INSTITUT ZA UPOREDNO PRAVO

INSTITUTE OF COMPARATIVE LAW

STRANI PRAVNI ŽIVOT

FOREIGN LEGAL LIFE

ISSN 0039 2138
UDK 34
Beograd, 2024/ Broj 3/ Godina LXVIII

IUS NULLO CONTINETUR LOCO

1956. BEOGRAD

INSTITUT ZA UPOREDNO PRAVO

UDK 34

ISSN 0039 2138

ISSN (online) 2620 1127

STRANI PRAVNI ŽIVOT

Beograd, 2024/ Broj 3/ Godina LXVIII

Izdavač/ Publisher
INSTITUT ZA UPOREDNO PRAVO/ INSTITUTE OF COMPARATIVE LAW
Terazije 41, 11000 Beograd, Srbija, tel. + 381 11 32 33 213

Za izdavača/ For the Publisher
Prof. dr JELENA ĆERANIĆ PERIŠIĆ

Štampa/ Print
Birograf Comp doo Beograd

Tiraž/ Circulation
100 primeraka/ 100 copies

Prilozi objavljeni u časopisu referisani su u bazama/ Abstracted and indexed in
Directory of Open Access Journals (DOAJ), Central and Eastern European Online Library (CEEOL), European Reference Index for Humanities and Social Sciences (ERIHplus), HeinOnline Law Journal Library, Srpski citatni indeks (SCIndeks), Kooperativni online bibliografski sistem i servisi (COBISS).

Adresa uredništva/ Address of the Editorial Board
Terazije 41, 11000 Beograd, Srbija; tel. + 381 11 32 33 213; e-mail: redakcijaspz@gmail.com
Časopis se objavljuje tromesečno uz podršku Ministarstva nauke, tehnološkog razvoja i inovacija Republike Srbije.

UDK 34

ISSN 0039 2138
ISSN (online) 2620 1127

INSTITUT ZA UPOREDNO PRAVO
STRANI PRAVNI ŽIVOT

Broj 3 *Godina LXVIII* *jul–septembar 2024.*

SADRŽAJ/ TABLE OF CONTENTS

ČLANCI/ ARTICLES

Antonije Đ. Živković*

Pregledni naučni članak
UDK: 004.388: 347.77/78
doi: https://doi.org/10.56461/SPZ_24301KJ
Primljeno: 25. 5. 2024.
Izmenjeno: 2. 7. 2024.
Prihvaćeno: 23. 9. 2024.

COMPUTER PROGRAMS LEGAL PROTECTION FRAMEWORK WITH SPECIAL REFERENCE TO ARTIFICIAL INTELLIGENCE *CHATGPT***

Summary

Computer programs are protected by copyright both in the comparative law and in the positive law in Serbia. One or more computer programs together with electronic databases make up information systems. With the development of artificial intelligence, a wide range of sophisticated information systems have been created that can, as a rule, create or generate text based on user queries (e.g. ChatGPT). This paper provides a case study related to the generative artificial intelligence ChatGPT. Legal regulation of artificial intelligence-generated products from the aspect of copyright poses a special challenge. In this paper, the author puts a special emphasis on the comparative presentation of the legislation that regulates artificial intelligence from the aspect of copyright, stating the legal theory positions and judicial practice that claim that artificial intelligence-generated products have no place in intellectual property law. After the exhaustive comparative legal analysis and the case study, the author will propose de lege ferenda the legal protection framework for artificial intelligence.

Keywords: computer program, information system, copyright, artificial intelligence, ChatGPT.

* Master of Laws with passed bar exam; Industrial property representative (patent representative) before the Institute for Intellectual Property of Bosnia and Herzegovina; student in doctoral academic studies (PhD student) at the Faculty of Law, University of Kragujevac, Republic of Serbia; Head of legal department at "LANACO" Limited Liability Company for information technologies Banja Luka, Republika Srpska, Bosnia and Herzegovina.
E-mail: *antonije.zivkovic@hotmail.com*
ORCID: *https://orcid.org/0009-0003-2806-7629*

** This work has won the first prize at "Dr Stefan Andonović" competition for the best scientific work in the category of young researchers for 2024 on the topic "Legal framework for artificial intelligence - potential and risk in the future", organized by the Institute of Comparative Law Belgrade, Republic of Serbia and the Faculty of Law University in Kragujevac, Republic of Serbia.

PRAVNI OKVIR ZAŠTITE RAČUNARSKIH PROGRAMA SA POSEBNIM OSVRTOM NA VEŠTAČKU INTELIGENCIJU *„CHATGPT“*

Sažetak

Računarski programi kako u uporednom pravu, tako i u pozitivnom pravu Srbije štiti se autorskim pravom. Jedan ili više računarskih programi zajedno sa elektronskim bazama podataka čine informacione sisteme. Razvojem veštačke inteligencije, stvoren je širok spektar sofisticiranih informacionih sistema koji mogu, po pravilu, na osnovu upita korisnika, da načine ili generišu tekst (npr. ChatGPT). U radu će biti izvršena studija slučaja vezana za generativnu veštačku inteligenciju ChatGPT. Poseban izazov predstavlja kako pravno regulisati proizvode koje stvara veštačka inteligencija sa aspekta autorskog prava. Autor će kroz ovaj članak poseban akcenat dati na uporednom prikazu zakonodavstava koji su regulisali veštačku inteligencije sa aspekta autorskog prava, ali će navesti i one stavove pravne teorije i sudske prakse koji smatraju da proizvodi koji stvoreni od strane veštačke inteligencije nemaju mesta u pravu intelektualne svojine. Nakon celokupne uporednopravne analize i studije slučaja, autor daje predloge de lege ferenda pravnog okvira zaštite veštačke inteligencije.

Ključne reči: kompjuterski program, informacioni sistem, autorsko pravo, veštačka inteligencija, ChatGPT.

1. Introduction

In the today's era of digital transformation of all social processes, one can pose a justified question, is this the end of intellectual property as we know it or a new beginning? In this regard, let us consider first the example of Estonia, which, in accordance with the centralized e-Estonia platform, currently has an efficient, transparent and safe eco-system and as much as 99% of services provided by the government to the citizens available online, with the advantages of digitization coming to the fore especially during the COVID-19 pandemic crisis (Ćemalović, 2021, p. 701). The development of artificial intelligence is inevitably connected with digital transformation.

The study of artificial intelligence (hereinafter: AI) poses a challenge from a scientific and professional aspect in the sphere of both technical and social sciences, including economics, law, medicine, psychology, sociology, etc. The

widespread adoption of AI systems and the continued AI development are of research interest considering the complexity of automatic data handling, code, and the AI model itself (Steidl, *et al*., 2023, p. 120). The European Commission Communication "Artificial Intelligence for Europe", dated 25 April 2018, points out the need to "consider the relationship between artificial intelligence and intellectual property rights, from the perspective of both Intellectual Property Offices and the users, in order to encourage balanced innovation and legal certainty" (Živković, 2020, pp. 619-620). Human intelligence has always been important to us humans, and there is a great interest in the study of AI from a scientific aspect considering that AI can now understand and create things only humans are capable of creating. "We humans call ourselves Homo sapiens - smart man - because our intelligence is so important to us. For thousands of years, we have been trying to understand how to think, that is, how nothing more than a handful of matter can perceive, understand, predict, and govern a world far larger and far more complex than that matter itself. The field of artificial intelligence, or AI, goes even further: it tries not only to understand, but also to create intelligent entities." (Russell & Norvig, 2011). In essence, artificial intelligence can be defined as "a general name for advanced computer systems that strive to simulate the functioning of human intelligence in such a way that machines are capable of replacing the roles and work of humans in various activities, from simple to complex". The work and development of technologies that artificial intelligence is based on relies on previously entered information and parameters entered by humans (Andonović, 2020, p. 112).

After the initial introduction, the main part of the paper provides a summary of the computer programs copyright provisions in various legislation in the technical context of software and information systems, and proceeds to analyze the (in)ability of copyright to protect AI-generated works, with a special emphasis provided through a comparative presentation of a few pieces of legislation that recognize AI protection from the aspect of copyright, to close with a case study of the extremely popular generative AI *ChatGPT*. Finally, the conclusion provides a brief summary of the research findings including the *de lege ferenda* proposals.

2. Differences Between Computer Program Definition in Comparative Law and Software and Information System Technical Terms

The prevailing scientific and legal opinion in comparative law is that computer programs are protected as an author's literary work. This paragraph defines the conditions and duration of such legal protection (Marković, 2018, pp. 149-150).

This position has received its international confirmation in the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter: TRIPS), with Article 10, Paragraph 1, stipulating that computer programs, whether in source code or object code, are protected as literary works under the Berne Convention (Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS Agreement). This pragmatic rule has also been confirmed in Article 4 of the WIPO Copyright Treaty of the World Intellectual Property Organization, stipulating that *computer programs are protected as literary works* within the meaning of Article 2 of the Berne Convention, and that this protection applies to computer programs, regardless of the way or form of their expression (WIPO Copyright Treaty – WCT). The term "source code" implies a computer program expressed in one of the programming languages, while the term "executive" or "object code" refers to a computer program converted into a digital machine record that a computer can understand and execute (Marković, 2018, p. 150).

This position was adopted by both the Republic of Serbia (hereinafter: Serbia) and the neighboring countries Bosnia and Herzegovina (hereinafter: BiH) and the Republic of Croatia (hereinafter: Croatia). Article 4, paragraph 2, subparagraph a) of the BiH Law on Copyright and Related Rights stipulates: "A work of authorship shall be considered in particular: a) written works (literary texts, studies, manuals, articles and other writings, as well as computer programs)", while Article 4, paragraph 1, of the same Law stipulates: "An individual spiritual creation from the field of literature, science or art is considered an author's work, regardless of the type, method and form of expression, unless otherwise determined by this law". Article 14, paragraph 1 of the Croatian Law on Copyright and Related Rights stipulates the following: "(1) A work of authorship is an original intellectual creation from the literary, scientific or artistic field that has an individual character, regardless of the manner and form of expression, type, value or purpose, unless otherwise determined by this Law", while paragraph 2 of the same Article prescribes:"(2) Author's works are: linguistic works, such as written works, spoken works and computer programs, which include the expression of a computer program in any form, including preparatory design material". Finally, Article 2, paragraph 1, of the Serbian Law on Copyright and Related Rights prescribes: "A work of authorship is an original intellectual creation of the author, expressed in a certain form, regardless of its artistic, scientific or other value, its purpose, size, content and manner of manifestation, as well as the permissibility of public communication of its content", while Article 2, paragraph 2, subparagraph 1 of the Serbian Law on Copyright and Related Rights prescribes: "written works (books, brochures, articles, translations, computer programs with all accompanying technical and user documentation in any form of their expression, including preparatory material for their creation, etc.).

Analyzing the Serbian, Croatian and BiH comparative legislation, one can draw several conclusions. Firstly, the ZASP BiH stipulates that the author's work is an *"individual spiritual creation",* and this definition lacks the word "original" in comparison with Serbia and Croatia, where the legislator, when defining the author's work, points out that it is an "original spiritual creation" (Serbia) or "original intellectual creation" (Croatia). Secondly, the term "computer program" as prescribed by the BiH, Serbian and Croatian legislators, which could be protected by copyright, should be distinguished from the term "*software*" in the technical and legal sense. Software is a broader term than a computer program, and can consist of one or more computer programs, preparation of designed material (program description), and additional, i.e., accompanying (user) documentation, and potentially other elements. From the point of view of copyright, a computer program and preparatory design material can represent a special type of author's work, provided that they are an "original intellectual creation" in the sense of Article 2, paragraph 1 of the Serbian Law on Copyright and Related Rights.

This view is supported by the French text of the Computer Program Directive, where the terms "computer program" and "software" are clearly distinguished, and protection is provided only to computer programs! One can conclude that the legal term "computer program" includes the technical term "computer program" and the accompanying technical documentation (Kunda, Matanovac Vučković, 2010, pp. 85-132). In Article 2, paragraph 1 of the ZASP RS, Serbia has expanded the definition of a computer program as an author's work, bringing the definition of a computer program closer to the technical term "software".

It has to be noted that in the era of digital information and transformation technologies, with the digital transformation of all social processes, ready-made "package" solutions have come to the fore in the banking sector, telecommunications, companies, electricity distribution, and other sectors. These are widely known as "information systems". "Information system" is a broader term than "software", and such systems consist, *inter alia*, of (electronic) database models and application software (i.e., computer program and program description, or accompanying technical documentation), which "manages" the aforementioned database. An information system may contain a copyright on one or more computer programs (which together constitute software), as well as a copyright on the database structure, and another special *sui generis* right of the database producer (Živković & Hasić, 2022, p. 315). Article 137 of the ZASP RS defines a database producer as "a natural or legal person who has made a significant investment, in a quantitative or qualitative sense, in obtaining, checking or presenting the content of the database". From the aspect of AI, personal data protection, trade secret and unfair competition rules are of particular importance. The AI rests

on a machine learning system that learns from content that may be copyrighted. Data and text mining may require extensive data sets copying and collections which may include copyrighted works resulting in the copying of the creative elements that make up the copyrighted work (Bogataj Jančić, 2023, p. 180). Understanding what an information system represents, and which intellectual property rights apply to it is of key importance for the study of the generative artificial intelligence *ChatGPT* as it includes sophisticated information systems that are, as a rule, based on user queries and can create or generate text, and whose legal analysis and the case study will take a special place in this paper.

