each European Union Member State must provide the protection of collective marks. Thanks to Directive 2015/2436, the actual protection of collective marks is similar in each Member State. The protection of such marks should be approximated to EU collective trade marks registered by the EUIPO in Alicante (Recital 35 Directive 2015/2436).

Before Regulation 2017/1001 entered into force, some quality marks were also registered as community trade marks (so-called 'individual' or 'ordinary' trade marks). According to a judgement of the Court of 8 June 2017[38], individual trade marks (registered nationally or in the European Union) cannot be protected only as a 'label of quality.' This usage is not a genuine use of individual trade marks. That is why pure 'green marks' cannot be registered as individual trade marks and should instead be protected as certification (guarantee) trade marks at the local, regional (European) or international level[39]. EU certification marks create a new possibility for protection that cannot be replaced by other existing kinds of trade marks registered in Alicante.

6. Final remarks

Cities and rural areas are acting with more and more awareness to implement sustainable development principles. They often do so in cooperation with local businesses, which stimulates local economic growth. The recent changes in the field of trade mark protection in the European Union and the introduction of uniform protection of certification (guarantee) marks may also be helpful in this respect. This type of trade marks, apart from the 'green' trade marks administered by the European Union for several years (in particular Ecolabel, the EU organic logo or EMAS) may be an interesting form of cooperation between the local government and local businesses, and may thus contribute to local economic growth. It could help to create an interesting local economic asset of local 'green' trade marks. Municipalities and local entrepreneurs could consciously use different types of 'green' signs created by them or supervised by the European Union.

By creating 'green' trade marks, municipalities and local entrepreneurs could build a kind of economic asset with a huge economic value. It is very important for municipalities and local entre-

36 EU certification mark No. 1269024 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/009136714> accessed 15 Dec 2023.

37 EU certification mark No. 017961474 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/017961474> accessed 15 Dec 2023.

38 See Judgment of the CJEU C-689/15 EU:C:2017:434.

39 K Wernicka, 'Indywidualny znak towarowy znakiem certyfikującym – glosa do wyroku Trybunału Sprawiedliwości z 8.06.2017 r., C-689/15, W.F. Gözze Frotterweberei GmbH i Wolfgang Gözze przeciwko Verein Bremer Baumwollbörse' [An Individual Trademark as a Certification Mark. Commentary on Court of Justice Judgment of 8 June 2017, C-689/15, W.F. Gözze Frottierweberei GmbH and Wolfgang Gözze v. Verein Bremer Baumwollbörse], (2019) Glosa – Prawo Gospodarcze w orzeczeniach i komentarzach [The Commentary – Economic Law in Judgments and Comments] 1(1), 79–85.

preneurs to exploit the full potential of local IP, especially of 'green' trade marks. It could lead to local economic development. Any 'green' trade mark created by local government or local business should be protected as a certification (guarantee) trade mark. According to European Union law, each certification (guarantee) trade mark can be protected, generally, through a national body (e.g. the Polish Patent Office) or a regional one (e.g. the EUIPO). Registered certification (guarantee) trade marks could be licensed, providing added value for municipalities and entrepreneurs. The creation of new 'green' trade marks could be a tool to improve local economic development.

Such 'green' trade marks of local government and local business could be also useful for European Union citizens in their everyday shopping. Purchasing decisions are very often based on different factors, for example, environmental and social influences. In the decision 'to buy or not to buy', the role of labelling could be also quite important: our consumption choices could have some negative consequences for us, for our families or for the environment. Well designed 'green' signs could communicate to potential buyers positive information about environmentally friendly characteristics of a good or service. This 'green' trade mark could project a positive image of a product, or of a locality. It should also be a factor in local economic development.

References

Literature

Belson J, *Certification and Collective Marks: Law and Practice* (Edward Elgar Publishing Limited 2017).

Bojar-Fijałkowski T, 'Odpowiedzialność prawna organizacji z certyfikowanym systemem EMAS' [Legal Liability of an Organization with a Certified EMAS system] in E Zębek, M Hejbudzki (eds), *Odpowiedzialność za środowisko w ujęciu normatywnym* [The Enivronmental Responsibility in Normative Terms] (Katedra Prawa Międzynarodowego Publicznego WPiA UWM 2017) 235–250.

Courtelis N, Corre PY, 'The Legal Regime of Community Trademark 'construed as a Nutritious or Health Claim (2008) European Food and Feed Law Review 3(1), 30–34.

Gielen C, 'Harmonisation of trade mark law in Europe: The first trade mark harmonisation. Directive of the European Council' (1992) European Intellectual Property Review 14(8), 262–269.

Micheletti M, *Political Virtue and Shopping: Individuals, Consumerism and Collective Action* (Palgrave Macmillan 2003).

Miller L, 'Ethical Consumption and the Internal Market' in D Leczykiewicz, S Weatherill, *The Images of the Consumer in EU Law Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 279–303.

Pacaud N, Fontaine B., 'Rencontre du troisième type: la marque de certification de l'Union européennee' (2017) Propr Ind Propriété industrielle 11(28).

Schutter O De (ed), *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Bloomsbury Publishing 2015).

Skrzydło-Tefelska E, 'Oświadczenia żywieniowe i zdrowotne w prawie Unii Europejskiej a znaki towarowe' [Nutrition and Health Claims in European Union Law and Trademarks] (2016) Europejski Przegląd Sądowy [European Judiciary Review] 2(125), 4–9.

Tritton G, *Tritton on Intellectual Property in Europe* (Sweet & Maxwell 2020).

Valderyron N, 'Sécurité alimentaire' in C Bluman (ed), *Politique Agricole commune et politique commune de la pêche* (Éditions de l'Université de Bruxelles 2011).

Wernicka K, 'Indywidualny znak towarowy znakiem certyfikującym – glosa do wyroku trybunału sprawiedliwości z 8.06.2017 r., C-689/15, W.F. Gözze Frotterweberei GmbH i Wolfgang Gözze p. Verein Bremer Baumwollbörse' [An Individual Trademark as a Certification Mark. Commentary on Court of Justice Judgment of 8 June 2017, C-689/15, W.F. Gözze Frottierweberei GmbH and Wolfgang Gözze v. Verein Bremer Baumwollbörse] (2019) Glosa – Prawo Gospodarcze w Orzeczeniach i Komentarzach [The Commentary – Economic Law in Judgments and Comments] 1(1), 79–85.

Online sources

'Co to jest EMAS' [What is EMAS?], <https://emas.gdos.gov.pl/co-to-jest-emas> accessed 8 Feb 2023.

'Ecolabel', <http://ec.europa.eu/ecat/hotels/en/lista> accessed 8 Feb 2023.

'Ecolabel for ecofriendly tourist accommodation', <http://ec.europa.eu/ecat/hotels-campsites/en> accessed 8 Feb 2023.

'O projekcie' [About project], <http://www.eco-miasto.pl/o-projekcie/> accessed 12 Feb 2023.

List of legislative acts

Council Regulation (EEC) 880/92 of 23 March 1992 on a Community eco-label award scheme on a Community [1992] OJ L 99/1.

Regulation (EC) 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L 237/1.

Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (Text with EEA relevance) [2010] OJ L 27/1.

Regulation (EC) 1221/2009 of the European Parliament and the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No. 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L 342/1.

Commission Regulation 271/2010 of 24 March 2010 Regulation 2010/271 – Amendment of Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007, as regards the organic production logo of the EU [2010] OJ L 84/19.

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1.

Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L 150/1.

Act of 20 February 2019 on Amendments to the Act on Industrial Property, WIPO Lex PL105.

List of Judgment

Judgment of the CJEU C-689/15 EU:C:2017:434.

Other documents

Communication from the Commission of 16 July 2008 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan COM/2008/0397 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0397> accessed 15 Dec 2023.

EU certification mark No. 017961474 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/017961474> accessed 15 Dec 2023.

EU certification mark No. 017996233 (rightsholder: Green Brands Organisation GmbH), <https://euipo.europa.eu/eSearch/#details/trademarks/017996233> accessed 15 Dec 2023.

EU certification mark No. 1268381 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/W01268381> accessed 15 Dec 2023.

EU certification mark No. 1269025 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/W01269025> accessed 15 Dec 2023.

EU certification mark No. 1269024 (rightsholder: The European Union), <https://euipo.europa.eu/eSearch/#details/trademarks/W01269024> accessed 15 Dec 2023.

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Contemporary Central & East European Law

The role of court guardians in proceedings under the 1980 Hague convention on the civil aspects of international child abduction. Issues selected in the light of a case files' research*

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Abstract
The 1980 Hague Convention on the Civil Aspects of International Child Abduction[1] only regulates in a very general way certain elements of the proceedings pending under this treaty. Each state-party regulates procedural details in this respect mainly in accordance with their own domestic law. The article furnishes facts and data about results of the state of the application of the Convention in Poland and tasks carried out by a court guardian and a state official.

Cross-border Hague proceedings are not a classic guardianship process. However, an appointed court guardian applies steps similar in nature to those derived from typical domestic guardianship and family cases. The office acts as an information source, it supervises the course of contacts and, if necessary, it is responsible for the compulsory collection of a child. Those tasks are not strictly regulated in the Convention. This article aims to show the actual level of participation of court guardians in Hague proceedings in Poland, and to examine to what extent the best interests of children might be affected by the actions of court guardians.

Keywords
court guardian, 1980 Hague Convention, guardianship courts, child

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1 The 1980 Hague Convention on the Civil Aspects of International Child Abduction [1995] JoL 528, correction of the translation – [1999] JoL 1085.

1. Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction regulates a number of issues related to ensuring that a minor returns to the state of his or her habitual residence as soon as possible following unlawful detention or removal. Its basic aim is to protect the child, as well as the right to custody and the right to maintain contact with the child. The basic assumption of the Convention is the paramount importance of the child's best interests in proceedings relating to his or her care and protection.[2]

Accordingly, the treaty generally outlines such issues as the conditions for the proceedings pending in the requested countries or the tasks of the authorities examining the applications (depending on the domestic law of each country – either judicial or administrative authorities)[3] as well as central institutions which, *inter alia*, coordinate the cross-border flow of information and documentation related to these types of matters,[4] circumstances that give rise to an obligation to order the return of a child[5] and those that relieve that obligation.[6]

Outside of the scope of the Convention are, for example, issues such as the method of collecting information on the child's situation or the methods of obtaining the child's opinion. Both the Convention and the EU law[7] modifying the treaty for the majority of the EU Member States leave the state-parties a degree of freedom on how to shape many procedural details under the applicable domestic law.

In Poland, many of the auxiliary activities undertaken in the course the proceedings based on the Convention are entrusted to court guardians. What is the level of their participation in Hague proceedings, and to what extent do the best interests of the children concerned depend on tasks which are not regulated in the Convention?