Finally, AI systems can be connected to and embedded into hardware, creating advanced robots, drones, and software applications that are connected to the so-called *Internet of Things* (Andonović, 2020, p. 114). This issue can relate to computer programs of technical character and can be protected by a patent. A computer program can be protected by a patent in two cases.[1]

3. (In)ability to Protect Artificial Intelligence-Generated Works Through Copyright

An author's work can be defined as a human creation that has a spiritual content, a certain form, and is original. One can conclude that the elements of the author's work are: 1) human creation; 2) spiritual content; 3) definiteness of form, and 4) originality (Marković & Popović, 2017, p. 38.).

Human creation is underlined as the first element of the author's work, suggesting that only human-created works can be considered an author's work, and that human creation does not include any pre-existing content that a human found in nature and presented as his/her work. In the conditions of modern transformative technologies, AI computer programs are no longer just an ordinary auxiliary tool, and are often solely responsible for the created content, with the developer responsible only for the AI program itself. In the above case, the man is the author of the "author" of the work itself. Given that one of the conditions for the existence of the author's work is that it is a human creation, it is clear

[1] The first case is when a computer program algorithm solves a technical problem in the functioning of the computer, which can refer to both operating and application software, which in interaction with the computer (hardware) produces the so-called "additional technical effect." The second case refers to software for automatic management of a production process or other processes, consisting of sensors (which register data and monitor the process in connection with the overall system operation), hardware, i.e., computers (that process these data), and finally a control mechanism (which ensures that the operation of the system that is monitored is maintained within the prescribed values) (Šokinjov, 2023, pp. 57-58).

that only a human being can have the status and position of the author. Subjective copyright extends over the author's life and 70 years after the author's death. Article 3 of the Berne Convention on the Protection of Literary and Artistic Works stipulates that protected authors are citizens of one of the countries of the European Union for their published or unpublished works. In the German copyright system, according to the principle of personal creation (German: *Shöpferprinzip*), the author can only be a man, as the creator of the work. It should be pointed out that at the time when the Berne Convention was concluded, computer programs, especially advanced transformative and information technology as we know it today, did not exist (Ašković, 2019, pp. 14-16).

Legal experts point out that, even in countries whose regulations do not explicitly speak of copyright as a human creation, the prevailing view is that only human creations should be protected by copyright. Such is the position of the Austrian Supreme Court. In the judgment of the Supreme Court of Austria, the court finds "that the concept of copyright is based on the protection of those creative achievements that a human being produces as a creator. Therefore, only the product of the human mind should be protected by copyright" (Lučić, 2022, p. 189). The US Copyright Office Manual states "it will register an original copyrighted work provided that the work is made by a person" (Bogataj Jančić, 2023, p. 191). An interesting case of the US Copyright Office regarding the submission of Dr Stephen Thaler's application for the AI program "DABUS". The US Copyright Office ultimately concluded "the work lacks the requisite human authorship and that Thaler has not provided evidence of sufficient creative input or intervention by a human author in the work".[2] In addition, the US Supreme Court took the position that copyright belonged only to men.[3]

[2] What makes this case particularly interesting is that the applicant, Dr. Thaler, acknowledged the AI program as the "author" of the artwork, but at the same time claimed copyright for himself as the owner of the machine, and not for AI. The US Copyright Office Review Board rejected this request with the following explanation: "Thaler must prove that the work is the product of human authorship or convince the Office to depart from the centuries-old (legal) theory of copyright". Finally, the Review Board rejected Thaler's additional argument that the work in question was the result of a contract for the commission of an author's work for the simple reason that AI does not have the legal capacity to enter into contracts (Lučić, 2022, p. 188-189).

[3] Thus, the judgment of the US Supreme Court *Burrow-Giles Lithographic Co. v Sarony states*, *inter alia*, that "copyright is the exclusive right of man to the products of his genius or intellect". The US Supreme Court in the case of *Burrow-Giles Lithographic Co. v Sarony* 111 US 53, 58, 1884, held that copyright belongs only to man. In the aforementioned judgment, the Supreme Court decided whether a photograph meets the conditions for copyright protection, as well as whether a photographer can have the status of an author. The practice of the US Supreme Court is in line with the practice of the US Copyright Office, according to which the fruits of intellectual labor that reside in the creative powers of the mind are protected. The Office will reject the request for

From the above, it can be concluded that one of the biggest obstacles for artificial intelligence-created works to receive protection under copyright is that the work is not created by a human.

If we consider the second element of the author's work, *spiritual content,* it is clear that all human creations, including all author's works, have a spiritual content. Spiritual content, which can be emotional or rational, gives the author's work sense and meaning. In a sociological sense, an author's work is a social creation that is a means of communication between people. The communication that the author's work establishes between people must be immediate, i.e., based on sense and meaning that are immanent in the work itself. For example, a credit card or a traffic sign cannot be works of authorship because they have no spiritual content and acquire sense and meaning only through the rules for their use and interpretation (Marković & Popović 2017, p. 38). Computer programs do not meet this requirement, because their work has no spiritual content. However, if this condition is viewed only from the perspective of direct communication, i.e., whether a work acquires sense and meaning only through the rules for its use, it could be claimed that computer-generated works meet this condition. For example, if we look at a picture or listen to music without knowing that it was created by a computer program, we will certainly find sense and meaning in it, in the same way as if it originated from a person (Ašković, 2019, p. 16). In the context of this element, the author will underline the case law of the Higher Regional Court in Berlin, which in January 2020 found "that a product image generated on a computer does not enjoy protection even as a work protected by copyright in the sense of Art. 2, nor as a photograph according to Art. 72 of the German Copyright Act", and took the position that "a photograph that lacks the author's creative freedom, i.e., the possibility for the author to express his creative spirit in an original way, does not meet the copyright protection requirements". [4]

the registration of the author's work if it determines that a human being did not create the work considering that copyright is limited to the author's original creations. Finally, Section 313.2 of the US Copyright Office Manual lists examples of works that lack human creation, and lists works created by a machine or a purely mechanical process operating randomly or automatically without any creative input or intervention from the human author (Ašković, 2019, p. 24).

[4] "In the specific case, the plaintiff, a perfume manufacturer, had product images of his perfume bottles created on the computer using the so-called USA Tools, representing computer tools used by professional designers to help them design. "The defendant used these images on its website to advertise the products without the plaintiff's consent. A court in Berlin eventually ruled that images of virtual objects created on a computer using electronic commands do not constitute copyrighted works. In principle, computer animations or graphics can also enjoy this protection if they are not based solely on computer activity. However, the photographs in question lacked the author's creative freedom, that is, the possibility for the author to express his creative depth in an original way". (Lučić, 2022, p. 190).

The third element of the author's work, *originality*, implies unequivocally that an author's work must be original. Originality means uniqueness or the individuality of the work. The reason why the law recognizes copyright protection for a specific work is precisely its originality, which is the essential and most significant characteristic of an author's work. The originality of the work is derived from the author's personality. The copyright science has taken the position "that every spiritual creation that is not the result of nominal or unconscionable support of already existing cultural heritage or intellectual work that is strictly determined by external frameworks that leave no room for the expression of the personal spiritual individuality of the one who works, is original". [5]

We can conclude that originality is a *conditio sine qua non* for a work to be protected by copyright, regardless of whether it meets all other conditions. Copyright protection extends only to the original elements of the author's work. Determining originality is the most difficult of all elements. The concept of originality is not defined or determined by the positive law governing this matter, and it is left to judicial practice to provide interpretations and clarifications of originality. The originality concept interpretation varies depending on national legislation and has changed throughout history". [6]

In the USA today, it is generally accepted "it should be an independent creation with a modicum of creativity". Here, instead of effort, the emphasis is on originality, and mere collections of information no longer enjoy copyright protection and are not considered original, unless that information is coordinated, selected or organized in such a way that the end result is original. The US Supreme Court in

[5] This practice gave birth to the view that a work is original if it is different from all existing works. There are areas of human creativity that are determined from all sides by practical, technical, functional or logical conditions, and they do not leave room for the manifestation of personality traits (e.g. creating alphabetical lists of tenants, a list of electricity consumers, a list of telephone subscribers), and these works cannot fulfill the condition of originality (Marković & Popović, 2017, pp. 39-41).

[6] In the USA, until 1991, the valid copyright law doctrine was "sweat of the brow", according to which copyright protection was provided primarily to reward the author's time, effort and the invested resources, while the originality of the work was neglected. Cf. for this doctrine, we can point out that databases and, for example, a telephone directory are also considered works of authorship because their authors made an effort to collect the information that makes them up (Živković, 2020, p. 628). Rural Telephone Service Co. decided in 1991 that the basis of copyright protection is not effort but originality, even in a minimal form, and that without originality there is no copyright protection as soon as the "sweat of the brow" doctrine was officially rejected. The plaintiff and defendant in the case of *Feist Publications, Inc. v Rural Telephone Service Co.* 499 U.S. 340 (1991) was a telephone directory in which the US Supreme Court held that the plaintiff's telephone directory (Rural TSC) was not a copyrighted work (*United States Supreme Court, Feist Publications, Inc. v Rural Telephone Service Co.* Inc. 499 U.S. 340 (1991).

the case of F*eist Publications, Inc. v Rural Telephone Service Co.* Inc. 499 U.S. 340 (1991) does not specify the minimum of creativity, but notes that, to qualify for copyright protection, the end result must be new, innovative, or surprising. In its decisions, the European Court of Justice took the position that originality means "that the work is the author's intellectual creation, which is present when the author can express free and creative choices and leave his stamp on the work, and which is not present when expression is limited by technical or functional rules, such as where there is only one way to express an idea, or expression is predetermined by a specific goal or narrowed rules that leave no room for free and creative choices".[7]

In its decisions, the European Court of Justice gave guidelines to national courts on how to review the originality of a work. Let us consider "The Next Rembrandt" project, where algorithms were written to find what constitutes the personal stamp of the famous Dutch painter Rembrandt. The goal of the project is to create a painting as if it were painted by Rembrandt himself. "The Next Rembrandt" project is an example of a not fully automated AI, that is, there is a significant human contribution. The teams of people who worked on "The Next Rembrandt" considered the possibilities for creativity, and that creativity was contained in the necessary algorithms that were written, and not in the painting that we are considering here. The portrait itself is the result of an algorithm or a computer program (Živković, 2020, p. 629).

Although it has not been officially confirmed by the court, legal experts point out that projects such as "The Next Rembrandt" AI or "Ai-Da" AI, which is an artistic robot that draws and paints using cameras in its eyes and its robotic arm, cannot challenge the condition of originality because they are not copies of already existing works. However, as the work must be shaped by the expression of the human spirit and human will, creativity must be expressed at the level of human consciousness, AI, however sophisticated, will never be able to reach this level. In order for a work to be protected by copyright, it must be shown that it was created not only thanks to AI, but also thanks to the person who has managed and trained AI (Lučić, 2022, p. 187).

The fourth and last element of the author's work is the *determination of the form*. "A certain shaping of the spiritual content has the character of the form of the author's work and gives that work its identity. Thanks to this, the author's work is separated from the personality of the author and becomes suitable for communication

[7] The decisions of the European Court of Justice that provide a more precise interpretation of originality include: *Infopaq International A/S v Danske Dagblades Forening from 2009, Bežpočnnostni softwarova asociace v Ministerstvo kultury from 2010, Football Associatin Premier League v QC Leisure and Karen Murphy v Media Proteciton Services from 2011, Eva Maria Painter v Standard Verlays Gmb from 2011, and Football Dataco v Yahoo! from 2012*" (Ašković, 2019. pp. 16-22).

and commercial use". The definiteness of the form, in the sense of determining the legal term of the author's work, does not mean the material form in which the work becomes factually accessible to people's senses. The form of an author's work is "a certain arrangement of signs (codes) that people use in their communication". [8] For example, in the "The Next Rembrandt" project, the image was first created in digital format to be subsequently transformed into a real image with the help of a 3D printer. The conclusion is that computer-generated works meet the copyright protection requirement in terms of the definiteness of the form element.[9]

4. Analysis of Comparative Legislation Prescribing Artificial Intelligence-Generated Works Protection Through Copyright

In comparative legislation, some countries classify computer-generated works as works of authorship, despite the fact that they only meet the condition of the definiteness of the form and/or the condition of originality. Consider, as the first example, Article 9, paragraph 3 of the UK Copyright, Designs and Patents Act (hereinafter: CDPA UK) stipulating that the author in the case of written, dramatic, artistic or musical works created partly by a computer program is considered to be the person who took the necessary measures to create the work, while Article 214 of the CDPA UK stipulates that the protection provided to computer-generated works extends only to literary, dramatic, musical and artistic works, and it does not apply to media works. Article 178 of the CDPA UK provides the definition of computer-generated works, stipulating that these are all works created in

[8] There are examples of national legislation that prescribes a mandatory material form as a condition for the existence and protection of an author's work. For example, in the USA, the spiritual content must be recorded on a physical medium (Marković & Popović, 2017, p. 39). A similar solution exists in the UK Copyright, Designs and Patents Act, which stipulates that there can be no copyright on literary, musical and dramatic works unless these works are recorded in writing or in some other form (Ašković, 2019, p. 22).