In order to answer the questions posed, this article examines some of the tasks entrusted to family court guardians in connection with the application of the Hague Convention in Poland using partial results of file research carried out by the author.[8]

2 Preamble of the Convention, sentence 1.

3 E.g. Art. 11, 14–15 of the Convention.

4 E.g. Art. 6–7, 9–10 of the Convention.

5 Art. 3–4, 12, sentence 1 of the Convention.

6 Art. 12, sentence 2, Art. 13 of the Convention.

7 Mainly the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2009] OJ UE L 70/19 and the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ UE L 178/1.

8 The files' research on Hague cases in Poland was carried out under the grant National Science Centre no UMO-2014/15/B/HS5/03305. These cases mainly covered instances examined before 2014, that is before the reform of the procedure for considering the Hague Convention in Poland introduced by the Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements. The query covered selected district court cases and included a total of 176 Hague proceedings. Most of the files were from the years of 2008-2013. Of the available cases, 36 were from before 2008. Due to the outbreak of the pandemic, work on cases dealt with under the amended procedure was limited to the Regional Court in Poznan. A detailed discussion of the research and its results can be found in a book publication being prepared for printing, which is to be published by the Publishing House ILS PAS at the end of 2021.

2. A COURT GUARDIAN

A family court guardian in Poland is a state official[9] who supports the work of a judge deciding on family, guardianship and juvenile matters. Though this institution has evolved, from its very beginning its nature has been characterized by a functional connection with courts as well as the wide range of tasks that it is bound to perform.[10]

Since 2001, the system of family guardianship in Poland has been regulated by the Act of 27 July 2001 on court guardians (hereinafter: 2001 Act).[11] It specifies, among other things, the requirements for candidates wishing to become court guardians (Art. 5 and 84), the rules based on which they may perform their tasks[12] as well as the issues related to the organization of the wider court guardian service, including its self-government, court guardian centres, issues of professional responsibility and remuneration of court guardians.[13] Until 2001, a number of issues related to the organization and performance of such curatorial tasks had been regulated, *inter alia*, by the Ordinance of 1986.[14]

The structure of the profession of court guardians in Poland is dualistic in nature and covers the work of both vocational as well as social court guardians (Art. 2(1) of the 2001 Act). Moreover, this division is compounded by specialization into family court guardians and adult probation officers (Art. 2(2)), however only the first group is engaged in Hague Convention cases.

Every candidate for such position is required to complete university or postgraduate studies, with only sociological, pedagogical, psychological and legal faculties being taken into account (Art. 5(4) and 5(6) of the 2001 Act). It is also necessary to undertake a curatorial apprenticeship and pass the final exam (Art. 76–83). By the definition, therefore, court guardians are vocationally prepared to fulfil their mission and their occupation is a profession of public trust.[15]

The admission to service and the referral to a specific court as well as to a specific team of court guardians takes place through a separate appointment by the President of the District Court in question (Art. 4 of the 2001 Act). According to the Art. 147 §2 of Act on the System of Common Courts, court guardians work in courts.[16]

The vocational court guardians, apart from other duties, supervise the work of assisting social court guardians, who in turn perform their functions honourably and are not employees of the courts.[17] Social court guardians are also not subject to the same professional requirements

9 K Stasiak, 'Wprowadzenie' [Introduction] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 25.

10 K Jadach, *Praca kuratora w sprawach rodzinnych, nieletnich i karnych* [Work of court guardian in family, juvenile justice and criminal matters] (WN UAM 2011) 24–31. The institution of a court guardian representing a child in a civil trial, pursuant to Art. 99(1) of the Family and Guardianship Code, is beyond the scope of this work.

11 Ustawa z dnia 27 lipca 2001 r. o kuratorach sądowych [Act of 27 July 2001 on court guardians and probation officers] [2021] JoL 1071; uniform text – [202] JoL 167.

12 Art. 6, 9-11, 13, 85–90 of the Act of 27 July 2001 on court guardians.

13 Chapters from II to V of the Act of 27 July 2001 on courts guardians.

14 Rozporządzenie Ministra Sprawiedliwości z 24 listopada 1986 r. w sprawie kuratorów sądowych [Ordinance of the Minister of Justice of 24 November 1986 on court guardians] [1986] JoL 212.

15 A Prusinowska-Marek, 'Kuratela rodzinna – proces profesjonalizacji, współczesne wyzwania i potrzeby' [Family guardianship – the process of professionalization, contemporary challenges and needs] (2020) Dziecko Krzywdzone. Teoria, badania, praktyka 19(3), 108 and subsequent, <https://dzieckokrzywdzone.fdds.pl/index.php/DK/article/download/778/629> accessed 19 Dec 2021.

16 Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych [The Act on the System of Common Courts] uniform text [2020] JoL 2072; K Gromek, *Ustawa o kuratorach sądowych. Komentarz* [Act on court guardians. Commentary] (Lexis Nexis 2005), LEX – commentary on Art. 1 and 11.

17 A Prusinowska-Marek (2020) 113.

as vocational court guardians, and they can actually represent various professions. In light of the research, the tasks related to Hague proceedings are usually entrusted to vocational court guardians.

All court guardians work primarily at the place of residence of those people on behalf of whom they fulfil their tasks (Art. 3(1) of the 2001 Act). Their working time is determined by the type and number of duties (Art. 13(1)). The scope of activities of family court guardians is regulated in more detail by the Ordinances of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians[18] and of 9 June 2003 on the workload standards of vocational court guardians.[19]

3. Hague proceedings in Poland

The Hague Convention has been in force in Poland for nearly 30 years.[20] Its application (including some issues not covered by the Hague Convention) is governed by the rules of the Code of Civil Procedure,[21] which has changed several times during this period. In the period from 1 November 1992, when it entered into force in Poland,[22] until 26 August 2018, applications submitted under it were examined by district courts. Most of these courts had family and guardianship departments (there are around 300 of them nationwide).[23] This meant that Hague cases were considered by judges specializing in family and guardianship matters.

The courts of second instance were initially 49 voivodeship courts. On 1 January 1999 they were replaced by 46 regional courts, which took over the handling of Hague cases in the second instance.[24] Until 1 July 2000, it was possible to bring a cassation appeal to the Supreme Court against the decisions of the second instance courts issued in Hague cases.

In Poland, the situation where district courts could settle Hague cases was maintained until 2018.[25] This was justified by the argument that such courts were closest to the children concerned. That is why the courts often knew about the situation of a given family, because Hague cases were often preceded by other trials, usually initiated by those with whom the children involved had been staying. However,

18 Rozporządzenie Ministra Sprawiedliwości z 12 czerwca 2003 r. w sprawie szczegółowego sposobu wykonywania uprawnień i obowiązków kuratorów sądowych [Ordinances of Polish Ministry of Justice of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians uniform text] [2014] JoL 989.

19 Rozporządzenie Ministra Sprawiedliwości z 9 czerwca 2003 r. w sprawie standardów obciążenia pracą kuratora zawodowego [Ordinances of Polish Ministry of Justice of 9 June 2003 on the workload standards of vocational court guardians] [2003] JoL 1100.

20 Convention was ratified on 10 August 1992 and entered into force in Poland 1 November 1992.

21 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [1964] JoL 96, uniform text: [2021] JoL 1805 with amendments (hereinafter: CCP).

22 'Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – status on: 5 June 2021', <https://assets.hcch.net/docs/33bba6da-cb14-4c0e-bdc0-826c56051633.pdf> accessed 5 Jun 2021.

23 H Haak, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny' [The role of a family court guardian in the implementation of legal protection granted by the family court] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 650–664.

24 Art. 2.1 of Ustawa z dnia 18 grudnia 1998 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych [Act of 18 December 1998 r. amending the Act on the common courts system] [1998] JoL 1064 and Rozporządzenie Ministra Sprawiedliwości z 30 grudnia 1998 r. w sprawie utworzenia sądów apelacyjnych, sądów okręgowych i sądów rejonowych oraz ustalenia ich siedzib i obszarów właściwości [Regulation of the Minister of Justice of 30 December 1998 on the establishment of courts of appeal, district courts and regional courts and establishing their seats and areas of jurisdiction] [1998] JoL 1253 with amendments.

25 Compare with *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction', Part I. Central Authority Practice* (Hague Conference on Private International Law 2003) 37, <https://assets.hcch.net/docs/31fd0553-b7f2-4f34-92ba-f819f3649aff.pdf> accessed 27 Dec 2018.

as regards the higher level of the judiciary, not all regional courts had established family departments and there was the concern that matters related to such delicate issues as the removal of children would be entrusted to judges who had no experience in resolving family and guardianship cases.

This situation resulted in problems with the application of the Convention. These were related, *inter alia*, to the lack of knowledge and preparation of individual judges deciding in Hague cases, particularly as regards the substance of the Convention itself and the general nature of cross-border proceedings. An additional difficulty was posed by the shortage of the Supreme Court's judgments, which, due to the inadmissibility of reviewing cassation appeals as of 1 July 2000, limited the issuance of its decisions in Hague cases.

The heterogeneity of the case law concerning the Convention and its autonomous interpretation as well as certain problems related to the speed of the proceedings were two examples of serious problems that resulted in several complaints being brought before the ECHR in Strasbourg and unfavourable judgments being consequently passed against Poland.[26]

An attempt to remedy this situation was the adoption of the Act of 26 January 2018 on the performance of certain activities of the central authority in family matters in the field of legal transactions under the European Union law and international agreements.[27] This law espoused the concentration of Hague cases entrusting them to eleven regional courts. The Court of Appeal in Warsaw was designated as the court of second instance. The legislator also decided to admit the lodging of cassation appeals to the Supreme Court by the Ombudsman for Children, the Ombudsman and the Prosecutor General.[28]

The new Act introduced into the Code of Civil Procedure a number of provisions regulating certain issues related to Hague cases.

4. Tasks carried out under Hague proceedings by court guardians in Poland

4.1. Background surveys in the course of Hague cases

In connection with applications requesting the return of a child or the establishment and maintenance of contact under the Hague Convention, in the majority of cases the deciding court (previously the district court, and now one of the designated regional courts) has ordered a court guardian to conduct background surveys in order to determine the situation of the child concerned and all the circumstances of the case at hand.[29]

According to the file research conducted by the author, the courts ordered a survey in over 80% of cases. The research performed under the auspices of the Institute of Justice, which

26 For Example, Judgement of the ECHR 7710/01 [2005] HUDOC; Judgement of the ECHR 30813/14 [2016] HUDOC; Judgement of the ECHR 2171/14 [2016] HUDOC; Judgement of the ECHR 28481/12 [2018] HUDOC.

27 Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych [Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements] [2018] JoL 416.

28 Art. 519^{19} § 2^{2} CCP as amended by the Act of 26 January 2018.

29 T Jedynak, K Stasiak, *Ustawa o kuratorach sądowych. Komentarz* [The Act on court guardians. Commentary] (Wolters Kluwer 2014), LEX – commentary on Art. 11; H Haak, *Ochrona prawna udzielana przez sąd opiekuńczy* [Legal protection granted by the guardianship court] (Dom Organizatora TNOiK 2002) 249 and subsequent.

covered the material collected in 30 Hague cases decided under the new procedures,[30] shows a percentage decrease in the number of surveys commissioned by regional courts. In light of the results published by the Institute of Justice, such interviews were commissioned in 40% of cases.[31] However, this could have been influenced by the percentage of cases discontinued or rejected due to the failure to complete formal deficiencies at the application stage. The data is presented in a way that does not allow for a more precise evaluation.

Pursuant to the Art. 6(1) of Ordinance of 12 June 2003, a court guardian should determine and make a report about the circumstances indicated by the court, in its order to conduct a background survey. Art. 5 of the Ordinance of the Minister of Justice of 11 June 2003 currently in force do not contain any template for such a survey, imposing only an obligation to apply the method of conducting criminal intelligence interviews appropriately in family matters.[32] Art. 570[1](1) CCP can also be applied here. Thanks to the work of the court guardian, the court should learn, *inter alia*, about the conditions in which the child in question lives and is brought up, about his or her health, the living situation of the family concerned, about the minor's behaviour, the way the child spends their free time, about his or her contacts, their attitude towards both parents, other relatives or guardians, and if the child goes to school, about the course of his or her education.

Due to the specificity of cross-border cases, the court (especially in newer cases) usually expects the court guardian in question either to confirm or deny the fact that the child had been staying in the place indicated in the application. Another piece of information expected from the court guardian was how long the child had been staying in Poland. It is also important for the court to determine whether any proceedings are pending in the country of the child's habitual residence or in Poland, whether and what decisions have been already made in these proceedings, and how the minor in question had been taken care of before leaving the country of permanent residence.

In order to determine the unlawfulness of the child's departure from the country of his or her habitual residence, the court guardian in question should set up whether a return is being planned and whether the parent or guardian under whose care the child has been staying in Poland in fact intends to return to that country. It is also important to establish whether the parent or relevant person in question has the written consent of other entities authorized to care for the minor.

In the course of the proceedings, the court must also determine whether the conditions set forth in Art. 13(b) of the Convention exist. The strong conviction of a grave risk of physical or psychological harm or placing the child in an intolerable situation if returned is grounds for refusing to order the minor's return. The court also examines how the applicant has behaved during the child's stay in Poland. This analysis includes, in particular, questions as to whether he or she is in contact with that child and if so, in what form, how often and whether they contribute towards the child's maintenance.

30 M Białecki, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r.* [Adjudication in cases for the return of a child under the Convention on the Civil Aspects of International Child Abduction drawn up in The Hague on 25 October 1980] (IWS 021), poz. 616, <https://iws.gov.pl/analizy-i-raporty/raporty/#rodzinne21> accessed 19 Dec 2021.

31 Ibid.

32 Art. 5 of the Ordinance of the Minister of Justice of 11 June 2003 on the regulations of activities in the field of conducting a background survey and a model questionnaire for the interview [2003] Journal of Laws 1018 in connection with Art. 6(2) of the Ordinance on the detailed manner of exercising the powers and duties of courts guardians [2014] Journal of Law 989.

The scope of the matters covered by the survey is finally determined by the court in its order. The information is collected on the basis of targeted conversations and observations, carried out with the child's parents or guardians in the place indicated in the court's order, but also by seeking information from other sources, for example kindergartens or schools attended by the child, as well as on the basis of case files which the court guardian should thoroughly read.[33]

In some of the files made available to the author for examination, there was information on certain interviews that court guardians had performed with children covered by Hague applications. In some of these cases, this was the child's only conversation with any government official throughout the proceedings. Regardless of the age and maturity level of the minor in question, an issue that still remains unregulated is how to assess the information so obtained and whether the statements of the child expressed before the court guardian (often in the presence of other household members) can be treated as an authoritative source of information about that child's opinion on his or her situation.

From the point of view expressed in Art. 72 of the Constitution of the Republic of Poland,[34] the right of a child to express their opinion in any proceedings concerning that child is an issue of great importance. For years clear postulates have been formulated in the literature on the subject, so as to specify the tasks and methods of their implementation by court guardians in matters related to the work for persons subjected to various educational, corrective or preventive decisions by guardianship courts. It seems justified that such a postulate, specifying the requirements for court guardians with regard to collecting information from underage children, should also be developed.[35]

The court guardian shall within 14 days draw up a written report on the activities they carried out. In most Hague cases, however, the court sets a shorter time limit for the survey and the preparation of a written report. Although it should be indicated that in the cases examined not all reports met the formal requirements (Art. 7 of the Ordinance of Justice of 12 June 2003) and were undated, in about 10% of cases the report was prepared and received by the court on the same day.

It should be mentioned that in more or less the same percentage of cases, the 14-day period prescribed by law was significantly exceeded, sometimes taking even more than 31 days. The justifications for these delays varied, although they were usually associated with the difficulties in determining the whereabouts of the minor in question. It might be concluded that preparation for the surveys related to the need to read the files (although the interview is one of the first steps recorded in the files, in Hague cases, the application is often accompanied by a number of documents that contain information requiring further verification by court guardians), the interviews themselves, as well as the preparation of reports are time-consuming activities. The very fact that a survey was prepared on the same day on which it was commissioned in such a large percentage of Hague cases merely proves the awareness of the importance of the tasks at hand.

33 T Jedynak, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny. Wywiady środowiskowe' [Role of the court guardian in realisation of the family court' legal protection. The Background surveys] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 688–699.

34 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483.

35 M Andrzejewski, 'O specyfice kurateli rodzinnej' [About the specifics of family guardianship], in A Barczykowska, M Muskała (eds), *Horyzonty pedagogiki resocjalizacyjnej. Księga Jubileuszowa Profesora Wiesława Ambrozika* [Horizons of rehabilitation pedagogy. Jubilee Book of Professor Wiesław Ambrozik] (WN UAM 2017) 347 and subsequent.

4.2. Compulsory collection of a child

The purpose of the Hague Convention is the prompt return of a child to the country of his or her habitual residence.[36] If the court in question orders the return, and the person obliged to return the child abroad fails to comply with this obligation, proceedings may be initiated for the compulsory collection of the child (Art. 598[6] CCP). The court guardian has an executive function here. The provisions on this matter introduced in 2001 replaced the previous regulations, according to which compulsory collections of children were carried out by court bailiffs, whereas the provisions themselves were located in the part of the code on enforcement proceedings.[37] Since then, however, certain elements of this procedure have been gradually clarified, including, for example, the participation of the police and other authorities in the course of the activities undertaken by court guardians.

The provisions regarding the assistance offered to the court guardians in the course of undertaking the activities of collecting children have raised certain objections for a long time. It was not fully known, for example, what assistance activities social welfare authorities were specifically entitled to and what tangible assistance court guardians might expect from the police. There were serious legal doubts concerning the legitimacy of forceful police intervention when the person obliged to surrender the child did not open the door of the apartment where he or she, and (probably) the child, had been staying.[38] The 2018 Act amended a large part of the regulations in this respect, among others providing a legal basis for the police to search the apartment in order to find the child concerned (Art. 598[10] and Art. 598[11a] CCP).

Since the enforcement proceedings for collecting a child are initiated at the request of the entitled person, Art. 598[9] CCP requires that he or she be present during the activities, which should ensure the child's safety by taking over from the court guardian following the collection. This result may not be achieved in situations when the applicant is not present, even where he or she is replaced by someone duly designated (for example a consular officer of their state).[39] In the course of the current research, the files of nine cases contained information about the initiation of a procedure for the collection of a child. Five cases were successfully completed, whereas in three of them, it was necessary to repeat the activities at least once (one case) or twice (two cases) due to the failure of previous attempts or the non-arrival of the parent entitled to collect the child. In the files examined under the new procedures, there was no case that necessitated conducting proceedings to take the child away.

In the published research conducted under the auspices of the Institute of Justice, enforcement proceedings were initiated in two cases out of 30.[40] There is no information on the results of these proceedings. It is only known that in one of these cases, the child concerned was kept in hiding, because the court ordered a search by the police and allowed them 'to determine the location of the mobile phone used by the person responsible'.[41]

The current procedural provisions impose an obligation on the court to indicate the date (but no longer than two weeks) by which the obligated person should return the child to state that within two weeks of the decision becoming final, the obligated person should return with the minor to

36 Preamble, sentence 2, Art. 1 (a) of the Convention.

37 J Gajda in K Pietrzykowski (ed), *Komentarz do Kodeksu rodzinnego i opiekuńczego* [Commentary to Guardianship and Family Code] (C.H. Beck 2021) pt. 21 i subsequent – commentary on Art. 100.

38 M Pawlak, *Informacja o działalności Rzecznika Praw Dziecka oraz uwagi o stanie przestrzegania praw dziecka* [Information on the activities of the Ombudsman for Children in the year 2020 and comments on the state of observance of the children's rights] (2021) 229–236.

39 Art. 5989 sentence 2 CCP.

40 M Białecki (2021) 64–68.

41 Ibid – case no 22.

the minor's country of habitual residence (Art. 598[5] § 2 CCP). Failure to comply with the order will result in the initiation of a compulsory collection at the request of the entitled applicant.

When implementing a court's order for compulsory collection, the court guardian must take into account the best interests of the child and protect the minor against any physical and moral harm (Art. 598[12] § 1 sentence 1 of CCP). For this reason she/he may select the appropriate services and bodies to help in order to minimize the risk of events that may have negative consequences for the morality and health of the child concerned (Art. 59[85] § 5 CCP). The guardian is obliged to stop the activities if it is decided that their completion would cause serious harm to the child. It is up her/him to assess whether the level of risk to the child in question has reached a level that justifies the interruption of activities. Quite often, it is so difficult to determine this aspect that some court guardians have complained about their lack of training in this area. However, if leaving the child in the place to which he or she was unlawfully brought poses a greater risk, it is the duty of the court guardian to arrange for that child to be collected (Art. 598[12] § 2 CCP). The court guardian shall draw up a written note reporting on the course of activities during the collection (§ 9(3) of the Ordinance of 12 June 2003).

While the Act of 2018 introduced the concentration of jurisdiction in Hague cases, the performance of tasks by court guardians is normally transferred from the regional courts to the court guardians service in the district court in whose jurisdiction the child is located. If the child's place of stay changes, the collection will be redirected to the appropriate local court guardian (Art. 598[7] CCP).