[9] In terms of material form, computer-generated content is always in digital format, unlike traditional works that exist in analog formats (books, paintings on canvas, sculptures in marble, etc.), i.e., in tangible form. Despite the fact that computer-generated works are essentially "ones and zeros", that is, an abstract mathematical expression, this does not pose a problem for copyright considering that digital form is material form, the only clear specificity being that our senses do not allow us to perceive analog copies of the work immediately, e.g., just by opening a book or looking at a painting or sculpture. However, the difference is reflected in the fact that in order to perceive a work in digital format, we need to have a device or apparatus through which we can, for example, listen to music on a compact disc, while our senses allow us to perceive analog examples of the work immediately by simply opening a book or looking at a picture. Most works that exist in digital format can also be recorded in analog format and vice versa (Ašković, 2019, p. 22).

such circumstances when there is no human author of the work, while Article 12(7) of the same Law specifies that copyright on computer-generated works lasts for 50 years from the end of the calendar year in which the work was created (Copyright, Designs and Patents Act, 1988, United Kingdom). It can be concluded that the UK positive copyright law accepts that literary, dramatic, musical and artistic works can be created by AI in the form of a computer program, and provides them copyright protection, specifying the right holder and prescribing the duration of copyright on these works. What remains disputed is that it fails to define more closely what constitutes the necessary creation actions that define the author of the work. As the Law does not specify or give any examples of the actions that are sufficient or necessary, would clicking the mouse button be enough for a person to be considered an author? Is the author the programmer who created the computer program or the computer user or a third natural and/or legal person? (Ašković, 2019, p. 24).

Another example is the Republic of Ireland Copyright and Related Rights Act, which specifies computer-generated works as works created in such circumstances that the author is not an individual (person, individual) (Copyright and Related Rights Act of the Republic of Ireland). The EU legal experts suggest that computer-generated works, which are regulated under the UK and Ireland CDPAs, should be categorized as a special (new) related right, the protection of which requires no human creative contribution, and in some cases, no economic investment.[10] In addition, the Serbian legal experts, i.e., national legal experts, have provided *de lege ferenda* proposals for the development of a separate related law that would protect AI-created artistic and literary works in the cases where they do not meet the condition of originality (Milosavljević, 2023, p. 102). Apart from the United Kingdom, the Republic of Ireland, and countries that "classified computer-generated works as works of authorship", other countries that have given the status of author's work to computer and AI-generated works and provide copyright protection include the Republic of India and New Zealand, while the Italian Copyright Law, in Article 8, paragraph 1, stipulates "the author is an entity (and thus not necessarily a human being) who is stated to be the author according to custom, or who is indicated as the author in acting, performing or presenting or broadcasting the work", meaning that there is a possibility that the Italian positive legislation also allows for AI-created works to have the status of an author's work. Finally, the EU Convention or

[10] In most cases, the designated holder of the related right will be the AI user, and not the AI system developer, because the user is the one who initiates the process on the AI program, the result of which will be the subject of protection. In addition, there may be cases where the data collection that will be created with the help of AI will remain without any protection if the results do not meet the copyright protection criteria, and at the same time, are not protected by any of the related rights, nor by the *sui generis* related right of the database producer data (Bogataj Jančić, 2023, p. 191).

Directive neither prohibits the protection of AI-created works, nor contains a provision allowing it, and it can be concluded that there is a legal void in this respect. The United States of America, as the country where the concept of AI was born, shares similar views. Thus, the Compendium (US Copyright Registry Administrative Manual) of the US Copyright Office practice states in paragraph 306 that the Bureau will only register the copyrighted work provided that the work was *created by man*. According to the Copyright Bureau practice, the fruits of intellectual labor that reside in the creative powers of the mind are protected. The Bureau will reject applications for registration of the copyrighted work if it determines that that the work was not created by a human being as the copyright is restricted to the original works by an author.[11]

Finally, it is worth to mention the practice of the Chinese court that has granted protection to an article written by AI where it completely avoided justifying the decision based on the determination of human contribution as the author. Namely, they failed to determine whether the creative decisions of a person participated in the creation of the article, and decided, based on a certain measure of the originality of the work, that the work meets the conditions for copyright protection.[12]

5. How to Determine the Copyright Holder for AI-Created Works?

In the Anglo-Saxon legal tradition, in the case of works created to order, i.e., in an employment relationship, there is an exception to the rule that the original copyright holder is the author, i.e., the person who actually created the work.

[11] For example, the practice of the U.S. Supreme Court, which in their ruling in B*urrow-Giles Lithographic Co. v Sarony* states, *inter alia,* that "copyright is the exclusive right of man to the products of his ingenuity or intellect." In addition, paragraph 313.2 of the Compendium provides examples of works that lack human creation, and lists "works created by a machine or a pure mechanical process that operates randomly or automatically without any creative input or human intervention." Based on the above and taking into account that very few countries provide copyright status to computer-generated contents, it can be concluded that, at least for the time being, copyright protection of AI-generated work will not be universally accepted in intellectual property law (Živković, 2020, p. 631).

[12] The AI, in this case, is "Tancet Dreamwriter AI Writing Robot". In the court proceedings, the defendant was "Shanghai Yingxyun Technology Company", who pointed out "that the articles that were copied were not protected by copyright, because their author was not a human being, and therefore they were in the public domain, which means that anyone could use them. Nevertheless, the court decided that the form of expression of the article corresponds to the requirements of a written work, and the content shows the selection, analysis and evaluation of relevant stock market information and data, and that the structure of the article is reasonable, the logic is clear and has a certain originality" (Bogataj Jančić, 2023, p. 192).

If the work was created in an employment relationship or to order, the employer or the customer (individual or legal entity) is considered the author, regardless of the fact that the work was essentially created by an employee or a contractor under the order contract for the work (Živković, 2020, p. 631). In the Anglo-Saxon legal theory, the solutions for determining the copyright holder in the case of AI-created works have been found in the application of the "work to order", i.e., "work in employment" doctrine. If this doctrine is applied to the programmer, as the author of a super developed computer program that represents AI, the programmer would be treated as the employer, and the AI program would be the employee, and the programmer, as the author of the "author" of AI, would remain the original copyright holder (Bridy, 2011, p. 26). From the aspect of general social utility, the prevailing views are that the goal is to encourage AI development, and that, consequently, the fairest solution would be to assign the copyright to those who are most deserving of its development, namely its investors, i.e., software companies, research institutions, international organizations and universities, which could then, as the holders, assign property rights over the author's work to end users (Živković, 2020, p. 631).

This solution is certainly easier to apply in the Anglo-Saxon legal tradition, where there is a legal assumption for the "work to order" or "work in employment" doctrine that the original copyright holder, who retains both moral and property-legal powers, is considered to be the person commissioning the work, i.e., the employer. In the European-continental system (which includes Serbia), the situation regarding the original copyright holder is different. Firstly, Article 9 of the ZASP RS stipulates that the author is the individual who created the work of authorship. Therefore, legal entities cannot be authors, but they can be copyright property rights holders. Article 95, paragraph 1, of the ZASP RS stipulates: "If a computer program is created based on a contract on the order of an author's work, the client shall acquire all rights to use the computer program, unless the contract stipulates otherwise", while Article 98, paragraph 4 of the ZASP RS prescribes: "If the author's work is a computer program or a database, the permanent holder of all exclusive property rights for the work is the employer, unless otherwise stipulated by the contract". The author is entitled to special remuneration if that is provided for by the contract. [13]

[13] Article 2/3 of the EC Directive on the legal protection of computer programs stipulates that, in the case of creation of a computer program upon the instructions by the employer in the course of performance of an obligation from the employment relationship, Member States must incorporate into their legislation a rebuttable presumption in favor of the employer on the basis of which he has the exclusive right to retain property rights components of copyright on the computer program thus created (Gliha, 2006, p. 818).

6. *ChatGPT* Case Study

While there are different types and divisions of AI, this paper will analyse *ChatGPT* as one of the most popular and used AI platforms.[14] *ChatGPT* is a language model created by the San Francisco-based AI company *OpenAI. ChatGPT* can generate natural language responses to various end-user queries. Its main focus is on language modelling, which includes creating plausible models that can accurately predict the following word in a given sequence based on the previous words. Such a system can generate text in any language, in any format, and on any topic in a few seconds. Considering the enormous influence of such systems, this has opened numerous legal and ethical issues, especially in the area of copyright. Language modelling is achieved by training models on large volumes of textual data. The goal of language modeling is to create a system that can accurately generate human responses and recognize natural language input, making it an essential component of modern natural language processing applications (Lucchi, 2023, p. 2-3.). The definition of what *ChatGPT* is was given by *ChatGPT* itself at the user's request, and it can be claimed that *ChatGPT* is an AI language module developed by *OpenAI* that uses natural language processing to generate human-understandable text in response to various user inputs.[15]

One of the most contentious and complex questions relates to the ownership of the *ChatGPT*-created content. The owner is usually the holder of the copyright property rights, i.e., the author of the texts[16] created using tools such as *ChatGPT,*

[14] Here we will mention only some of the AI types. Thus, according to the similarity to the human mind, or its level of development, AI is divided into four main types: 1) reactive machines; 2) machines with limited memory; 3) theory of mind, and 4) consciousness. In addition to this division, three additional AI types are recognized, specifically: 1) Artificial Narrow Intelligence - ANI, which refers to the ability of a computer to perform a specific task at a high level; 2) Artificial General Intelligence - AGI, which refers to whether a computer can perform any intellectual task that a human could, and 3) Artificial Superintelligence – ASI, that surpasses human intelligence (Joshi, 2019).

[15] This is essentially a "chatbot" that automatically generates and delivers data from various sources, processes it, and produces grammatically correct and contextually appropriate responses. Having been trained on a huge volume of text data, constantly learning and improving, it can serve as customer support in a variety of ways. It collects information from various sources such as books, magazines, websites, articles, which results in an original and interesting discussion. If a user asks *ChatGPT* about the essence of existence, the answer may at first seem insightful and lucid, but it may still lack a comprehensive understanding of the philosophical principles and hypotheses underlying the research (Lucchi, 2023, pp. 5-6).

[16] The distinction of whether someone is the author or the holder of copyright property rights is important in the Serbian and BiH legal systems, in which the author can only be an individual who can only own copyright moral rights, while the holder of copyright property rights can be both a legal person or a natural person.

the individual or the organization (legal entity) that provided the original ideas and data the system is based on or that issued the appropriate instructions. The AI language model that creates the generated text cannot be protected by copyright, considering that copyright in general recognizes *a human as the author of the original work* on which the human retains copyright. However, in some cases, the generated text may be considered original enough to be protected by copyright if there is *sufficient human input or intervention in its creation*.[17]

When analysing the cases of generative AI ChatGPT, legal theorists claim that the UK solution that the author is "the person who took the necessary steps to create the work" is outdated because it was created back in 1988, and the AI systems available today differ to a great extent from the information systems at that time. A particularly contentious issue is how to determine the person who took the necessary steps to create the work, and that often needs to be resolved on a case-by-case basis. In addition, given the complexity of the modern-day AI programming, there is *significant legal uncertainty in that respect* (Lucchi, 2023, pp. 6-7).

Another controversial question relates to *how an AI will exercise its rights* (seek copyright protection, assert claims) if it lacks reasoning capabilities. Every persons has a general (complete, universal) legal capacity, *meaning* "the subject's ability to have rights and obligations," in contrast to business and delictual capacity, which not everyone has.[18] Other problems relate to errors during the creation of the AI, control of the programmers and their personal responsibility, potential hacker attacks, and feeding artificial intelligence the "prejudices" of the author of the AI itself. As an example, we will take our case study about the generative artificial intelligence *ChatGPT* and the "criticisms" that it makes jokes about Krishna, but not about Jesus Christ and Prophet Muhammad (Avramović & Jovanov, 2023, p. 173). In order for AI to receive the status of the author, the legal order needs to recognize AI platforms as subjects in the eyes of the law, similarly as individuals and legal persons.[19] As an AI language model, *ChatGPT* has no legal identity and

[17] For example, AI-generated work could be considered unique enough to qualify for copyright protection if someone uses the responses as a starting point and then adds significant creative or original content, such as editing, commenting, analysis, or merging work. The person who would add additional creative or original content in this scenario would usually own the copyright on the final product (Lucchi, 2023, pp. 6-7).

[18] There are human beings that are not characterized by reason, such as, for example, small children, conceived unborn human beings *(lat. nasciturus*) or mentally ill persons who do have legal capacity, but they do not have business and delictual capacity. As for business and tort capacity, these persons are appointed their legal representatives who represent their rights and fulfill their obligations in accordance with positive legal regulations (Babić, 2008, pp. 69-78).

[19] Throughout history, not all people have had legal subjectivity, such as, for example, slaves, women and children. In the period before the American Civil War (1861-1865), African Americans

no ability to own property because it is not human. Even if the AI-created content were original enough to qualify for copyright protection, AI will not own it. According to different laws, the AI copyright for the final product could belong to the individual or legal person who has legal authority over the AI, such as the AI developer or owner. In some cases, the copyright on the content may also belong to the users – the persons who contributed to or edited the AI-generated work.[20]

The third contentious issue relating to AI *ChatGPT* is that of *originality*. While such generative AI systems excel at generating responses that engage people in conversation, these responses sometimes run the risk of being contrived, unoriginal, or simply repeating past information. Ownership of intellectual property is closely related to the uniqueness, individuality and originality of AI *ChatGPT*. The originality condition is a requirement for granting copyright protection to literary, dramatic, artistic and musical works. Although there are different approaches to defining the originality threshold, such as "the minimum degree of creativity" in the US, according to the EU originality standards, AI-created works may not qualify for copyright protection due to *lack of creative choices and personal expression*.[21]

The fourth issue relates to whether the use of copyrighted material to train generative AI programs such as *ChatGPT* constitutes *copyright infringement,*[22] and could machine learning be subsumed under "fair use" or is it a copyright infringement.[23]

---

who were born as slaves were not considered US citizens, nor did they have the right to property, and patents for their inventions were awarded to their masters, i.e., slave owners (Johnson, 2017, America's always had black inventors – even when the patent system explicitly excluded them).

[20] A practical approach would be to assign copyright to the people behind the machine's relationship, i.e., AI developers, users, and owners. The key stakeholders are the people behind the AI production process. From the common law perspective, taking into account the originality doctrine and the requirement of human authorship, there is no copyright on AI-created works without human authorship, and copyright-free works naturally belong to the public domain (Lucchi, 2023, p. 8).

[21] In addition to the fact that *ChatGPT* can provide quality answers and save users' time thanks to its extensive database, this AI does not have the necessary human input to meet the requirement of copyright protection. In addition, robots and AI technologies, regardless of their level of autonomy, cannot be considered persons under the ethical and legal frameworks. This distinction is based on the understanding that copyright protection aims to encourage and reward the unique and subjective contributions of human creators (Lucchi, 2023, pp. 9-10).

[22] Various techniques are used to facilitate the training of AI algorithms, including text and data mining and generative deep learning techniques. The challenge however lies in the fact that AI systems cannot learn from art in the same way that humans do for the simple reason that they need an exact copy of the artwork in their training dataset, and this is how datasets of millions are made, for example, as copies of copyrighted images, videos, audio or text messages (Lucchi, 2023, p. 12).

[23] Big companies like *Google, Facebook, Amazon* and *Open AI* have access to large collections of image and language data that they can use for AI development purposes and this can be seen as a competitive advantage that can improve their products and services. In addition, one of the problems

Currently, text and data harvesting is considered to be fair use in the US. However, *OpenAI* and other prominent generative AI platforms are currently facing lawsuits over alleged copyright infringements for training AI systems.[24] These cases are pending and their outcomes are uncertain. That will certainly provide the legal foundations for the use of AI from the aspect of copyright infringement. If the plaintiffs' claims are upheld by the courts, they could potentially have a significant impact on the advancement of the AI technologies. Contrary to the US, the EU has established a greater degree of responsibility for data use in AI training, governed by the Directive on Copyright in the Digital Single Market, which provides for broad exemptions regarding text and data mining and the application of the GDPR regulation. It is the developer's responsibility, when developing and training *ChatGPT,* to ensure that data is used without any copyright infringements. Article 4(1) of the Directive on Copyright in the Digital Single Market stipulates that individuals such as commercial AI system programs and educators may reproduce works or databases to extract information from text and data. They may keep these copies for as long as they are needed for the AI training process. However, the rights holders have the option to opt out of text and data mining with mining parties to protect their commercial interests (Lucchi, 2023, p. 15).

Finally, studying the development of technology through the provision of that technology requires a basic knowledge of contract law and intellectual property law (Meeker, 2018, p. 1). This complex issue could be addressed by concluding contracts that would regulate in detail intellectual property rights and personal data protection. Such contracts can establish restrictions, contract licenses (authorizations for use) for materials protected by copyright and related rights, as well as industrial property rights in the AI training processes, contract copyright, and license fees, to ensure that all parties in this legal transaction are satisfied in a fair manner (Lucchi, 2023, pp. 17-18).

The USA practice license agreement must be distinguished from the license agreement prescribed by Article 686 of the Serbian Law on Obligations, which regulates granting of the right to use objects protected by industrial property rights (inventions, technical knowledge and experience, trademarks, samples or models) for a fee. The right to use a computer program for a fee is not a contract

is that the corpus of training works also consists of works protected by copyright. This raises the question of whether the use of the work is legal and under what circumstances (Lucchi, 2023, p. 12).

[24] Specifically, in the case *Tremblay v Open AI Inc*., the plaintiff claims that *OpenAI* used their copyrighted books without obtaining proper authorization to train *ChatGPT*. Furthermore, in the case of *Silverman et. al. v OpenAI Inc*, the plaintiffs allege that *OpenAI* engaged in the unauthorized use of copyrighted work for the purpose of training *ChatGPT*, specifically a book titled "*The Bedwetter*" (Lucchi, 2023, pp. 13-14).

in the sense of the Serbian Law on Obligations. What creates confusion in the practice of countries that have an almost identical Laws on Obligations, which were created in the territory of the former Yugoslavia (such as Serbia, Montenegro, Bosnia and Herzegovina, and Croatia) is that the license refers exclusively to industrial property rights, while a computer program is protected by copyright, and it would be best to use the wording "granting the right to use a computer program" to the holder of copyright property rights in order to avoid confusion with the license that refers to industrial property rights.

7. Conclusion

The vast majority of national legislation, including in the USA, as the country where the concept of "artificial intelligence" was born, maintains the *exclusivity of human* as the only possible author. Irrespective of that, some countries in their positive legislation regulate computer (generated) works and works where the author is not a human. These include the United Kingdom, the Republic of Ireland, Italy, and New Zealand. However, in the United Kingdom, the author is considered to be the *person who has taken the necessary measures to create the work*, but this wording is not precise enough because it can lead to different interpretations in practice, and in order to regulate this issue, a solution is needed that would be more precise and specific, and regulated by a legal norm. Other objections relate to the UK Copyright, Designs and Patents Act, which entered into force back in 1988 and needs to be harmonized with the AI development to reflect the considerable progress that has been achieved since the adoption of this law.

Based on the analysis of the Serbian, Croatian, and Bosnia and Herzegovina comparative legislation in the field of copyright with a special emphasis on computer programs, the author proposes *(de lege ferenda)* that when adopting a new Bosnia and Herzegovina Law on Copyright and Related Rights or amending the existing one, following the example of Serbia and Croatia, the definition of a computer program should be extended to include the accompanying technical and user documentation in any form of expression, including preparatory material for their creation and preparatory design material. Such a solution would ensure that the concept of a computer program in the legal sense is aligned to a greater extent with the technical term "software" and add the term "original" when defining the author's work consisting of one or several computer programs and databases.

As for the proposal concerning AI and copyright, the *first de lege ferenda* proposal is to apply the "works to order" or "works in employment" doctrine to

AI-created works where the programmer is treated as the employer, and the AI would be the employee, with the developer remaining the original copyright holder, as the author of the "author" of the AI. This proposal is more adapted to the Anglo-Saxon legal system, where both individuals and legal persons can appear as the author, while in Serbia and the European continental type countries, the author of the work can only be an individual, while a legal person can only have property rights.

Some AIs can meet the originality requirement, while others, such as *ChatGPT,* often cannot meet this requirement due to the lack of creative choices and personal expression, and consequently, another *de lege ferenda* proposal could be *to introduce a new related sui generis right* that would imply less strict conditions than those required for copyright, to give room to legal regulation of AI-created works.

The third *de lege ferenda* proposal concerning the AI development and learning (which can be seen in particular in the resulting court cases in the USA brought against the owners of generated AIs such as *ChatGPT*) is to regulate the use and prohibition of copyright infringement *through contracts* between authors, i.e., copyright holders, on the one hand, and the owners who developed AI, on the other, to possibly regulate the terms of use of copyrighted works, royalties, and personal data protection, and this could be the fairest solution from the point of view of the protection of authors, as well as from the aspect of the AI owner, and the continued future AI development.

References

Andonović, S. 2020. Strateško-pravni okvir veštačke inteligencije u uporednom pravu. *Strani pravni život,* 64(3), pp. 111-123. https://doi.org/10.5937/spz64-28166

Ašković, A. 2019. *Razvoj veštačke inteligencije i pravo intelektualne svojine.* Master rad iz Prava intelektualne svojine. Beograd: Pravni fakultet Univerziteta u Beogradu.

Avramović, D. & Jovanov I. 2023. Sudijska (ne)pristrasnost i veštačka inteligencija. *Strani pravni život,* 67(2), pp. 161-177. https://doi.org/10.56461/SPZ_23201KJ

Babić, I. 2018. *Građansko pravo – uvod u građansko pravo i stvarno pravo.* Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci.

Bridy, A. 2011. Coding Creativity: Copyright and the Artificially Intelligent Author, *Stanford Technology Law Review,* 5, pp. 1-28. U. of Pittsburgh Legal Studies Research Paper No. 2011-25. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888622 (21. 2. 2024).

Bogataj Jančić, M. 2023. Može li umjetna inteligencija biti autor autorskog djela?. In: Završnik, A. & Simončić, K. (eds), *Pravo i umjetna inteligencija – pitanje etike, prava čovjeka i društvene štete*. Sarajevo: Dobra knjiga, pp. 180-192.

Ćemalović, U. 2021. Intellectual property rights and digital transformation in Estonia – aspects related to copyright and patent protection. *Strani pravni život*, 65(4), pp. 701-713. https://doi.org/10.5937/spz65-34681

Gliha, I. 2006. Prava na autorskim djelima nastalim u radno odnosu i po narudžbi. *Zbornik Pravnik fakulteta Zagreb*, 56 (special no.), pp. 791-836.

Joshi, N. 2019. *7 Types of Artificial Intelligence*. Available at: https://www.forbes.com/sites/cognitiveworld/2019/06/19/7-types-of-artificial-intelligence/?sh=1a5013233ee7 (2. 2. 2024).

Johnson, S. 2017. *America's always had black inventors – even when the patent system explicitly excluded them*. Available at: http://theconversation.com/americas-always-had-black-inventors-even-when-the-patent-system-explicitly-excluded-them-72619 (21. 2. 2024).

Kunda, I. & Matanovac Vučković, R., 2010. Raspolaganje autorskim pravo na računalnom programu – materijalnopravni i kolizijskopravni aspekti. *Zbornik Pravnog fakulteta Sveučišta u Rijeci*, 31(1), pp. 85-132.

Lucchi, N. 2023. ChatGPT – A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems. *European Journal of Risk Regulation*, pp. 1-23. https://doi.org/10.1017/err.2023.59

Lučić, S. 2022. Veštačka inteligencija i autorsko pravo. In: Vujisić, D. (ed.), *XXI vek – vek usluga i Uslužnog prava*. Kragujevac: Pravni fakultet Univerizeta u Kragujevcu, Institut za pravne i društvene nauke, pp. 181-194. https://doi.org/10.46793/XXIv-13.181L

Marković, S. 2018. *Pravo intelektualne svojine i informaciono društvo*, 2. dopunjeno izdanje. Beograd: JP Službeni glasnik.

Marković, S. & Popović, D. 2017. *Pravo intelektualne svojine*. 5. izmjenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za izdavašto i informisanje.

Meeker, H., 2018. *Technology Licensing: A Primer.* 4th Edition. California.

Milosavljević, N. 2023. Orignalnost književnih i umetničkih dela stvorenih od strane veštačke inteligencije. In: Perović Vujačić, J. S. (ed.), *Međunarodni pravni odnosi i pravda – Zbornik radova 36. susreta Kopaoničke škole prirodnog prava – Slobodan Perović*. Beograd: Kopaonička škola prirodnog prava, pp. 87-105.

Russell, S. & Norvig, P. 2011. *Artificial Intelligence: A Modern Approach*. 3rd Edition. Pearson Education Inc.

Steidl, M., Golendukhina, V., Felderer, M & Ramler, R. 2023. Automation and Development Effort in Continuous AI Development: A Practitioners' Survey. *2023 49th Euromicro Conference on Software Engineering and Advanced Applications (SEAA)*. pp. 120-127. Available at: https://www.researchgate.net/publication/377074021_Automation_and_Development_Effort_in_Continuous_AI_Development_A_Practitioners'_Survey (31. 1. 2024). https://doi.org/10.1109/SEAA60479.2023.00027

Šokinjov, S. 2023. *Pravo industrijske svojine*. 5. izmenjeno i dopunjeno izdanje. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu.

Živković, A. 2020. The Challenges of Protecting Intellectual Property Rights in the Age of Transformative, Digital Information and Communication Technologies with Special Reference to Artificial Intelligence. In*:* Mirjanić, Ž. & Milinković, I. (eds.) *Transformative Technologies: Legal and Ethical Challenges of the 21st Century*. Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci, pp. 619-631.

Živković, A. & Hasić, H. 2022. Korištenje baze podataka kao predmeta autorskopravne i zaštite srodnog prava proizvođača baze podataka u eri informacionih tehnologija. In: Mirjanić, Ž, Milinković, I. & Vlaški, B. (eds.), *Izazovi i perspektive razvoja pravnih sistema u XXI vijeku* Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci, pp. 315-338.

Legal Sources

Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS Agreement (as amended on 23 January 2017). World Trade Organization (WTO) TRT/WTO01/002.

Copyright, Designs and Patents Act. 1988. United Kingdom. Available at: http://www.legislation.gov.uk/ukpga/1988/48 (17. 2. 2024).

Copyright and Related Rights Act of the Republic of Ireland, No. 28 of 2000. Available at: https://www.wipo.int/edocs/lexdocs/laws/en/ie/ie098en.pdf (23. 2. 2024).

Law of Contract and Torts of the Republic of Serbia, *Official Gazette of the SFR of Yugoslavia*, Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the SR Yugoslavia*, No. 31/93*, Official Gazette of Serbia and Montenegro*, No. 1/2003, Constitutional Charter and *Official Gazette of the Republic of Serbia*, No. 18/2020.

Law on Copyright and Related Rights of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 63/2010.

Law on Copyright and Related Rights of the Republic of Croatia, *Official Gazette of the Republic of Croatia,* No. 111/2021.

Law on Copyright and Related Rights of the Republic of Serbia, *Official gazette of the Republic of Serbia*, Nos. 104/09, 99/11, 119/12, 29/16 – decision of Constitutional Court and 66/2019.