If the child is not collected and the obligated person has not complied with the order to return the minor within 3 months from the issuance of the decision, while other circumstances in the case have not changed, the proceedings may be resumed under the previous decision (Art. 59812(a) CCP). Contrary to the suggestions of the Ombudsman for Children, as a result of the 2018 amendment, it is not possible in Hague cases to apply for a change of the collection decision due to some new circumstances (such as, for example, a child's illness which prevents the execution of the ruling or the illness of the entitled applicant).[42]

4.3. Contacts

In the course of Hague proceedings, court guardians also perform control functions, supervising the course of contacts between the entitled person and the child (§ 10(1) of the Ordinance of 12 June 2003). The decision on securing contacts for the duration of the proceedings is taken at the request of the person concerned if, in the opinion of the court, this does not threaten the child's welfare. Establishing the supervision of a court guardian over such contacts in Hague cases faces similar problems as in the case of other guardianship matters.

Contact in the presence of a court guardian is usually ordered when there is a conflict between the parties to the proceedings over the possibility of seeing the child.[43] The supervision of the court guardian is to prevent the risk of another abduction by the person entitled to contact, and to allow to observe the relationship between that person and the child in order to determine whether it poses any threat to the child's welfare, including his or her development.[44]

42 Art. 598[5] § 5 of the CCP.

43 J Zajączkowska-Burtowy, *Kontakty z dzieckiem, Prawa i obowiązki* [Contacts with the child. Rights and duties] (Wolters Kluwer 2020) 142–144.

44 T Jedynak, N Górska, 'Odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką oraz udział kuratora w sprawach o umieszczenie dziecka w środowisku' [Role of the court guardian in realisation of the family court' legal protection]in T Jedynak, K Stasiak (eds), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 793–808.

When it comes to the investigated cases, the place of contact was very differently specified: at the house of the obligated person, on the premises of an nongovernmental organisations, on the premises of the court, but also at supermarkets and playgrounds. The court guardian shall make notes regarding the course of the contact.

Paragraph 10(1) of Ordinance provides that the presence of a court guardian during the contact is to prevent exceeding the time limit of the meeting. Meanwhile, in the cases examined, the main problem was instead the short duration of the meetings due to the presence of other household members and their comments towards the person entitled to contact, and even the complete failure to meet due to this reason. In one case, the meeting was terminated early by the court guardian when the entitled person took the child into the corridor of the court guardians centre so that the child could greet their grandparents who had not been granted permission to attend the meeting. This behaviour was treated as an attempt to kidnap the child again and a violation of the terms of the meeting.

As regards the examined files, the court considered applications for securing contact during Hague proceedings in 25 situations out of 140 cases from the years 2008–2013. Most of the requests for a court guardian's supervision were made by the party obligated to allow the contact with the child as a response to the request for access to see the child. The decision to allow a meeting with a court guardian usually resulted from the rejection of more extreme requests by the parties.

As in domestic cases, court guardians in Hague proceedings demand that the scope of their own duties be more detailed when it comes to the implementation of the provisions on contacts and the obligations of the parents as well as other persons participating in the meetings in order to prevent incidents occurring during that time. They also postulate to specify their own rights as well as the rights of the persons entitled to contact and other concerned entities.[45]

5. Conclusions

The true scope of the tasks of court guardians is wide and includes diagnostic, information, control and executive functions.

The way the guardians perform the mission entrusted to them, and how they present the results of their activities to the court, will very often affect the assessment of the facts by the judge, and consequently also the protection and implementation of the rights of the children in question together with those of other entities affected by the outcome of the proceedings.

Considering the scope and time-consuming nature of the activities that court guardians perform in connection with Hague cases at the request of the court, it should be stated that they are probably the state officials who spend the most time with the children concerned. Without their participation, the fulfilment of the state's obligations related to the application of the Hague Convention would be impossible. From this point of view, the office of court guardianship is an indispensable and irreplaceable body and, although its tasks for the application of the Convention are not very prominently exposed in the text of the treaty itself, without this service the court would be unable to observe the provisions binding upon each state-party.

In carrying out the tasks entrusted to them in Hague proceedings, court guardians act as the eyes and ears, and sometimes also as an arm of the judiciary. Not to mention that, as the person who is potentially the first (and sometimes the only) state authority to meet with a child covered by an application, they are the face of the justice system in Poland.

45 T Jedynak, N Górska (2018) 793–808; A Prusinowska-Marek (2020) 119.

References

Literature

Andrzejewski M, 'O specyfice kurateli rodzinnej' [About the specifics of family guardianship] in A Barczykowska, M Muskała (eds), *Horyzonty pedagogiki resocjalizacyjnej. Księga Jubileuszowa Profesora Wiesława Ambrozika* [Horizons of rehabilitation pedagogy. Jubilee Book of Professor Wiesław Ambrozik], (WN UAM 2017) 347–368.

Białecki M, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r.* [Adjudication in cases for the return of a child under the Convention on the Civil Aspects of International Child Abduction drawn up in The Hague on 25 October 1980'] (IWS 2021), <https://iws.gov.pl/analizy-i-raporty/badania-instytutu-wymiaru-sprawiedliwosci-w-ujeciu-tematycznym/prawo-rodzinne-i-zagadnienia-zwiazane-z-jego-funkcjonowaniem/> accessed 19 Dec 2021.

Pietrzykowski K (ed), *Komentarz do Kodeksu rodzinnego i opiekuńczego* [Commentary to Guardianship and Family Code] (C.H. Beck 2021).

Gromek K, *Ustawa o kuratorach sądowych. Komentarz* [Act on court guardians. Commentary] (LexisNexis 2005).

Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Hague Conference of International Private Law 2003).

Haak H, *Ochrona prawna udzielana przez sąd opiekuńczy* [Legal protection granted by the guardianship court] (Dom Organizatora TNOiK 2002).

Haak H, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny' [The role of a family court guardian in the implementation of legal protection granted by the family court] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego*' [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 650–664.

Jadach K, *Praca kuratora w sprawach rodzinnych, nieletnich i karnych* [Work of a court guardian in family, juvenile and criminal matters] (WN UAM 2011).

Jedynak T, 'Rola kuratora rodzinnego w realizacji ochrony prawnej udzielanej przez sąd rodzinny. Wywiady środowiskowe' [Role of the court guardian in realisation of the family court' legal protection. The Background survey] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 688–699.

Jedynak T, Górska N, 'Odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką oraz udział kuratora w sprawach o umieszczenie dziecka w środowisku zastępczym' [Removal of a person subject to parental authority or guardianship and participation of the guardian in cases of placement of a child in a foster environment] in K Stasiak (ed), *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 793–808.

Jedynak T, Stasiak K, *Ustawa o kuratorach sądowych. Komentarz* [Commentary on the act on court guardians] (Wolters Kluwer 2021).

Prusinowska-Marek A, *Kuratela rodzinna – proces profesjonalizacji, współczesne wyzwania i potrzeby* [Family guardianship – the process of professionalization, contemporary challenges and needs] (2020) Dziecko Krzywdzone. Teoria, Badania, Praktyka 19(3), 102–127, <https://dzieckokrzywdzone.fdds.pl/index.php/DK/article/download/778/629> accessed: 19 Dec 2021.

Stasiak K, 'Wprowadzenie' [Introduction] in K Stasiak (ed) *Zarys metodyki pracy kuratora sądowego* [Outline of the methodology of the work of a court guardian] (Wolters Kluwer 2018) 25–37.

Zajączkowska-Burtowy J, *Kontakty z dzieckiem, Prawa i obowiązki* [Contacts with the child. rights and duties] (Wolters Kluwer 2020).
Pawlak M, *Informacja o działalności Rzecznika Praw Dziecka oraz uwagi o stanie przestrzegania praw dziecka* [Information on the activities of the Ombudsman for Children in the year 2020 and comments on the state of observance of the children's rights] (2021) DS 1104.

Legal Acts

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [1964] JoL 96, uniform text: [2021] JoL 1805 with amendments.
The 1980 Hague Convention on the Civil Aspects of International Child Abduction [1995] JoL 528, correction of the translation – [1999] JoL 1085.
Rozporządzenie Ministra Sprawiedliwości z dnia 24 listopada 1986 r. w sprawie kuratorów sądowych [Ordinance of the Minister of Justice of 24 November 1986 on court guardians], [1986] JoL 212.
Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483.
Ustawa z dnia 27 lipca 2001 r. o kuratorach sądowych [Act of 27 July 2001 on court guardians and probation officers] [2021] JoL 1071; uniform text – [202] JoL 167.
Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych [The Act on the System of Common Courts], uniform text [2020] JoL 2072.
Rozporządzenie Ministra Sprawiedliwości z 9 czerwca 2003 r. w sprawie standardów obciążenia pracą kuratora zawodowego [Ordinances of Polish Ministry of Justice of 9 June 2003 on the workload standards of vocational court guardians] [2003] JoL 1100.
Rozporządzenie Ministra Sprawiedliwości z 11 czerwca 2003 r. w sprawie regulaminu czynności w zakresie przeprowadzania wywiadu środowiskowego oraz wzoru kwestionariusza tego wywiadu [The Ordinance of the Minister of Justice of 11 June 2003 on the regulations of activities in the field of conducting a background survey and a model questionnaire for the interview] [2003] JoL 1018 in connection with Art. 6(2) of the Ordinance of 12 June 2003**.**
Rozporządzenie Ministra Sprawiedliwości z 12 czerwca 2003 r. w sprawie szczegółowego sposobu wykonywania uprawnień i obowiązków kuratorów sądowych [Ordinances of Polish Ministry of Justice of 12 June 2003 on the detailed manner of exercising the powers and duties of court guardians uniform text] [2014] JoL 989.
Council Regulation (EU) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2009] OJ UE L 70, 19.
Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych [Act of 26 January 2018 on the exercise of certain activities of the central authority in family matters with regard to legal turnover under European Union law and international agreements] [2018] JoL 416.
Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ UE L 178, 1.

Judgements

Judgement of the ECHR 7710/01 [2005] HUDOC.
Judgement of the ECHR 2171/14 [2016] HUDOC.
Judgement of the ECHR 30813/14 [2016] HUDOC.
Judgement of the ECHR 28481/12 [2018] HUDOC.

Online Sources

'Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – status on: 5 June 2021', <https://assets.hcch.net/docs/33bba6da-cb14-4c0e-bdc0-826c56051633.pdf> accessed 5 Jun 2021.

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The legal situation of minor parents in determining the parentage of their child and placing it for adoption*

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Abstract
The issue of parentage of minors is one of the contemporary legal challenges. It is very important for society, as reflected in the significant number of minor parents and the media's interest in their functioning. The youngest mothers are girls aged 12.
Minor parents have limited legal capacity, remain under the parental authority of their parents until the age of majority and do not have parental authority over their children. They may only participate in the ongoing care and upbringing of their children, unless the guardianship court decides otherwise due to the child's best interests. For this reason, it is important to determine whether they can submit declarations necessary for the recognition of paternity, participate in court proceedings related to the determination of their child's parentage or consent to the placement of a child for adoption.