WIPO Copyright Treaty – WCT, *Official Journal L 089 , 11/04/2000 P. 0008 – 0014.*

Case Law

United States Supreme Court, Feist Publications, Inc. v Rural Telephone Service Co. Inc. 499 U.S. 340 (1991). Available at: https://supreme.justia.com/cases/federal/us/499/340/, (22 February 2024).

Uroš I. Zdravković*

Pregledni naučni članak
UDK: 347.447: 339.5
doi: https://doi.org/10.56461/SPZ_24302KJ
Primljeno: 4. 1. 2024.
Izmenjeno: 9. 9. 2024.
Prihvaćeno: 23. 9. 2024.

PRAVNE POSLEDICE RASKIDA UGOVORA O MEĐUNARODNOJ PRODAJI ROBE**

Sažetak

Predmet ovog rada su pravne posledice raskida ugovora o međunarodnoj prodaji robe u režimu Konvencije UN o ugovorima o međunarodnoj prodaji robe. Cilj istraživanja je da se naučnoj i stručnoj javnosti ponudi sistematski pregled najznačajnijih aspekata posledice raskida ugovora o međunarodnoj prodaji robe u svetlu odredaba Konvencije. Osnovno polazište u radu se zasniva na tome da raskid ugovora izaziva ozbiljne pravne posledice i da realizacija prava i obaveza nakon raskida može biti praćena brojnim pravnim i faktičkim komplikacijama. Metodologija istraživanja se ogleda u analizi odgovarajućih odredaba Konvencije, dostupne sudske i arbitražne prakse, kao i dosadašnjih zapažanja domaćih i stranih autora u vezi sa temom rada. Na osnovu odredaba Konvencije, ugovorne strane se nakon raskida ugovora oslobađaju svojih obaveza, uz određene izuzetke. Konvencija uspostavlja i obavezu restitucije, u smislu da svaka strana koja je izvršila ugovor u celini ili delimično, nakon raskida ugovora, može zahtevati povraćaj od druge strane onoga što je dato. Pored ovih posledica, prodavac je dužan da uz vraćanje novca koji je dobio od kupca na ime plaćanja cene za robu vrati kupcu i kamatu, dok je kupac, uz određene izuzetke, dužan da prodavcu, prilikom vraćanja robe, vrati i korist koju je imao od robe.

Ključne reči: Konvencija UN o ugovorima o međunarodnoj prodaji robe, ugovor o međunarodnoj prodaji robe, raskid ugovora, pravne posledice, restitucija.

* Doktor pravnih nauka, Vanredni profesor, Pravni fakultet Univerziteta u Nišu.
E-mail: *uros@prafak.ni.ac.rs*
ORCID: *https://orcid.org/ 0000-0002-2581-0195*

** Rad je nastao kao rezultat finansiranja od strane Ministarstva nauke, tehnološkog razvoja i inovacija, po Ugovoru evidencioni broj 451-03-65/2024-03/ 200120 od 5. 2. 2024. godine.

LEGAL EFFECTS OF THE AVOIDANCE OF THE CONTRACT FOR THE INTERNATIONAL SALE OF GOODS

Summary

The subject of this paper are the legal consequences of the termination of the contract for the international sale of goods under the regime of the UN Convention on Contracts for the International Sale of Goods. The aim of the research is to offer a systematic review of the most significant aspects of the consequences of the termination of the contract for the international sale of goods in the light of the mentioned Convention. The basic premise of the work is based on the fact that the termination of the contract causes serious legal consequences and that the realization of rights and obligations after the termination may be accompanied by numerous legal and factual complications. The research methodology is reflected in the analysis of the relevant provisions of the UN Convention on Contracts for the International Sale of Goods, available judicial and arbitration practices, as well as previous observations of domestic and foreign authors regarding the topic of the work. Based on the provisions of the aforementioned Convention, the contracting parties are released from their obligations after the termination of the contract, with certain exceptions. The Convention also establishes the obligation of restitution, in the sense that any party that has performed the contract in whole or in part, after termination of the contract, may demand the return of what was given from the other party. In addition to these consequences, the seller is obliged to return the money he received from the buyer for the payment of the price for the goods to the buyer and the interest, while the buyer, with certain exceptions, is obliged to return to the seller, when returning the goods, the benefit that he had obtained from goods.

Keywords: Convention on contracts for the international sale of goods, contract on the international sale of goods, avoidance, legal effects, restitution.

1. Uvodna razmatranja

Kada se neka od ugovornih strana suoči sa povredom ugovora, na raspolaganju ima, u zavisnosti od okolnosti povrede, više pravnih sredstava koja može upotrebiti sa ciljem zaštite svojih prava i interesa. Raskid ugovora predstavlja najradikalnije pravno sredstvo koje ugovorna strana može upotrebiti kada se suoči sa povredom ugovora. Od svih ostalih sredstava kojima se ugovorne strane mogu služiti, jedino raskid podrazumeva prestanak ugovora. Ukoliko se odluči za raskid ugovora, strani moraju biti poznate eventualne posledice takvog postupka. To se odnosi i na stranu koja čini povredu ugovora: u njenom je interesu da zna koje je sve obaveze i posledice čekaju ukoliko druga strana raskine ugovor.

Predmet analize ovog rada jesu pravne posledice raskida ugovora u režimu Konvencije UN o ugovorima o međunarodnoj prodaji robe[1] (dalje i: Konvencija; Bečka konvencija). Pomenuta Konvencija sadrži nekoliko članova kojima se uređuju posledice raskida ugovora. Pritom, za ove odredbe se ne može tvrditi da predviđaju posebno unikatna rešenja u odnosu na nacionalne pravne sisteme. One predstavljaju odraz i simbiozu rešenja u pogledu pravnih posledica raskida ugovora koja su zastupljena u reprezentativnim pravnim sistemima.

Da bi se primenile odredbe Bečke konvencije koje uređuju pravne posledice raskida ugovora, potrebno je da se ispune dva uslova.

Prvi uslov podrazumeva da je ugovor raskinut valjano. To znači da su se prethodno stekli materijalnopravni uslovi za raskid ugovora,[2] i da je izjava o raskidu ugovora proizvela svoje dejstvo, u smislu da je data na način i u proceduri na koju upućuje čl. 26 i ostale relevantne odredbe Konvencije. Konvencija predviđa bitnu povredu ugovora kao glavni „reper" za postojanje osnova za raskid ugovora (Ceesay, 2021, p. 187). Materijalnopravni uslovi za raskid ugovora se stoga najčešće povezuju sa postojanjem bitne povrede ugovora, nakon čega strana ima pravo da upotrebi raskid ugovora, kao pravno sredstvo „poslednje namene" (Ay, 2022, p. 26). Što se tiče formalnosti u vidu davanja izjave o raskidu, Konvencija ne predviđa naročite proceduralne uslove za raskid ugovora (Babiak, 1992, p. 135). Pitanje forme i procedure raskida ugovora o međunarodnoj prodaji robe lakonski je uređeno članom 26 Bečke konvencije koji glasi: „Izjava o raskidu ugovora ima dejstvo jedino ako je o njoj obaveštena druga strana." Obaveštenje o raskidu može biti učinjeno u bilo kojoj formi. Član 26, kao ni ostale relevantne odredbe

[1] Konvencija je doneta 11. aprila 1980. godine u Beču, a stupila je na snagu 1. januara 1988. godine. Konvenciju je do sada ratifikovalo 97 država. Socijalistička Federativna Republika Jugoslavija ratifikovala je Konvenciju 1984. godine (*Službeni list SFRJ – Međunarodni ugovori*, br. 10-1/1984). Republika Srbija primenjuje Konvenciju kao jedan od pravnih sledbenika SFRJ.

[2] Više o materijalnopravnim uslovima za raskid ugovora vid. Zdravković, 2023, pp. 471-489.

Konvencije, ne predviđa naročitu formu za izjavu o raskidu, niti se pominju obavezni elementi takve izjave (Flechtner, 1988, p. 83).

Drugi uslov je da strane nisu raskinule ugovor putem sporazuma koji predviđa drugačija prava i obaveze nakon raskida. Tada će se na njihova prava i obaveze primeniti odredbe uzajamno postignutog sporazuma o raskidu. Norme Bečke konvencije koje uređuju pravne posledice i dejstvo raskida primenjuju se samo kada je raskid jednostrano učinila jedna ugovorna strana, odnosno kada strane nakon jednostranog raskida nisu sačinile sporazum o međusobnim pravima i obavezama (Odluka Međunarodne trgovačke arbitraže pri Trgovačko-industrijskoj komori Ruske Federacije br. 82/1996 od 3. marta 1997. godine; Presuda Višeg regionalnog suda u Minhenu u predmetu *Italian cars*, br. 7 U 3771/97 od 28. januara 1998. godine – *CLOUT case* No. 288). Ukoliko se pak pojavi neko pitanje koje nije izričito uređeno uzajamnim sporazumom o raskidu ili uzajamnim sporazumom o pravima i obavezama nakon jednostranog raskida, na njega će se primeniti relevantni članovi Konvencije koji uređuju pitanje dejstva raskida ugovora (Presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine – *CLOUT case* No. 422).

Predmet ovog rada su pravne posledice raskida ugovora, odnosno prava i obaveze koje nastaju između strana nakon što je ugovor između njih raskinut, a u svetlu odredaba Bečke konvencije. Pritom, pored pravnih, nisu zanemarljive ni ekonomske posledice raskida ugovora o međunarodnoj prodaji robe. Prodavac se može suočiti sa teškoćama da robu proda nekom trećem licu, uz rizik gubitka njene vrednosti. Kupac takođe može imati ekonomske gubitke ukoliko je već investirao u određene poslove očekujući robu koja je bila predmet ugovora (Magnus, 2005, p. 423). Međutim, autor neće ulaziti u ekonomske aspekte raskida ugovora, već će se držati pravnih. Takođe, rad se ne bavi ni materijalnim ni proceduralnim uslovima za raskid ugovora. Pretpostavka za raspravu u okviru rada je da je ugovor već valjano i osnovano raskinut. Stoga su osnovno polazište analize odgovarajuće odredbe Bečke konvencije koje se ekskluzivno primenjuju u situaciji kada je ugovor raskinut. Međutim, i u tom pogledu je napravljen jedan izuzetak. Članovi 75 i 76 Konvencije uređuju pravo na nadoknadu štete u situaciji kada je ugovor raskinut (u vidu supstitutivne transakcije i nadoknade štete kada roba ima tekuću cenu). Cilj autora je bio da u okviru prihvatljivog obima za jedan rad predstavi zainteresovanoj domaćoj javnosti osnovne i najznačajnije aspekte posledica raskida ugovora o međunarodnoj prodaji robe. Zbog toga je autor odlučio da iz analize izostavi oblast nadoknade štete, koja po svojoj kompleksnosti zaslužuje obradu u okviru samostalnog rada koji bi se nadovezao na ovaj. Od velike pomoći autoru su bili dostupni izvori sudske i arbitražne prakse u pogledu tumačenja relevantnih odredaba Konvencije, kao i odgovarajuća dosadašnja zapažanja domaćih i stranih autora u literaturi koja je autoru bila dostupna.

2. Oslobođenje od ugovornih obaveza

Osnovna posledica raskida ugovora je oslobođenje strana od obaveza koje su preuzele na osnovu ugovora. Ovo pitanje je uređeno u st. 1, čl. 81 Konvencije UN o ugovorima o međunarodnoj prodaji robe koji glasi:

> „Raskidom ugovora obe strane se oslobađaju svojih ugovornih obaveza, izuzev eventualne obaveze da se nadoknadi šteta. Raskid ne utiče na odredbe ugovora o rešavanju sporova ili na bilo koju odredbu ugovora koja uređuje prava i obaveze strana posle raskida ugovora."

Prema Bečkoj konvenciji, u pogledu obaveza koje su ugovorne strane preuzele na osnovu ugovora, raskid ugovora ima dejstvo *pro futuro*. Ugovorne strane se ubuduće oslobađaju od obaveza koje do tada nisu izvršile. Tako, na primer, kupac neće biti u obavezi da plati cenu ili preuzme isporuku, a prodavac neće biti obavezan da isporuči robu, preda robna dokumenta ili prenese svojinu na robi. Ugovorne strane će biti oslobođene i od izvršenja drugih obaveza na osnovu ugovora ili Konvencije. Ukoliko je ugovor delimično raskinut na osnovu čl. 51 ili 73 Konvencije,[3] strane se oslobađaju od obaveza koje se odnose na konkretni deo ugovora koji je raskinut (*Chengwei, 2005, p. 10;* Lookofsky, 2000, p. 167). Da bi oslobođenje od obaveza nastupilo, potrebno je da je ugovor valjano raskinut. Ukoliko nije postojao materijalni osnov za raskid ugovora (u vidu odgovarajuće povrede ugovora) ili ugovor nije raskinut u odgovarajućoj formi i proceduri (nije poslato adekvatno obaveštenje o raskidu), strane će i dalje biti vezane svojim obavezama.[4]

Član 81(1) Bečke konvencije predviđa *izuzetke* od pravila prestanka važenja obaveza nakon raskida. Na osnovu ove odredbe, mogu se izdvojiti *tri izuzetka* na koje ne utiče raskid ugovora.

Prvi izuzetak se odnosi na obavezu nadoknade štete. Ugovorna strana čije je neizvršenje podstaklo drugu stranu da raskine ugovor dužna je da toj strani nadoknadi štetu nakon raskida ugovora. Ovo pravilo je opšteprihvaćeno i u

[3] Čl. 51 Konvencije uređuje prava kupca usled delimičnog izvršenja obaveza od strane prodavca, dok čl. 73 Konvencije uređuje pravo na delimični raskid ugovora usled povrede obaveze kod ugovora sa uzastopnim isporukama.