Keywords
minor parents, parental responsibility, legal capacity, recognition of a child, judicial determination of paternity, adoption

1. Introduction

The issue of parenthood of minors is one of today's legal challenges. It has a high public profile in many countries,[1] as evidenced by the significant number of minor parents and by media interest

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1 M Bidzan, *Nastoletnie rodzicielstwo. Perspektywa psychologiczna* [Teenage parenthood: Psychological perspective] (Harmonia Universalis 2013) 18.

in their functioning.[2] Adolescents around the world are beginning sexual initiation sooner.[3] Premature sexual intercourse can in turn lead to unplanned and unwanted pregnancies.[4]

In Poland, the youngest mothers are girls at the age of 12,[5] and worldwide there have been cases of births by even younger mothers.[6] There are many more girls who gave birth at the age of 13 or 14: about 50–60 per year. The Polish Demographic Yearbook for 2020 shows that there were 168 children born to girls who were under 15, while 16-year-olds gave birth to 482 children and 17-year-olds delivered 1,054 children. In some cases, a minor mother gave birth to more than one child. On the other hand, 1106 boys under the age of 19 became fathers.[7] However, these data do not show a complete picture of the scale of underage fatherhood, as the statistics also include fathers who are already of age. It is also unclear whether the information found in the Yearbook includes men who have acknowledged paternity or whose court paternity establishment case was legally concluded, or whether the data is based solely on the claims of mothers.

The legal situation of minor parents includes several aspects, such as determining the parentage of the child (by judicial as well as extrajudicial means), placing the child for adoption, parental authority and ongoing custody of the child. This essay will further elaborate on the issues related to establishing the child's parentage as well as placing the child for adoption.

2. Parental authority

Minor parents have limited legal capacity and themselves remain under the parental authority of their parents until they reach the age of majority (Article 92 of the Family and Guardianship Code,[8] hereinafter referred to as the Family Code). They do not have parental authority over their child (Article 94 § 1 of the Family and Guardianship Code).

A minor girl who has reached the age of 16 and is pregnant or has given birth to a child may be allowed by the guardianship court to marry for important reasons, when the circumstances are such that the marriage will be compatible with the good of the family that has been estab-

2 D Olzen in D Schwab (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Verlag C.H. Beck 2017), 892–893.

3 M Andrzejewski, 'Podstawy prawne ochrony macierzyństwa w Polsce. Status prawny małoletnich i nieletnich matek' [Legal grounds for maternity protection in Poland: The legal status of minors and underage mothers], in A Sikora (ed) *Sytuacja prawna, społeczna i wychowawcza nieletnich ciężarnych i nieletnich matek przebywających w placówkach resocjalizacyjnych. Raport z realizacji projektu „Chcę być z Tobą MAMO!"* [The legal, social and educational situation of pregnant minors and underage mothers residing in resocialisation institutions: Report on the implementation of the project "I want to be with you MOM!"], ([Fundacja po Drugie] 2013) 83–84, <https://podrugie.pl/kopia/wp-content/uploads/2016/09/RAPORT.pdf> accessed 17 Dec 2022.

4 U Kempińska, *Małżeństwa młodocianych. Przyczyny i konsekwencje* [Juvenile Marriages: Causes And Consequences] (Wyższa Szkoła Humanistyczno-Ekonomiczna 2005) 52.

5 P Szukalski, 'Urodzenia nastolatek' [Teenage births] (2016) Demografia i Gerontologia – Biuletyn Informacyjny 6, 3 <https://dspace.uni.lodz.pl/bitstream/handle/11089/19661/2016-06%20Nastoletnie%20macierzy%c5%84stwo.pdf?sequence=1&isAllowed=y> accessed 12 Dec 2022.

6 M Bidzan 28–30.

7 (2020) Rocznik demograficzny [Demographic Yearbook], 261, 271 <https://dane.gov.pl/pl/dataset/718,rocznik-demograficzny-2020/resource/35527/table> accessed 26 Dec 2022.

8 Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [Family and Guardianship Code of February 25 1964] [2020] JoL 1359, consolidated text.

lished (Art. 10 § 1 of the Civil Code).[9] Marriage is an avenue for a woman to come of age sooner and thus gain parental authority. This measure is rightly criticised, as it is one way to obtain parental authority earlier than at the age of eighteen. It should be noted that the mere fact of marriage does not determine a person's maturity or experience in life. Nor does it guarantee the proper exercise of this authority. The attainment of majority will occur regardless of who will be the minor's spouse.[10] A minor father is not entitled to such authority.

It is proposed that the Family and Guardianship Code be supplemented with a provision authorising the guardianship court to grant parental authority to minor parents if they have reached the age of 16 and the evidence gathered, including psychological, social and medical assessments, speaks in favour of their being sufficiently mature to exercise parental authority.[11]

On the other hand, the minor parents may participate in the day-to-day custody and upbringing of the child, unless the guardianship court decides otherwise for the sake of the child's welfare (Art. 96 § 2 of the Family Code). Day-to-day custody mainly includes meeting the child's daily needs related to nursing, feeding and playing with the newborn.[12] This legal solution should be evaluated favourably, as it allows the minor parents to build a bond with the child and satisfies their sense of closeness. However, minors cannot make any decisions about the child, consent to medical procedures, decide on the child's worldview (e.g., baptism) or represent the child in court.[13] Parental authority cannot be exercised by anyone other than the parents, so in the event that neither of them is entitled to it, custody is established for the child. This situation arises when both parents are minors, as well as when the mother is a minor and paternity has not been established.

Minor parents also have rights associated with the fact of being parents. These include the right to personal contact with the child. It is not an element of parental authority, but a personal right, so persons who do not have this authority for any reason are also entitled to it (Article 113 of the Civil Code).

9 A Urbańska-Łukaszewicz, 'Sytuacja prawna małoletnich rodziców w zakresie możliwości sprawowania władzy rodzicielskiej' [Legal situation of minor parents in terms of the possibility of exercising parental authority] (2021) Studia Prawnicze KUL 87(3), 181–187.

10 M Andrzejewski (2013) 90; M. Andrzejewski, Relacja rodzice i inne osoby dorosłe a dzieci w świetle nowych przepisów Kodeksu rodzinnego i opiekuńczego i niektórych innych ustaw (wybrane problemy) [The Relationship Between Parents and Other Adults and Children in View of The New Provisions of The Family and Guardianship Code and Some Other Laws (Selected Problems)] (2014) AIS 6, 379–380; M Andrzejewski, 'Prawna ochrona macierzyństwa młodocianych matek' [Legal Protection of Motherhood of Juvenile Mothers] in M Andrzejewski, K Dadańska (eds) *Współczesne problemy Prawa rodzinnego i spadkowego* [Contemporary Problems of Family and Inheritance Law] (Volumina.pl 2014) 23–41; A Urbańska-Łukaszewicz 186.

11 T Sokołowski, *Władza rodzicielska nad dorastającym dzieckiem* [Parental Authority Over an Adolescent Child] (UAM 1987) 129, 149; M Andrzejewski (2013) 90–91; A Urbańska-Łukaszewicz 187.

12 T Sokołowski (1987) 23.

13 More: A Urbańska-Łukaszewicz 189.

3. Determination of the parentage of a child of minor parents

3.1. Determination of maternity and acknowledgment of paternity

The mother of a child is the woman who gave birth to it (Article 619 of the Civil Code), which means that any minor who gives birth to a child will be its mother. Maternity therefore arises from the moment the child is born.

The situation is different with the establishment of paternity. If a child is born in marriage, it is presumed to be the biological child's of the mother's husband, i.e. of the married parents (Article 62 of the Civil Code). A minor who has reached the age of sixteen may marry the child's father, who is of age, for valid reasons, only with the consent of the court. Then, if the child is born in marriage, the father will be the mother's husband. It should be noted, however, that the mother of the child will become of age at the time of marriage and will also gain parental authority over the child.

For a child born out of wedlock, there are two ways to establish the father: acknowledgment of paternity and judicial determination of paternity (Article 72 of the Civil Code). A minor mother cannot marry a minor father. To determine paternity, it is necessary to use the above options.

Acknowledgment of paternity is an act of knowledge by both parents who admit that the child is biologically descended from a man who acknowledges his paternity[14] (Article 73 of the Civil Code).[15] Thus, in acknowledging and confirming paternity, it is irrelevant that the minor parents do not have parental authority over the child.[16] In the case of minors, recognition is made by the guardianship court. The child's mother must confirm the child's descent from the man who makes the acknowledgment. She may do so either at the same time as the acknowledgment or within three months of the father's declaration. It is possible to recognise paternity before the birth of a child who is already conceived (Art. 75 § 1 of the Civil Code).

The right to acknowledge paternity is held by minors (father as well as mother) who are at least 16 years of age and when there are no prerequisites for their incapacitation (Art. 77 § 1 and 2 of the Civil Code). They can make the declarations that are required by law only before the guardianship court. The head of the registry office should refuse to accept the declarations (Ar. 73 § 3 of the Civil Code). The guardianship court has the ability to verify the claims of minors, for example, by ordering a genetic test.[17] In this way, it can fulfil its duty to determine the existence

14 Explanatory Memorandum to the Amendment of the Family and Guardianship Code, Parliamentary Print No. 629 <http://orka.sejm.gov.pl/Druki6ka.nsf/0/1E8CDBD5F38B2E25C125746700371126?OpenDocument> accessed 31 Dec 2022.

15 B Trębska in J Wierciński (ed) *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (WKP 2014) 642 ff.

16 Parliamentary Print No. 629.

17 Commentary to Art. 581(4): J Bodio in A. Jakubecki (ed), *Kodeks postępowania cywilnego. Komentarz aktualizowany. T. I. Art. 1–729* [Code of Civil Procedure: Updated Commentary. Vol. I. Articles 1–729] Lex/el 2019. See also the commentary to Art. 581(7): P Pruś in M Manowska (ed), *Kodeks postępowania cywilnego. Komentarz. T. II* [Code

of the prerequisites for the admissibility of the statements necessary for the acknowledgment of paternity.[18] Such scrutiny is necessary due to the immaturity of those who make the statements required for the acknowledgment of paternity. The minor parents themselves participate in the proceedings that affect them and their child. In this regard, despite the lack of parental authority, they also represent the interests of their unborn or newborn child.

The guardianship court, on the other hand, supervises the welfare of the minor (both the parents and their child). It can also take a number of steps ex officio relating to the child's legal situation (Art. 570 of the Code of Civil Procedure hereafter referred to as the Code of Civil Procedure[19]). If it turns out that the child does not have an appointed guardian, then the court will take proceedings to appoint one. In addition, the court shall also proceed ex officio and control the manner in which the guardianship is exercised, demand explanations from the guardian (Art. 165 § 2 of the Civil Procedure Code), monitor the manner in which the parents exercise day-to-day custody of the child, or change the guardian if he or she improperly performs his or her duties (Art. 168 of the Civil Procedure Code).