[4] Presuda Višeg regionalnog suda u Kelnu u predmetu *Dealer agreement*, br. 18 U 121/97 od 21. avgusta 1997. godine (CLOUT case No. 284); presuda Saveznog suda Nemačke u predmetu *Computer printing system*, br. VIII ZR 306/95 od 4. decembra 1996. godine (CLOUT case No. 229); presuda Višeg regionalnog suda u Frankfurtu na Majni u predmetu *Italian shoes* br. 5 U 15/93 od 18. januara 1994. godine (CLOUT case No. 79); presuda Višeg regionalnog suda u Diseldorfu u predmetu *Textile*, br. 6 U 32/93 od 10. februara 1994. godine (CLOUT case No. 81); presuda Višeg regionalnog suda u Minhenu u predmetu 7 U 4419/93 od 2. marta 1994. godine (CLOUT case No. 83); odluka Arbitražnog suda Privredne komore Ciriha br. 273/95 od 31. maja 1996. godine; odluka Arbitražnog suda Međunarodne trgovinske komore br. 9887 iz avgusta 1999. godine.

sudskoj i arbitražnoj praksi.[5] Nakon raskida ugovora, strane često posežu za supstitutivnom transakcijom (kupovina ili prodaja radi pokrića), na osnovu čl. 75 Konvencije, odnosno kupac kupuje robu od drugog prodavca ili prodavac prodaje robu drugom kupcu. Strana koja trpi povredu ugovora i koja je ugovor raskinula, pa potom izvršila supstitutivnu transakciju, ima pravo na konkretnu štetu u vidu razlike između ugovorene cene iz ugovora koji je raskinut i cene koja je ugovorena prilikom supstitutivne transakcije (Ay, 2023, p. 156). Ovde se supstitutivna transakcija navodi samo kao primer, jer će strana u svakom slučaju imati pravo na nadoknadu štete ukoliko je ona nastala usled neizvršenja obaveze druge strane, bez obzira na to da li je došlo do supstitutivne transakcije.

Drugi izuzetak predstavljaju odredbe ugovora koje uređuju rešavanje sporova. Strane u ugovoru mogu predvideti arbitražni način rešavanja sporova unošenjem odgovarajuće arbitražne klauzule u tekst ugovora ili zaključivanjem posebnog arbitražnog sporazuma. U pravnom smislu, arbitražna klauzula je odvojena i samostalna od suštinskih odredaba ugovora (Presuda Saveznog suda Nemačke u predmetu *German Buyer v. Dutch Seller of Spice,* br. I ZR 245/19 od 20. novembra 2020. godine), te „nadživljava" ostale odredbe ugovora koji je raskinut i dalje deluje na obaveze strana u pogledu pokretanja procedure pravne zaštite (Presuda Okružnog suda Južnog distrikta Njujork u predmetu *Filanto, S.p.A. v. Chilewich International Corp.* od 14. aprila 1992. godine – CLOUT case No. 23).

Treći izuzetak obuhvata prava i obaveze strana posle raskida ugovora. Smisao ovog izuzetka se prevashodno sastoji u očuvanju pravnog dejstva klauzula koje predviđaju ugovornu kaznu (Odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *German goods*, br. 9978 iz marta 1999. godine). To, međutim, ne znači da će se ugovorna kazna aktivirati automatski nakon raskida ugovora. Ugovorna kazna se vezuje za neizvršenje konkretne obaveze, a ne za raskid ugovora. Ukoliko je ugovor raskinut zbog povrede obaveze za koju nije predviđena ugovorna kazna, ona se neće aktivirati, bez obzira na to što je ugovor raskinut. Pored toga, ovaj izuzetak se primenjuje i na klauzule ugovora koje uređuju obaveze strana u pogledu vraćanja robe ili drugih stvari koje su isporučene tokom

[5] Presuda Apelacionog suda Kantona Ticino (Švajcarska) u predmetu *Cacao beans*, br. 12.97.00193 od 15. januara 1998. godine (CLOUT case No. 253); presuda Okružnog suda u Hajlbronu (Nemačka) u predmetu *Film coating machine*, br. 3 KfH O 653/93, od 15, septembra 1997. godine (CLOUT case No. 345); presuda Privrednog suda Kantona Cirih u predmetu *Sunflower oil*, br. HG950347 od 5. februara 1997. godine (CLOUT case No. 214); presuda Višeg regionalnog suda u Hamburgu u predmetu *Jeans*, br. 1 U 31/99 od 26. novembra 1999. godine (CLOUT case No. 348); presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine (CLOUT case No. 422); odluka Arbitraže Trgovačke komore Ziriha br. ZHK 273/95 od 31. maja 1996. godine; odluka arbitražnog suda Privredne komore Hamburga u predmetu *Chinese goods* od 21. marta 1996. godine (CLOUT case No. 166).

izvršenja ugovora (Presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine – *CLOUT case* No. 422), zatim na pitanja koja se tiču isključenja ili ograničenja odgovornosti (Tallon, 1987, p. 603) itd.

Iako raskid ugovora po sebi ne dovodi do prestanka navedenih obaveza iz ugovora, to ne mora značiti da će one u svakom slučaju ostati na snazi. Ukoliko se ispostavi da su u suprotnosti sa merodavnim nacionalnim ili sa međunarodnim pravom, takve klauzule neće važiti nakon raskida ugovora (Enderlein & Maskow, 1992, p. 286). Poput ostalih odredaba ugovora, Konvencija UN o ugovorima o međunarodnoj prodaji robe ne uređuje pitanje njihove punovažnosti, već to prepušta merodavnom nacionalnom pravu (čl. 4).

Nabrojani izuzeci u čl. 81 Bečke konvencije ne predstavljaju ekskluzivnu listu obaveza koje ne prestaju nakon raskida ugovora. Ako dođe do raskida ugovora, strane mogu, u zavisnosti od situacije, imati i obavezu čuvanja robe, na osnovu čl. 85-88 Konvencije. Pored toga, postoje i druge obaveze koje mogu nastaviti da važe i dalje na osnovu ugovornih klauzula, ali i običaja koji se primenjuju između ugovornih strana. Tako, na primer, obaveza čuvanja poslovne tajne i drugih poverljivih informacija koje su obelodanjene tokom pregovora ili izvršenja ugovora može delovati na ugovorne strane i nakon raskida ako to proizlazi iz ugovora ili običaja.

3. Obaveza restitucije nakon raskida ugovora

Član 81(2) Konvencije UN o ugovorima o međunarodnoj prodaji robe predviđa da „strana koja je izvršila ugovor u celini ili delimično može zahtevati od druge strane vraćanje onog što je na osnovu ugovora isporučila ili platila. Ako su obe strane dužne da izvrše vraćanje, uzajamna vraćanja vrše se istovremeno."

Citiranom odredbom Bečke konvencije uspostavlja se obaveza restitucije, u smislu da svaka strana koja je izvršila ugovor u celini ili delimično, nakon raskida ugovora, može zahtevati povraćaj od druge strane onoga što je dato. Restitucijom se izvršenje ugovora „odmotava unazad": za razliku od oslobođenja od obaveza, koje ima dejstvo *pro futuro*, restitucija ima retroaktivnu prirodu. Raskidom se preusmeravaju obaveze između ugovornih strana (Schlechtriem, 1986, p. 107) i kupac i prodavac menjaju uloge: kupac će imati obavezu da „isporuči" robu prodavcu, dok će prodavac imati obavezu da „plati" cenu kupcu.

U vezi sa ovim pitanjem, u literaturi se vodi debata da li raskid ugovora, u smislu Bečke konvencije, ima retroaktivnu ili prospektivnu prirodu. Prema retroaktivnoj teoriji, koja je prihvaćena u francuskom pravu, raskid ugovora poništava dejstvo ugovora od samog zaključenja: to podrazumeva da strane treba da se dovedu u situaciju u kojoj bi bile da do zaključenja ugovora nikad nije ni došlo. Osnov za naknadu

štete i vraćanje primljene robe se u tom slučaju nalazi u neosnovanom obogaćenju (Schlechtriem & Schwenzer, 2005, pp. 848-849). Francuska doktrina polazi od retroaktivnog dejstva izjave o raskidu, kako u obligacionopravnom, tako i u stvarnopravnom smislu – kako ističe profesor Vukadinović (2012, p. 551): „to je i moguće jer se svojina prenosi samim zaključenjem ugovora, koji se u slučaju raskida smatra kao da nije ni postojao tako da ni svojina na prodatoj robi nije preneta pa je nakon raskida ugovora kupac obavezan da primljenu robu vrati." S druge strane, prospektivna teorija, koja se primenjuje u nemačkom i anglosaksonskom pravu, podrazumeva da se ugovor raskida *ex nunc*: strane se oslobađaju od ugovornih obaveza nadalje, ali se aktivira obaveza restitucije (*Chengwei, 2005, pp. 3-6; Vukadinović, 2012, p. 551). Nakon izjave o raskidu, ugovor nije u potpunosti opozvan već se transformiše – reprogramira u novi sporazum o prestanku ugovornog odnosa (*Schlechtriem & Schwenzer, 2005, p. 848). *U smislu navedenog, za Konvenciju UN o ugovorima o međunarodnoj prodaji robe se ne može reći da isključivo prihvata retroaktivnu ili prospektivnu teoriju raskida ugovora. U pogledu oslobođenja od obaveza, raskid ugovora ima prospektivno dejstvo – strane se oslobađaju od obaveza za ubuduće: radnje koje su već preduzete tokom izvršenja ugovora se ne mogu „vratiti". Kada je u pitanju obaveza restitucije koja se uspostavlja nakon raskida ugovora, ona ima retroaktivno dejstvo – strane su u obavezi da vrate jedna drugoj ono šta su primile na osnovu ugovora.*

Širi smisao restitucije se ogleda u prevenciji neosnovanog obogaćenja, s obzirom na to da strane nisu ovlašćene da zadrže ono što su primile na osnovu ugovora koji više ne postoji. Pravo na restituciju ima svaka ugovorna strana i na ovo ne utiče okolnost koja je od njih povredila ugovor i koja je strana raskinula ugovor (Babiak, 1992, p. 136). Prodavac može tražiti povraćaj delimično ili u celini isporučene robe (Presuda Višeg regionalnog suda u Oldenburgu (Nemačka) u predmetu *Leather seating arrangement*, br. 11 U 64/94 od 1. februara 1995. godine – *CLOUT case* No. 165), dok kupac može tražiti povraćaj delimično ili u celini isplaćenog iznosa cene za robu (Presuda Okružnog suda u Sanu (Švajcarska) u predmetu Spirits, br. T 171/95 od 20. februara 1997. godine – *CLOUT case* No. 261; presuda Federalnog suda Australije u predmetu *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace,* br. SG 3076 of 1993 FED No. 275/95 od 28. aprila 1995. godine – *CLOUT case* No. 308). Važno je napomenuti da obaveza restitucije iz čl. 81(2) Bečke konvencije ne podrazumeva vraćanje ugovorne strane u poziciju u kojoj bi bila da je ugovor do kraja valjano izvršen ili u poziciju u kojoj bi bila da nije došlo do zaključenja ugovora. Ova pitanja su uređena članovima Konvencije koji se tiču prava na nadoknadu štete. U kontekstu čl. 81(2) Konvencije, prodavac će imati pravo na povraćaj konkretne isporučene robe, dok će kupac imati pravo na povraćaj tačnog iznosa cene ili dela cene koji je isplatio prodavcu,[6] uz pridodatu kamatu.

[6] Odluka Međunarodne trgovačke arbitraže pri Privredno-industrijskoj komori Ruske Federacije

Prema stavu sudske prakse prilikom tumačenja i primene Bečke konvencije, kupac je dužan da prodavcu vrati konkretnu robu koju je primio i na ovo pravilo ne utiče činjenica da je ta roba oštećena tokom vraćanja (Presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine – *CLOUT case* No. 422). Kupac, na osnovu čl. 81(2) Konvencije, neće biti obavezan da prodavcu vrati zamensku robu (ako se, na primer, radi o generičnoj robi), već samo konkretnu robu. Ovo pravilo ne treba poistovećivati sa obavezom kupca da robu vrati u suštinski istom stanju u kome ju je primio, na osnovu čl. 82 Konvencije. Obaveza kupca da robu vrati u suštinski istom stanju u kome ju je primio je materijalni preduslov (podložan izuzecima) za raskid ugovora od strane kupca (Zdravković, 2023, p. 483-485). S druge strane, obaveza restitucije iz čl. 81(2) Konvencije podrazumeva da je ugovor već valjano raskinut i da su se prethodno stekli i materijalni i formalni uslovi za raskid.[7]

Kao što prodavac ima pravo da traži povraćaj robe, tako i kupac ima pravo da traži povraćaj plaćene cene ili dela cene od prodavca. Iako Bečka konvencija ne uređuje to pitanje, arbitražna praksa je ustanovila da kupac ima pravo da traži povraćaj iznosa na ime plaćene cene u istoj valuti u kojoj je taj iznos prvobitno plaćen (Odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *Assembly line for batteries* br. 7660 od 1. januara 1994. godine – *CLOUT case* No. 302).