It is also the role of the guardianship court to determine whether there are grounds for full incapacitation for minors. This is because it is inadmissible to acknowledge paternity when there are prerequisites for total incapacitation of the minor. In such a situation, the guardianship court refuses to accept the statements necessary for the acknowledgment of paternity (Art. 581 of the Code of Civil Procedure). The court may also notify the prosecutor's office of the case if it deems its participation necessary (Art. 59 of the Code of Civil Procedure). The prosecutor, in turn, may initiate proceedings for incapacitation (Art. 7 of the Code of Civil Procedure).

The Code does not mandate that the father's affidavit and the mother's confirmation be made only before the guardianship court, in a situation where only one of the parties has limited legal capacity but has reached the age of 16. There is no contraindication, for example, for an adult father to make a statement before the head of the registry office, and a minor mother to confirm paternity before the court. If this happens, the court should send the information to the registry office.[20]

To be valid, the acknowledgment of paternity is not conditional on the consent of the child's legal representative or the legal representative of the minor parent[21]. This is because the legal rep-

of Civil Procedure: Commentary. Vol. II] LEX/el. 2020. Authors believes that if the court has doubts about the origin of the child, it should refuse to accept the statements necessary for the acknowledgment of paternity.

18 T Smyczyński, *Prawo rodzinne i opiekuńcze* [Family and Guardianship Law] (C.H. Beck 2018), 227; T Sokołowski, *Prawo rodzinne. Zarys wykładu* [Family Law: Outline of Interpretation] (Ars Boni et Aequi 2010) 127.

19 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Code of Civil Procedure of 17 November 1964] [2021] JoL 1805, consolidated text.

20 Art. 4 of Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego [Law on Civil Status Records of 28 November 2014] [2022] JoL 1681, consolidated text, Courts shall provide civil registry offices with copies of final judgments that form the basis for the issuance of a civil status record or affect the content or validity of a civil status record, together with a note of the date on which these judgments became final, within 7 days of the date on which the judgment became final. Cf commentary to Art. 77(6): G Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany* [Family and Guardianship Code: Updated Commentary] LEX/el. 2019.

21 Prior to the 2009 amendments to the Family and Guardianship Code, if the mother did not have parental authority, the consent of the child's legal representative was needed instead of her consent (Article 77 in the wording before the amendment). The child's father who has limited legal capacity could acknowledge the child before and after

resentatives of the minor parents could refuse to grant consent to the acknowledgment in order to postpone their own alimony obligation to their grandchild. In addition, acknowledgment of paternity and its confirmation is a statement of knowledge, so the statements must be made by those who have knowledge of the child's origin, namely the child's parents.[22] It is therefore an acknowledgment of a specific fact.

Therefore, minors who have reached the age of 16 participate in the paternity acknowledgment proceedings and make their own decisions on the matter. The minor's guardian is not competent to make statements on their behalf. The guardianship court oversees whether the declarations are made correctly, and thus whether the principle of the child's welfare is enforced.

If at least one of the parents is under the age of 16, the acknowledgment of paternity cannot take place at all (Art. 73 of the Civil Code). This is because the minor mother, the minor father and the child's legal representative cannot acknowledge paternity or express confirmation of this acknowledgment. In such cases, the only way to establish the origin of the child is through judicial determination of paternity. Doubts on this issue will be described below.

It is also not possible to acknowledge paternity when one of the parents has died or there are difficulties in communicating with him or her. This is because the child's legal representative cannot give the consent that is necessary for recognition. This measure is consistent with acknowledgment of paternity being qualified as an act of knowledge by both parents confirming that the child is born of them. Thus, the declaration of a parent cannot be made by another person.[23]

In order to recognise paternity, it is necessary to achieve sufficient intellectual and social maturity to understand the meaning of this legal institution with significant legal consequences. It was deemed that reaching the age of 16 is an appropriate limit, since such young parents have had limited legal capacity for three years and have acquired enough experience in using it to be able to make such important decisions as acknowledging paternity.[24] It was stressed that "those who already have a child are capable of making a prudent decision regarding the acknowledgment of paternity of their child, as long as their developmental stage, or mental health, does not deviate so much from the norm that total incapacitation could be justified".[25] This allows minors to bear responsibility for their actions, even though life experience shows that the appearance of a child in their lives is a matter of chance, an ill-considered decision rather than a planned, rational action. The age limit of 16 is systemically consistent with the age limit for a woman to obtain

his birth. His legal situation does not change with the birth of the child. However, for this recognition to be valid, the consent of his legal representative was needed. Such a solution was detrimental to minor mothers, and furthermore violated the principle of parental equality by allowing the minor father to recognise the child, and depriving the minor mother of the opportunity to consent to this recognition after the child's birth. Thus, the legislature decided to change and de lege lata the situation of the minor mother and the minor father is no different. T Sokołowski, 'Sytuacja prawna małoletniej matki przed urodzeniem dziecka' [The Legal Situation of the Minor Mother Before the Birth of the Child] (1995) REPiS 3, 5.

22 J Ignaczewski, *Pochodzenie dziecka i władza rodzicielska po nowelizacji. Art. 61⁹–113⁶ KRO* [The Origin of the Child and Parental Authority After the Amendment of Art. 61⁹–113⁶ of the Family And Guardianship Code] (C.H. Beck 2009) 94.

23 B. Trębska 652.

24 Parliamentary Print No. 629.

25 Ibid.

court permission to marry, and with the amended provisions of the Code of Civil Procedure on granting minor parents procedural capacity in proceedings for judicial determination of paternity.[26] If it turns out that the man is not the child's father, both he and the mother may file an action to determine the invalidity of the acknowledgment within a year from the date on which they learned that the child did not come from this man (Art. 78 and 79 of the Civil Procedure Code).[27] In the case of acknowledgment of paternity before the birth of a child who has already been conceived, the time limit cannot begin to run before the birth of the child. Minor parents have the procedural capacity to bring such an action (Art. 453^1 of the Civil Procedure Code). As regards cases to establish or deny the origin of a child and to establish the ineffectiveness of an acknowledgment of paternity, the mother and father of a child also have procedural capacity even if they are limited in their legal capacity, if they have reached the age of 16.

In summary, minors who have reached the age of 16 participate independently in proceedings to establish paternity. Although they do not have parental authority, they are entitled to make the necessary statements when there are no grounds for their incapacitation. These are submitted to the guardianship court, as only it has the ability to verify the claims of minors. As for minors who have not reached the age of 16, the acknowledgment of paternity cannot take place. It is necessary to bring an action for judicial determination of paternity.

3.2. Judicial determination of paternity

The second way to establish the origin of a child is judicial determination of paternity, which is the result of a dispute between the mother and the alleged father[28] or the consequence of the inability of the minor mother or father to make the statement necessary for the acknowledgment of paternity, for example, in a situation where the parents are under 16, one of them is dead or they have difficulties in reaching an agreement. Although, this is a procedural proceeding, there does not always have to be two parties representing the positions in dispute.

An action for judicial determination of paternity can be brought by the child, the mother, the alleged father and the prosecutor (Article 84 of the Civil Code).[29]

A decision on judicial establishment of paternity cannot be made only on the basis of acknowledgment of the claim or admission of facts.[30] Also, an out-of-court settlement in which the parties would determine who is the father of the child cannot have legal effect and does not create a presumption of paternity.[31] For young people without life experience and for their child, it is safest to provide special judicial review, which is made possible by an evidentiary hearing.

26 J. Ignaczewski 94.

27 B Trew in J Wierciński (ed) 654–660.

28 T Smyczyński 237.

29 J Haberko, T Sokołowski in H Dolecki, T Sokołowski (eds) *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (WKP 2013) 612.

30 K Piasecki in J Pietrzykowski (ed) *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with Commentary] (C.H. Beck 1990) 594; K Pietrzykowski in K. Pietrzykowski (ed), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (C.H. Beck 2015) 572.

31 Z Krzemiński, *Alimenty i ojcostwo. Praktyczny komentarz. Orzecznictwo. Piśmiennictwo. Wzory pism* [Aliments and paternity: Practical commentary. Case law. References. Model letters] (Kantor Zakamycze 2006) 50.

The question that needs to be answered is whether the minor parents are competent to sue for judicial determination of paternity on their own. A party involved in a lawsuit should have judicial capacity and procedural capacity. Judicial capacity is vested in every person regardless of age. Litigation capacity is the ability to perform procedural acts with legal effect. The prerequisite for this capacity in natural persons is legal capacity. An individual has procedural capacity in all matters only if he or she has full legal capacity. Such capacity is acquired upon coming of age (Art. 11 of the Civil Code).[32] This means that an individual has procedural capacity to the extent that he or she is equipped with legal capacity.[33] Therefore, a person with limited legal capacity has procedural capacity in matters arising from legal actions that he or she can independently perform in accordance with the Civil Code, and a person without legal capacity does not have procedural capacity at all (Article 65 § 2 of the Civil Code). In other cases, his or her legal representative must act on his or her behalf.

The Code of Civil Procedure grants procedural capacity in cases to establish or deny the parentage of a child and to declare the ineffectiveness of an acknowledgment of paternity to the child's mother and father also when they have limited legal capacity, if they have reached the age of 16 (Article 4531 of the Code of Civil Procedure). The argument in favour of such a measure is the availability of certain biological evidence such as genetic code testing that excludes the risk of prejudice to the interests of those who want to claim the establishment or denial of the origin of a child from them.[34] This solution makes it possible to establish the origin of the child, especially when the other parent does not want to make the appropriate statement necessary for the acknowledgment of paternity.

With regard to parents who are under 16 years of age, the predominant view is that the current legislation does not grant them procedural capacity in cases of state rights.[35] They cannot independently bring an action for judicial determination of paternity. It has been discussed in the literature whether the entitlement to bring this action is not a corollary of granting minor parents, regardless of their age, the legal opportunity to participate in the day-to-day custody of the child. However, it has been found that an action to establish marital status goes beyond day-to-day custody.[36] If this is the case, in accordance with Article 66 of the Code of Civil Procedure, minors in this action must be represented by a legal representative. The situation is similar for those parents who do not have legal capacity at all. On their behalf, an action to establish paternity can be brought by a legal representative.[37]

32 P Nazaruk in J Ciszewski, P Nazaruk (eds), *Kodeks cywilny. Komentarz* [Civil Code: Commentary] LEX/el 2019.

33 Commentary to Art. 11(3): S Kalus, in M Fras, M Habdas (eds), *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)* [Civil Code: Commentary. Volume I. General Part (Articles 1–125)] LEX/el 2018.