Prema Bečkoj konvenciji, ukoliko želi da se sprovede restitucija, ugovorna strana mora to zahtevati od druge strane. Ona to može učiniti i u odgovarajućem pravnom postupku u vezi sa povredom ugovora pred nadležnim forumom. Sud ili

br. 1/1993 od 15. aprila 1994. godine; odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *Assembly line for batteries* br. 7660 od 1. januara 1994. godine (CLOUT case No. 302); presuda Apelacionog suda u Parizu u predmetu *Société Productions S.C.A.P. v. Roberto Faggioni* od 14. januara 1998. godine (CLOUT case No. 312); presuda Okružnog suda u Hajlbronu (Nemačka) u predmetu *Film coating machine*, br. 3 KfH O 653/93, od 15. septembra 1997. godine (CLOUT case No. 345); presuda Apelacionog suda Kantona Ticino (Švajcarska) u predmetu *Cacao beans*, br. 12.97.00193 od 15. januara 1998. godine (CLOUT case No. 253); presuda Privrednog suda Kantona Cirih u predmetu *Sunflower oil*, br. HG950347 od 5. februara 1997. godine (CLOUT case No. 214); presuda Višeg regionalnog suda u Celeu (Nemačka), u predmetu *Used printing machines*, br. 20 U 76/94, od 24. maja 1995. godine (CLOUT case No. 136); presuda Kasacionog suda Francuske u predmetu *Karl Schreiber GmbH v. Société Thermo Dynamique Service et al.* od 26. maja 1999. godine (CLOUT case No. 315); odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *German goods*, br. 9978 iz marta 1999. godine (CISG-online No. 708); odluka Prijateljske arbitraže Hamburga u predmetu *Cheese*, od 29. decembra 1998. godine (CLOUT case No. 293).

[7] Odluka Prijateljske arbitraže Hamburga u predmetu *Cheese*, od 29. decembra 1998. godine (CLOUT case No. 293); presuda Privrednog suda Kantona Cirih u predmetu *Sunflower oil*, br. HG950347 od 5. februara 1997. godine (CLOUT case No. 214); presuda Okružnog suda u Hajlbronu (Nemačka) u predmetu *Film coating machine*, br. 3 KfH O 653/93, od 15. septembra 1997. godine (CLOUT case No. 345); odluka Međunarodne trgovačke arbitraže pri Privredno-industrijskoj komori Ruske Federacije br. 1/1993 od 15. aprila 1994. godine.

arbitraža mogu odlučiti da ne razmatraju pravo strane na restituciju, niti da obavežu drugu stranu da izvrši restituciju ukoliko takva restitucija nije izričito zahtevana (Odluka Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije br. T-4/05 od 15. jula 2008. godine – *CLOUT case* No. 1021). Pritom je poželjno da strana precizno i pojedinačno navede sve ono što smatra da treba da bude predmet restitucije. Štaviše, ugovorna strana i ne treba da izvrši restituciju ako nema izričitog zahteva druge ugovorne strane. Ovo je i razumljivo jer mogu postojati situacije kada strani nije u interesu da primi natrag određenu robu, a nije isključeno ni da strana usled prijema te robe podnese i dodatne troškove. U tom slučaju, ta strana (u konkretnom slučaju prodavac) može zahtevati od druge strane (kupca) da preproda robu i da po odbitku troškova i eventualne štete izvrši povraćaj novčane vrednosti robe.

Član 81 Bečke konvencije ne utvrđuje koja su prava i potraživanja prodavca ukoliko kupac, nakon raskida ugovora, ne može da vrati robu koju je primio na osnovu ugovora. Pritom nije od značaja da li je razlog za raskid na strani kupca ili prodavca. U literaturi postoji stav, koji treba podržati, da kupac može vratiti ono što je primio, ne samo u naturi već i u novcu (Enderlein & Maskow, 1992, p. 350; UNCITRAL, 2016, p. 391). U tom slučaju, prodavac će imati pravo da od kupca traži novčani iznos koji odgovara vrednosti robe u momentu raskida ugovora.

Odredbe Bečke konvencije ne uređuju pravo na restituciju u situaciji kada se jedna od ugovornih strana nađe u stečaju. U tom slučaju primenjuje se domaće stečajno zakonodavstvo države u kojoj se nalazi ugovorna strana nad kojom je otvoren stečaj. Drugim rečima, da li će prodavac imati izlučno pravo na robi koja je u državini kupca, a za koju kupac nije platio cenu, pitanje je na koje će se odgovor tražiti u odredbama unutrašnjih stečajnih propisa (Presuda Apelacionog suda u Ticinu (Italija) u predmetu *Can bottling machine*, br. 15.2016.26 od 20. aprila 2016. godine – *CLOUT case* No. 1771). Dodatni argument u pravcu primene domaćeg merodavnog prava na ovo pitanje je činjenica da Bečka konvencija ne uređuje način prenosa svojine na robi sa prodavca na kupca, već to prepušta merodavnim nacionalnim pravima.

Pored stečajnog zakonodavstva, izvršenje restitucije mogu ometati i drugi javnopravni propisi države. Država, na primer, može zabraniti ili ograničiti transfer novca, pa prodavac neće legalno moći da vrati novac kupcu na ime plaćene cene (Chengwei, 2005, p. 16). Može se desiti i da država ograniči promet pojedinom robom, pa kupac zapadne u teškoće prilikom vraćanja robe prodavcu. Strane između kojih se odvija restitucija u pogledu vraćanja robe podložne su i carinskim i drugim spoljnotrgovinskim propisima, koji dodatno mogu zakomplikovati i povećati troškove realizacije restitucije. Ukoliko je restitucija nemoguća ili je necelishodna zbog velikih troškova, strana koja je kriva za raskid ugovora biće u obavezi da nadoknadi štetu drugoj ugovornoj strani.

Bečka konvencija ne predviđa izričito u kom mestu se ima izvršiti restitucija. Iz dostupne sudske prakse se uočavaju podeljeni stavovi u vezi sa ovim pitanjem. U jednoj presudi se ističe da se odredbe Konvencije koje primarno uređuju mesto izvršenja obaveze ne mogu analogno primeniti na mesto restitucije. Drugim rečima, pravila o mestu izvršenja isporuke ili plaćanja cene ne mogu se posmatrati kao opšta načela na kojima Konvencija počiva, u kontekstu tumačenja pravnih praznina u Konvenciji.[8] Prema stavu jednog suda, na rešavanje pitanja mesta restitucije, u skladu sa čl. 7(2) Konvencije, treba primeniti merodavno nacionalno pravo (Presuda Apelacionog suda u Parizu u predmetu *Société Productions S.C.A.P. v Roberto Faggioni* od 14. januara 1998. godine – *CLOUT case* No. 312). S druge strane, postoje i presude gde su sudovi zauzeli stav da se odredbe Konvencije koje uređuju mesto izvršenja isporuke ili plaćanja cene mogu tumačiti kao opšta načela na kojima Konvencija počiva u skladu sa čl. 7(2). Smatramo da se treba prikloniti ovakvom stavu, imajući u vidu potrebu uvažavanja međunarodnog karaktera Konvencije prilikom njenog tumačenja (na podlozi čl. 7(1) Konvencije).[9] Na pitanje mesta izvršenja restitucije analogno bi se, dakle, primenila pravila Konvencije koja primarno uređuju mesto izvršenja obaveza. U slučaju obaveze vraćanja robe, u tom smislu su relevantne odredbe čl. 31 (koji uređuje mesto isporuke), dok bi kod mesta plaćanja cene merodavne bile odredbe čl. 57 Konvencije (koje uređuju mesto plaćanja cene).[10]

Kada je u pitanju obaveza vraćanja robe, analogno bi se primenila tač. b), st. 1, čl. 31 Bečke konvencije koja opisuje situacije kada je prodavac dužan da stavi robu na raspolaganje kupcu u mestu gde se ta roba nalazi: „ako su u slučajevima na koje se prethodna tačka ne odnosi, predmet ugovora individualno određene stvari, ili stvari određene po rodu koje treba izdvojiti iz određene mase ili ih treba

[8] Na osnovu čl. 7(2) Konvencije koji glasi: „Pitanja koja se tiču materija uređenih ovom konvencijom, a koja nisu izričito rešena u njoj, rešavaće se prema opštim načelima na kojima ova konvencija počiva ili, u odsustvu tih načela, prema pravu merodavnom na osnovu pravila međunarodnog privatnog prava."

[9] Međunarodni karakter Konvencije diktira i autonomni pristup prilikom tumačenja njenih odredaba (Malkawi, 2020, p. 25).

[10] Presuda Višeg regionalnog suda u Hamu (Nemačka) u predmetu *In-line skates*, br. 11 U 41/97 od 5. novembra 1997. godine (CLOUT case No. 295); presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine (CLOUT case No. 422). Čl. 57 Konvencije glasi:
„(1) Ako kupac nije preuzeo obavezu da plati cenu u bilo kom drugom određenom mestu, dužan je da je plati prodavcu:
(a) u sedištu prodavca; ili
(b) ako se isplata ima izvršiti uz predaju robe ili dokumenata, u mestu te predaje.
(2) Prodavac snosi svako povećanje troškova vezano uz plaćanje do koga je došlo zbog promene njegovog sedišta posle zaključenja ugovora."

proizvesti ili izraditi, a u vreme zaključenja ugovora strane su znale da je roba u određenom mestu ili je treba izraditi ili proizvesti u određenom mestu – u stavljanju robe na raspolaganje u tom mestu." S obzirom na to da je predmet restitucije uvek *individualno određena stvar*, kupac će svoju obavezu restitucije izvršiti, ukoliko se strane drugačije na sporazumeju, kada stavi prodavcu na raspolaganje robu u mestu gde se roba nalazila u momentu raskida ugovora. To bi značilo da će prodavac morati da preduzme radnje u vezi sa organizacijom eventualnog transporta robe do određenog mesta. Ovim se otvara i pitanje načina restitucije, koje Konvencija takođe ne uređuje. Strane se svakako, na osnovu autonomije volje, mogu sporazumeti oko načina restitucije. U odsustvu sporazuma strana ili analognih odredaba Konvencije u pogledu načina restitucije, primenilo bi se merodavno nacionalno pravo (Tallon, 1987, p. 606). Pritom bi kupac morao da preduzme sve razumne radnje u pogledu čuvanja robe za račun prodavca dok se ne izvrši restitucija. U tom smislu su relevantne odredbe Konvencije koje uređuju obavezu čuvanja robe (čl. 85-88).[11]

Konvencija UN o ugovorima o međunarodnoj prodaji robe ne predviđa izričito koja strana snosi troškove restitucije, iako oni često nisu zanemarljivi. Na troškove restitucije pretežno utiče način na koji se ona sprovodi. Kao što je navedeno, prodavac može snositi troškove transporta robe od mesta gde se roba nalazila u momentu raskida ugovora do željenog mesta. Osim toga, strane se mogu sporazumeti da kupac na sebe preuzme organizaciju transporta robe do određenog mesta. Prilikom realizacije te obaveze, može biti neophodno angažovanje prevoznika, zatim se mogu pojaviti i ostali troškovi u vezi sa otpremanjem robe, poput ambalaže, javnopravnih potraživanja države u vidu carina i sl. Budući da Konvencija predviđa da je ugovorna strana koja je stvorila osnov za raskid odgovorna i za štetu drugoj strani, logično je da će troškove restitucije snositi ona strana koja je izvršila povredu ugovora. Pritom, takvi troškovi bi morali biti razumni u skladu sa okolnostima.

Najzad, druga rečenica čl. 82(2) Bečke konvencije predviđa da ako su obe strane dužne da izvrše vraćanje, uzajamna vraćanja vrše se istovremeno. Sprovođenje ovog principa u praksi može da zakomplikuje činjenica da međunarodnu trgovinu odlikuje distancioni karakter, te nije uvek ostvarivo da se restitucija sprovede „iz ruke u ruku". Drugim rečima, uvek će morati da postoji ona strana od koje se očekuje prvi potez. Nakon prvog poteza jedne strane u pogledu restitucije, druga strana će morati odmah, bez odlaganja, da izvrši svoju obavezu

[11] Odredbe Konvencije koje uređuju obavezu čuvanja robe se ne aktiviraju ekskluzivno u situaciji kada je ugovor raskinut, već se primenjuju i u situacijama kada je ugovor i dalje na snazi, a pritom je došlo do povrede ugovora (putem docnje u preuzimanju robe ili plaćanja cene, ili isporuke nesaobrazne robe).

restitucije. U tom pogledu može se postaviti pitanje od koje strane se očekuje da prva vrati ono što je primila. Sudska praksa po ovom pitanju nije naročito izdašna. U jednom slučaju, Sud je istakao da je kupac taj koji mora prvi vratiti robu prodavcu i da prodavac nema obavezu da kupcu vrati iznos na ime plaćene cene dok ne dobije robu nazad od kupca (Presuda Federalnog suda Australije u predmetu *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace*, br. SG 3076 of 1993 FED No. 275/95 od 28. aprila 1995. godine – *CLOUT case* No. 308). Međutim, svakako ne bi trebalo insistirati na redosledu restitucije koji bi koristio strani koja je povredila ugovor, već bi se trebalo rukovoditi interesima one strane koja je izjavila raskid ugovora.