34 Parliamentary Print No. 629.

35 T Sokołowski (1987) 61; Z. Krzemiński, *Postępowanie odrębne w sprawach ze stosunków między rodzicami a dziećmi* [Separate Proceedings in Cases Involving Relations Between Parents and Children] (Wydawnictwo Prawnicze 1978) 22–23; Z. Krzemiński, *Legitymacja czynna w procesie o ustalenie ojcostwa* [Right of Action in a Suit to Establish Paternity] (1966) Palestra 10, 36–37; K Piasecki in J Pietrzykowski (ed) (1990) 591–592; H Haak, *Pochodzenie dziecka. Komentarz* [Origin of the Child: Commentary] (TNOiK 1997) 140; P Grzegorczyk in T Ereciński (ed) *Kodeks postępowania cywilnego. Komentarz. Tom I. Postępowanie rozpoznawcze* [Code of Civil Procedure: Commentary. Volume I. Exploratory proceedings] LEX/el 2016 – commentary to Art. 65(7).

36 T Smyczyński 257.

37 Ibid 242; Z Krzemiński (1978) 22–23. The author describes the legal situation of a woman who is completely incapacitated, which is the same as that of a person who has not reached the age of 13.

The child also has the legal standing to file an action for judicial determination of paternity. If the child does not have legal capacity, the mother or father will bring the action on their behalf. If the parents also lack full legal capacity, they do not have parental authority, then they cannot perform the action in question on behalf of their child. In such a case, guardianship is established for the child and a guardian is appointed. The guardian, as the child's legal representative, may bring an action on behalf of the child for judicial determination of paternity (Article 155 § 2 of the Civil Code in conjunction with Article 98 § 1 of the Civil Code). However, they should obtain permission from the guardianship court in all major cases involving the ward (Article 156 of the Civil Code).[38]

In cases of judicial determination of paternity, minor parents who have reached the age of sixteen participate in court proceedings on determination of parentage. Although they do not have parental authority, they have the competence to bring an action. A minor child also has the possibility to participate in these proceedings if he or she is represented by a legal guardian. The court, on the other hand, verifies that the child's welfare is not violated.

4. Adoption of a newborn child

When the parents of a child and their legal representatives do not feel ready to take on the responsibility of raising the child, they may consider placing it for adoption.

Adoption is carried out by court decision, after meeting the prerequisites required by law. These include the consent of the adopted child, the child's parents (unless they have been deprived of parental authority or are unknown or communication with them runs into insurmountable obstacles), and the child's guardian (Articles 119–120 of the Family Code[39]). Six weeks after the birth of the child, the parents may consent to adoption (Article 1192 of the Civil Code). They must do so in person.[40] This deadline was set to protect parents from making hasty decisions about adopting a child. Consent given earlier, e.g. during pregnancy, is ineffective.[41]

Among the many issues related to adoption from the point of view of the subject of the study, attention should be paid to the contentious issue of whether consent to adoption depends on the exercise of parental authority,[42] and thus whether minor parents have the right in question. According to some scholars who advocate the doctrine, the right to consent is not an element of parental authority, although it is related to it, since parents deprived of authority do not express it.[43] On the other hand, if the authority has been suspended, limited by the court, or is not available due to minor age, then consent to adoption is required. According to the doctrine,

38 H Haak 139.

39 H Dolecki in H. Dolecki, T Sokołowski (eds) 838–846.

40 Order of the PSC III CR 144/64 [1965] OSNCP 6, 105.

41 H. Dolecki in H Dolecki, T Sokołowski (eds) 845.

42 The following scholars have advocated that the right to consent is not linked to parental authority: T Sokołowski 177; E Holewińska-Łapińska, 'Przysposobienie' [Adoption], in T Smyczyński (ed) *Prawo rodzinne i opiekuńcze* [Family and Guardianship Law] (C.H. Beck 2011) 489-750; cf. E Budna, *W sprawie charakteru prawnego zgody rodziców na przysposobienie anonimowe dziecka* [On The Legal Nature Of Parental Consent To Anonymous Adoption Of A Child] (1996) PS 3, 37 ff.

43 T Smyczyński 307.

consent is a personal right of parents,[44] so the right to express it is given to persons with limited legal capacity (Article 119 § 2 of the Civil Code). Also, the view has been expressed in case law that "the circumstance that the mother of the child is limited in legal capacity does not affect the legal effectiveness of her statement of consent to the adoption of the child."[45] The Supreme Court noted that a literal interpretation of this provision suggests that the legislature makes no distinction between parents with full legal capacity and those limited in such capacity. Nor was the effectiveness of the consent of a parent with limited legal capacity made dependent on the consent of his or her legal representative. If it had been the intention of the lawmakers to make the effectiveness of consent to adoption conditional on the legal representative, they would have regulated this issue precisely, for example, as they did earlier with regard to the acknowledgment of paternity by a father with limited legal capacity.[46] They did not do so, and there is no basis for assuming that this is the result of an oversight that created a gap in the law. In the ruling in question, the Supreme Court also considered whether the obligation of the legal representative to give consent derives from the general provisions of the Civil Code on legal actions (Articles 17 and 19 of the Civil Code). However, it stated that these provisions apply to binding and dispositive actions, and such is not the nature of a statement on consent to the adoption of a child. Making a declaration is a personal act, so it can also be made independently by a parent with limited legal capacity. Particular attention is paid to the requirement to obtain the consent of the parents, not the legal representatives of the child.[47]

The literature points out that the right to consent to adoption ceases with the termination of parental authority. This right exists prior to the emergence of authority, that is, it exists for the minor mother and minor father, who has been legally established, but does not exist when the parents have been deprived of parental authority.[48]

This means that the minor parents have the independent authority to give the consent necessary for the adoption of the child, and this right does not depend on the exercise of parental authority. Statutory representatives cannot challenge the minor parents' consent or refusal to give it. Nor can they substitute for the minor parent as a participant in the proceedings, as he or she has procedural capacity in this regard. [49]

The right to consent does not extend to parents who have no legal capacity at all. This follows *a contrario* from Art. 119 § 2 of the Civil Code.[50]

In addition, the literature expresses the view that "the law regulates typical relations, and parenthood before the age of 13 in Poland does is not such a relation."[51]

Thus, any minor mother who has limited legal capacity has the right to consent to the adoption

44 Ibid; cf. J Panowicz-Lipska, 'Przysposobienie, zagadnienia wybrane' [Adoption: Selected Issues] in T Smyczyński (ed), *Rodzina w świetle prawa i polityki społecznej* [Family in View of Law and Social Policy] (CPBP 1990), 65–66. The author classifies consent as a legal-family action.

45 Decision of the PSC III CZP 159/94 (1995) OSN 3, 53.

46 Art. 74 PCC as it stood before 2008.

47 E Holewińska-Łapińska 518; R. Zegadło in J Wierciński (ed) 831–832.

48 T Sokołowski 177.

49 R Zegadło in J Wierciński (ed) 831–832.

50 K Pietrzykowski in K Pietrzykowski (ed) (2015) 731.

51 E Holewińska-Łapińska 519–520.

of a child. She becomes a mother from the moment the child is born (Article 619 of the Civil Code). In contrast, for the father to have the right in question, paternity must be established. The consent of the parents is not required for adoption if they are unknown. Thus, such a situation occurs, for example, if the child's descent from a man has not been established.[52]

However, even if the minor parents consent to the adoption, the court must determine whether they are not acting under pressure from the people around them or due to helplessness.[53] This is because a statement of intent, such as consent, must be made freely and knowingly (Art. 82 of the Civil Code).

In exceptional cases, when the absence of consent is manifestly contrary to the welfare of the child, the consent of parents with limited legal capacity may be disregarded (Art. 119 § 2 of the Civil Code). As a justification for this solution, it is pointed out that minor parents do not have parental authority, and even with gross negligence towards the child, they cannot be deprived of this authority.[54] This regulation applies when both parents have limited legal capacity. If one parent has full legal capacity then he or she is entitled to parental authority (Art. 94 § 1 of the Civil Code), so Art. 119 § 2 of the Civil Code will not apply.[55]

In order to decree adoption despite the lack of consent of parents whose legal capacity is limited, three conditions must be met concurrently.

The first is the occurrence of special circumstances justifying the ruling of adoption despite the lack of parental consent. These may include cases in which, if a parent had parental authority, he or she could be deprived of it, such as when he or she grossly neglects the child, uses violence against him or her, abandons him or her, etc.

The second premise is the refusal to consent to the adoption. It occurs when the parents expressly state before the court that they do not consent to the adoption, but also when they do not appear at the hearing and do not take a stand.[56] It is important to note that the situations in which adoption can be pronounced without parental consent are exceptional.[57] Cases in which a parent refuses to consent to the adoption should be approached with the utmost caution, because, although they are unable to perform their duties to the child due to their minority, they love the child and do not want to lose it.[58] The court should examine what the mother's real intentions are and whether she is acting under pressure from those around her.[59]

The third premise is that the refusal to consent to adoption is clearly contrary to the welfare of the child. That is, under the given circumstances, there is no doubt that the refusal harms the interests of the child.[60] One example is a situation in which the parents abuse alcohol or drugs and do not want to give up stimulants.

52 H Dolecki in H Dolecki, T Sokołowski (ed) 840.
53 R Zegadło in J. Wierciński (ed) 830.
54 H. Ciepła in K Piasecki (ed), *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with Commentary] (LexisNexis 2011) 869.
55 Commentary to Art. 77(6): G Jędrejek.
56 H Ciepła in K. Piasecki (ed) 870.
57 Commentary to Art. 77(6): G Jędrejek; R Zegadło in J Wierciński (ed) 830.
58 E Holewińska-Łapińska 526.
59 R Łukasiewicz, *Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia* [The Welfare of the Child Versus the Interests of Other Parties in the Polish Legal Regulation of Adoption] (WKP 2019) 105.
60 H Dolecki in H Dolecki, T Sokołowski (eds) 841; H Ciepła in K Piasecki (ed) 870.

Full adoption cannot be pronounced without the consent of the minor parents.[61] When it occurs, the consent of one of the parents may be omitted only if their consent is not necessary for the adoption (Article 1191 of the Civil Code). These are those cases where the parents have been deprived of parental authority or are unknown or communication with them faces insurmountable obstacles (Article 119 § 1 of the Civil Code).

If the child's parents are minors, then guardianship is established for the child.[62] In such a situation, the consent of the guardian is also required for adoption (Article 120 of the Civil Code). It is required even if the child's parents, due to their minority, are entitled to consent to the adoption. If this is the case, the power to consent exists simultaneously on the part of the guardian and the minor parent.[63] The guardian's stance in the adoption case is a more important matter within the meaning of Article 156 of the Civil Code, but the guardian does not need to obtain permission from the guardianship court to give or withhold consent, as the court reviewing the adoption case sufficiently protects the interests of the child.[64]

However, the guardianship court may, in view of special circumstances, decree adoption even in the absence of the guardian's consent, if the welfare of the child requires it, such as when, due to age or health, the guardian will not be able to provide adequate living conditions for the child.[65]

In summary, parental consent is required for the adoption of a newborn child. The power to give it is vested in minor parents who have limited legal capacity. Exceptionally, the court may decree full and partial adoption despite the lack of parental consent, when there are special circumstances in a particular situation and the refusal to consent to adoption is manifestly contrary to the welfare of the child. Full adoption cannot be pronounced without the consent of the minor parents. The consent of the child's guardian is also necessary for adoption.

Conclusion

The mother of the child is the woman who gave birth to the child, which means that any minor who gives birth to a child will be its mother. A minor who is pregnant may marry a man of full age for valid reasons with the permission of the court. Then, she becomes of age and if the child is born in marriage, the mother's husband will be its father. For a child out of wedlock, there are two ways to determine the father: acknowledgment of paternity and judicial determination of paternity. The right to acknowledge paternity is held by minors (father as well as mother) who are at least 16 years old and when there are no grounds for their incapacitation. They can only make statements before the guardianship court. The guardianship court has the ability to verify the parents' statements. It also verifies whether the prerequisites for the admissibility of the declarations necessary for the acknowledgment of paternity are met, as it has the duty to thoroughly investigate the case. The

61 T Sokołowski in H Dolecki, T Sokołowski (eds) 843.

62 R Zegadło in J Wierciński (ed) 838; J Gajda, *Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym* [The Confidentiality and Protection of Adoption in Polish Civil Law] (WSPiA 2012) 118.

63 E Holewińska-Łapińska 526.

64 R Zegadło in J Wierciński (ed) 838.

65 H Dolecki in H Dolecki, T Sokołowski (eds) 845–846.

effectiveness of the acknowledgment of paternity was not made conditional on the consent of the child's legal representative or the legal representative of the minor parent.

If the parents or only one of them is under the age of 16, the acknowledgment of paternity cannot take place at all (Article 73 of the Civil Code). In such cases, the only way to determine the origin of the child is through judicial establishment of paternity.

The Code of Civil Procedure grants procedural capacity in cases to establish or deny the origin of a child and to determine the ineffectiveness of an acknowledgment of paternity to the child's mother and father also if they have limited legal capacity, if they are at least 16 years old. If the parents are younger, then they are not competent to act independently in the proceedings.

Parental consent is required for the adoption of a newborn child. Consent to adoption is a personal right of the parents, so the right to give consent is given to persons with limited legal capacity. The right to consent does not apply to parents with no legal capacity at all.

Any minor mother who has limited legal capacity has the right to consent to the adoption of a child. She becomes a mother from the moment the child is born. In contrast, for the father to be entitled to this right, paternity must be established. In exceptional cases, the consent of parents with limited legal capacity can be omitted.

The discussion in this article shows that the Family and Guardianship Code has tried to balance both the protection of the rights of minor parents and their child. Although minor parents do not have parental authority over their child, they have been granted the right to make the statements necessary from the determination of parentage and adoption.

References

Literature

Andrzejewski M, 'Podstawy prawne ochrony macierzyństwa w Polsce. Status prawny małoletnich i nieletnich matek' [Legal Grounds For Maternity Protection In Poland: The Legal Status Of Minors And Underage Mothers] in A Sikora (ed) *Sytuacja prawna, społeczna i wychowawcza nieletnich ciężarnych i nieletnich matek przebywających w placówkach resocjalizacyjnych. Raport z realizacji projektu „Chcę być z Tobą MAMO!"* [The legal, social and educational situation of pregnant minors and underage mothers residing in resocialisation institutions: Report on the implementation of the project "I want to be with you MOM!"] ([Fundacja po Drugie] 2013) 83–99, <https://podrugie.pl/kopia/wp-content/uploads/2016/09/RAPORT.pdf> accessed 17 Dec 2022.

Andrzejewski M, 'Prawna ochrona macierzyństwa młodocianych matek' [Legal protection of motherhood of juvenile mothers] in M Andrzejewski, K Dadańska (eds), W*spółczesne problemy Prawa rodzinnego i spadkowego* [Contemporary Problems of Family and Inheritance Law] (Volumina.pl 2014) 23–41.

Andrzejewski M, *Relacja rodzice i inne osoby dorosłe a dzieci w świetle nowych przepisów Kodeksu rodzinnego i opiekuńczego i niektórych innych ustaw (wybrane problemy)* [The Relationship

Between Parents and Other Adults and Children in View of The New Provisions of The Family and Guardianship Code and Some Other Laws (Selected Problems)] (2014) AIS 6, 371–400.

Bidzan M, *Nastoletnie rodzicielstwo. Perspektywa psychologiczna* [Teenage Parenthood: Psychological Perspective] (Harmonia Universalis 2013).

Budna E, *W sprawie charakteru prawnego zgody rodziców na przysposobienie anonimowe dziecka* [On The Legal Nature Of Parental Consent To Anonymous Adoption Of A Child] (1996) PS 3, 37–61.

Ciszewski J, Nazaruk P (eds), *Kodeks cywilny. Komentarz* [Civil Code: Commentary] LEX/el 2019.

Dolecki H, Sokołowski T (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (WKP 2013).

Ereciński T (ed), *Kodeks postępowania cywilnego. Komentarz. T. I. Postępowanie rozpoznawcze* [Code of Civil Procedure: Commentary. Vol. I. Preliminary Proceedings] LEX/el 2016.

Fras M, Habdas M (eds), *Kodeks cywilny. Komentarz. T. I. Część ogólna (art. 1–125)* [Civil Code: Commentary. Vol. I. General Part (Art. 1–125)] LEX/el 2018.

Gajda J, *Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym* [The Confidentiality And Protection of Adoption In Polish Civil Law] (WSPiA 2012).

Haak H, *Pochodzenie dziecka. Komentarz* [Origin of the Child: Commentary] (TNOiK 1997).

Holewińska-Łapińska E, 'Przysposobienie' [Adoption] in T Smyczyński (ed), *Prawo rodzinne i opiekuńcze* [Family and Guardianship Law] (C.H. Beck 2011) 489–750.

Ignaczewski J, *Pochodzenie dziecka i władza rodzicielska po nowelizacji. Art. 61^9–113^6 KRO* [The Origin of the Child and Parental Authority After the Amendment of Art. 61^9–113^6 of the Family And Guardianship Code] (C.H. Beck 2009).

Jakubecki A (ed), *Kodeks postępowania cywilnego. Komentarz aktualizowany. T. I. Art. 1–729* [Code of Civil Procedure: Updated Commentary. Vol. I. Articles 1–729] LEX/el. 2019.

Jędrejek G, *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany* [Family and Guardianship Code: Updated Commentary] LEX/el. 2019.

Kempińska U, *Małżeństwa młodocianych. Przyczyny i konsekwencje* [Juvenile Marriages: Causes And Consequences] (Wyższa Szkoła Humanistyczno–Ekonomiczna 2005).

Krzemiński Z, *Alimenty i ojcostwo. Praktyczny komentarz. Orzecznictwo. Piśmiennictwo. Wzory pism* [Aliments and Paternity: Practical Commentary. Case Law. References. Model Letters] (Kantor Zakamycze 2006).

Krzemiński Z, *Legitymacja czynna w procesie o ustalenie ojcostwa* [Right of Action in a Suit to Establish Paternity] (1966) *Palestra* 10, 30–37.

Krzemiński Z, *Postępowanie odrębne w sprawach ze stosunków między rodzicami a dziećmi* [Separate Proceedings in Cases Involving Relations Between Parents and Children] (Wydawnictwo Prawnicze 1978).

Łukasiewicz K, *Dobro dziecka a interesy innych podmiotów w polskiej regulacji prawnej przysposobienia* [The Welfare of the Child Versus the Interests of Other Parties in the Polish Legal Regulation of Adoption] (WKP 2019).

Manowska M (ed), *Kodeks postępowania cywilnego. Komentarz. T. II* [Code of Civil Procedure: Commentary. Vol. II] LEX/el. 2020.

Panowicz-Lipska J, 'Przysposobienie, zagadnienia wybrane' [Adoption: Selected issues] in T. Smyczyński (ed) *Rodzina w świetle prawa i polityki społecznej* [Family in View of Law and Social Policy] (CPBP 1990).

Piasecki K (ed) *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with Commentary] (LexisNexis 2011).

Pietrzykowski J (ed), *Kodeks rodzinny i opiekuńczy z komentarzem* [Family and Guardianship Code with Commentary] (C.H. Beck 1990).

Pietrzykowski K (ed), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (C.H. Beck 2015).

Schwab D (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Verlag C.H. Beck 2017).

Smyczyński T, *Prawo rodzinne i opiekuńcze* [Family and Guardianship Law] (C.H. Beck 2018).

Sokołowski T, *Prawo rodzinne. Zarys wykładu* [Family Law: Outline of Interpretation] (Ars Boni et Aequi 2010).

Sokołowski T, 'Sytuacja prawna małoletniej matki przed urodzeniem dziecka' [The Legal Situation of the Minor Mother Before the Birth of the Child] (1995) RPEiS 3, 1–9.

Sokołowski T, *Władza rodzicielska nad dorastającym dziecki*em [Parental Authority Over an Adolescent Child] (UAM 1987).

Szukalski P, 'Urodzenia nastolatek' [Teenage births] (2016) Demografia i Gerontologia – Biuletyn Informacyjny 6, 1–4 <https://dspace.uni.lodz.pl/bitstream/handle/11089/19661/2016-06%20Nastoletnie%20macierzy%c5%84stwo.pdf?sequence=1&isAllowed=y> accessed 12 Dec 2022.

Urbańska-Łukaszewicz A., 'Sytuacja prawna małoletnich rodziców w zakresie możliwości sprawowania władzy rodzicielskiej' [Legal Situation Of Minor Parents In Terms Of The Possibility Of Exercising Parental Authority] (2021) *Studia Prawnicze* KUL 87(3), 177–196.

Wierciński J (ed), *Kodeks rodzinny i opiekuńczy. Komentarz* [Family and Guardianship Code: Commentary] (WKP 2014).

Online source

Rocznik demograficzny [Demographic Yearbook], <https://dane.gov.pl/pl/dataset/718,rocznik-demograficzny-2020/resource/35527/table>, p. 261, 271.

List of legislative acts

Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [Family and Guardianship Code of February 25 1964] [2020] JoL 1359, consolidated text.

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Code of Civil Procedure of 17 November 1964] [2021] JoL 1805, consolidated text.

Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego [Law on Civil Status Records of 28 November 2014] [2022] JoL 1681, consolidated text.

List of judgements

Order of the PSC III CR 144/64 [1965] OSNCP 6, 105.
Decision of the PSC III CZP 159/94 (1995) OSN 3, 53.

Official documents

Explanatory Memorandum to the Amendment of the Family and Guardianship Code; Parliamentary Print No. 629.

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