4. Obaveza isplate kamate i vraćanja koristi od robe

Član 84(1) Konvencije UN o ugovorima o međunarodnoj prodaji robe predviđa i obavezu za prodavca koji je dužan da vrati kupcu iznos na ime plaćene cene da takođe isplati kamatu kupcu, počev od dana kada mu je cena isplaćena. Pritom nije od značaja činjenica da li je kupčeva ili prodavčeva povreda ugovora dovela do raskida, niti činjenica koja strana je izjavila raskid. Kupac koji je povredio ugovor takođe ima pravo da traži povraćaj plaćene cene, kao i kamatu, od prodavca koji je raskinuo ugovor (Presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Spirits*, br. T 171/95 od 20. februara 1997. godine – *CLOUT case* No. 261). Poput čl. 78 Konvencije, koji načelno uređuje pravo na kamatu usled docnje ugovorne strane sa isplatom cene ili nekog drugog iznosa, ni čl. 84(1) ne predviđa stopu po kojoj će se obračunavati kamata. U sudskoj i arbitražnoj praksi preovlađuje stav da je u pogledu kamatne stope merodavno nacionalno pravo na koje upućuju kolizione norme u konkretnom slučaju.[12]

[12] Presuda Višeg regionalnog suda u Karlsrueu, br. 19 U 8/02, od 19. decembra 2002. godine (CLOUT case No. 594); presuda Apelacionog suda Kantona Ticino (Švajcarska) u predmetu *Cacao beans*, br. 12.97.00193 od 15. januara 1998. godine (CLOUT case No. 253); odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *Assembly line for batteries* br. 7660 od 01. januara 1994. godine (CLOUT case No. 302); presuda Višeg regionalnog suda u Celeu (Nemačka), u predmetu *Used printing machines*, br. 20 U 76/94, od 24. maja 1995. godine (CLOUT case No. 136); presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261); odluka Prijateljske arbitraže Hamburga u predmetu *Cheese*, od 29. decembra 1998. godine (CLOUT case No. 293); presuda Višeg regionalnog suda u Minhenu u predmetu br. 7 U 1720/94 od 08. februara 1995. godine (CLOUT case No. 133); odluka Međunarodne trgovačke arbitraže pri Privredno-industrijskoj komori Ruske Federacije br. 1/1993 od 15. aprila 1994. godine; odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *German goods*, br. 9978 iz marta 1999. godine (CISG-online No. 708).

Stav 2 člana 84 Konvencije predviđa analognu obavezu za kupca naspram prodavca: kupac je dužan da prodavcu nadoknadi sve koristi koje je imao od robe ili jednog njenog dela. Prema navedenoj odredbi Konvencije, kupac je dužan da prodavcu vrati koristi od robe u dve situacije:

(a) ako je dužan da vrati robu ili jedan njen deo ili
(b) ako mu je nemoguće da vrati robu ili jedan njen deo ili da robu ili jedan njen deo vrati u suštinski istom stanju u kome ju je primio, ali je i pored toga izjavio da ugovor raskida ili je zahtevao od prodavca zamenu robe.

Prva situacija podrazumeva postojanje kupčeve obaveze da izvrši restituciju robe u skladu sa čl. 81(2) Konvencije. To se odnosi na slučaj kada kupac u momentu raskida ugovora ima državinu na robi koju je isporučio prodavac. Ukoliko kupac ima obavezu da izvrši povraćaj robe prodavcu u skladu sa pomenutom odredbom Konvencije, dužan je da prodavcu nadoknadi i eventualne koristi od robe. Pritom nije od značaja to da li je kupac ili prodavac raskinuo ugovor.

Druga situacija koja je opisana u tač. b), st. 2, čl. 81 Bečke konvencije može se podeliti na dve okolnosti. Prva okolnost je kada je kupcu nemoguće da robu ili jedan njen deo vrati. U tom slučaju je kupac takođe dužan da vrati koristi koje je imao od robe. Druga okolnost podrazumeva da je kupac strana koja izjavljuje raskid ugovora (ili traži zamenu robe). Kada je kupac strana koja raskida ugovor, a pritom ne može da vrati robu ili jedan njen deo u suštinski istom stanju u kome ju je primio, biće u obavezi da prodavcu vrati koristi koje je imao od robe. Ova odredba Konvencije korespondira sa materijalnopravnim uslovima za raskid robe od strane kupca. Naime, prema čl. 82(1) Konvencije, kupac gubi pravo da izjavi da raskida ugovor ili da zahteva od prodavca da izvrši zamenu robe ako mu je nemoguće da vrati robu u suštinski istom stanju u kome je robu primio. Međutim, prema st. 2 istog člana, kupac može izjaviti raskid ugovora ili zahtevati zamenu robe čak i kada nije u mogućnosti da robu vrati u suštinski istom stanju, ukoliko nemogućnost vraćanja robe ili njenog vraćanja u suštinski istom stanju u kome je primljena nije posledica radnje ili propusta od strane kupca (čl. 82 (2)(a)); zatim ako je roba u celini ili delimično propala ili se pogoršala usled pregleda propisanog u čl. 38 (čl. 82(2)(b)); ili ako je roba, u celini ili delimično, prodata u redovnom toku poslovanja ili je kupac potrošio ili preradio u toku njene normalne upotrebe pre nego što je otkrio ili morao otkriti nedostatak saobraznosti (čl. 82(2)(c)). U nabrojanim okolnostima, kupac koji nije u mogućnosti da vrati robu u suštinski istom stanju u kome ju je primio, a pritom izjavljuje raskid ugovora, dužan je da prodavcu nadoknadi koristi koje je imao od robe.

Za razliku od kamate koju je prodavac dužan da isplati kupcu ukoliko je primio određeni novčani iznos na ime cene, korist koju je kupac imao od robe ne može se uvek precizno utvrditi. Kod kupca je manje očigledno kakve je on koristi

imao od robe (Ćirić, 2018, p. 206). Prema stavu sudske prakse, smisao čl. 84(2) Konvencije sastoji se u obavezi kupca da prodavcu isplati ekvivalentnu novčanu vrednost koristi koju je imao od robe (Presuda Višeg regionalnog suda u Oldenburgu (Nemačka) u predmetu *Leather seating arrangement*, br. 11 U 64/94 od 1. februara 1995. godine – *CLOUT case* No. 165). Pritom, na prodavcu je da dokaže postojanje koristi od robe, kao i novčani iznos te koristi (Presuda Višeg regionalnog suda u Oldenburgu (Nemačka) u predmetu *Leather seating arrangement*, br. 11 U 64/94 od 1. februara 1995. godine – *CLOUT case* No. 165).

5. Zaključak

Na osnovu analize odgovarajućih odredaba Konvencije UN o ugovorima o međunarodnoj prodaji robe, relevantne sudske i arbitražne prakse, kao i stavova u literaturi, možemo definisati odgovarajuće zaključke u pogledu pravnih posledica raskida ugovora o međunarodnoj prodaji robe. Moramo takođe, na kraju rada, napomenuti da je problem pravnih posledica raskida ugovora o međunarodnoj prodaji robe u okviru rada razmatran isključivo u svetlu odredaba Konvencije. Prava i obaveze iz ugovora o međunarodnoj prodaji robe mogu biti, u zavisnosti od okolnosti, podvrgnuti i drugim međunarodnim ili nacionalnim izvorima prava. Ukoliko je to slučaj, može se desiti da rešenja koja su razmatrana u okviru rada ne mogu biti primenjiva. Zato je neophodno da se prilikom tumačenja dejstva raskida ugovora o međunarodnoj prodaji robe prethodno ustanovi primena, kao i obim primene Konvencije na konkretni ugovor.

Raskid ugovora o međunarodnoj prodaji robe izaziva značajne pravne posledice po obe ugovorne strane. Da bismo razmatrali takve posledice, moramo prvo poći od pretpostavke da je ugovor valjano raskinut, odnosno da je postojao materijalni osnov za raskid i da je raskid učinjen u podobnoj formi. Ukoliko to nije slučaj, posledice raskida se neće aktivirati i ugovor će i dalje obavezivati strane.

Prva posledica raskida u režimu Bečke konvencije ogleda se u oslobađanju ugovornih strana od obaveza iz ugovora. Odredbe ugovora prestaju da važe i strane neće nadalje biti njima vezane. Od ovog pravila Konvencija predviđa i izuzetke. Prvo, strane će biti u obavezi da nadoknade eventualnu štetu. Drugo, odredbe ugovora koje uređuju način rešavanja sporova će takođe ostati na snazi. Na kraju, odredbe ugovora koje uređuju prava i obaveze nakon raskida će se i dalje primenjivati između strana. Ovi izuzeci su i logični, s obzirom na to da sprečavaju ugovornu stranu da raskid ugovora iskoristi kako bi u potpunosti „eskivirala" svoju odgovornost u pogledu obaveza koje bi prirodno morale da se održe i nakon raskida ugovora.

Druga posledica podrazumeva obavezu restitucije – vraćanja onoga što su strane isporučile ili platile na osnovu ugovora koji je raskinut. Kupac je dužan da prodavcu vrati robu, dok je prodavac dužan da kupcu vrati cenu ili deo cene koji je plaćen. Strane su dužne da jedna drugoj vrate i koristi koje su imale od robe, odnosno novca koji su primile. Konvencija takođe predviđa da se vraćanja imaju vršiti istovremeno. Obaveza restitucije je takođe prirodna posledica raskida ugovora i njen smisao se ogleda u prevenciji neosnovanog obogaćenja. Nijedna ugovorna strana nema više pravni osnov da zadrži ono što je primila na osnovu ugovora koji je raskinut.

Odredbe Konvencije nisu unikatne kada je u pitanju uređenje posledica raskida ugovora. One predstavljaju odraz i simbiozu rešenja koja su zastupljena u reprezentativnim pravnim sistemima poput francuskog, nemačkog i anglosaksonskog. Trgovci koji zaključuju ugovore o međunarodnoj prodaji robe moraju dobro da poznaju ne samo ekonomske nego i pravne posledice eventualnog raskida ugovora. Ovo je naročito značajno zbog svih objektivnih faktora koji mogu otežati restituciju nakon raskida ugovora, poput distancionog karaktera ugovora, javnopravnih propisa većeg broja suvereniteta, neujednačene prakse sudova i arbitraža po nekim pitanjima itd. U tom pogledu, često bi za ugovorne strane bilo možda korisnije da same predvide prava i obaveze nakon raskida ugovora. One to mogu učiniti i u okviru samog ugovora, a mogu i docnije, nakon raskida, putem posebnog sporazuma. Na taj način bi se prevenirale brojne nesigurnosti koje mogu proisteći. Pored toga, prilikom tumačenja prava i obaveza nakon raskida, prednost bi se morala dati odredbama Konvencije i njenom međunarodnom karakteru. Upućivanje na merodavno nacionalno pravo u pogledu mnogih važnih pitanja (poput mesta ili načina restitucije) stvorilo bi dodatnu nesigurnost u međunarodnom poslovnom prometu.

Literatura

Ay, E. Y. 2023. Types of Damages under the CISG. *Facta Universitatis Series: Law and Politics*, 21(2), pp. 151-161. https://doi.org/10.22190/FULP230404014A

Ay, E. Y. 2022. The Fundamental Breach of Contract of Sale Under the CISG. *Facta Universitatis Series: Law and Politics,* 20(1), pp. 25-32. https://doi.org/10.22190/FULP2201025A

Babiak, A. 1992. Defining Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods. *Temple International and Comparative Law Journal*, 6(1), pp. 113-144.

Ceesay, B. 2021. Finding an Ideal Contract Law Regime for the International Sale of Goods. *European Journal of Law Reform*, 23(2), pp. 185-221. https://doi.org/10.5553/EJLR/138723702021023002003

Chengwei, L. 2005. Effects of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and case law. *Nordic Journal of Commercial Law*, 2005(1), pp. 1-31.

Ćirić, A. 2018. *Međunarodno trgovinsko pravo – Posebni deo*. Niš: Pravni fakultet Univerziteta u Nišu.

Enderlein, F. & Maskow, D. 1992. International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary. New York: Oceana.

Flechtner, H. M. 1988. Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C. *Journal of Law and Commerce*, 8, pp. 53-108.

Lookofsky, J. 2000. Article 26; When Avoidance Declaration Effective. In: Herbots, J. & Blanpain, R. (eds.), *International Encyclopaedia of Laws: Contracts, Suppl 29.* The Hague: Kluwer Law International, pp. 75-88.

Magnus, U. 2005. The Remedy of Avoidance of Contract under CISG General Remarks and Special Cases. *Journal of Law and Commerce*, 25(1), pp. 423-436.

Malkawi, B. 2020. CISG: The Relation among Cure, Fundamental Breach, and Avoidance. *Journal of Law, Policy and Globalization*, Vol. 93, pp. 24-44.

Schlechtriem, P. & Schwenzer, I. 2005. *Commentary on the UN Convention on the International Sale of Goods (CISG),* 2nd ed. New York: Oxford University Press.

Schlechtriem, P. 1986. *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*. Vienna: Manz.

Tallon, D. 1987. Article 81. U: Bianca, C. M. & Bonell, M. J. *et al*. (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*. Milan: Giuffrè, pp. 600-608.

UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods. New York: United Nations, 2016.

Vukadinović, R. 2012. *Međunarodno poslovno pravo*. Kragujevac: Udruženje za evropsko pravo.

Zdravković, U. 2023. Materijalnopravni uslovi za raskid ugovora o međunarodnoj prodaji robe od strane kupca. *Strani pravni život*, 3, pp. 471-489. https://doi.org/10.56461/SPZ_23306KJ

Sudska i arbitražna praksa

Odluka Arbitraže Trgovačke komore Ziriha br. ZHK 273/95 od 31. maja 1996. godine.

Odluka Arbitražnog suda Međunarodne trgovinske komore br. 9887 iz avgusta 1999. godine.

Odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *Assembly line for batteries* br. 7660 od 1. januara 1994. godine (CLOUT case No. 302).

Odluka Arbitražnog suda Međunarodne trgovinske komore u predmetu *German goods*, br. 9978 iz marta 1999. godine.

Odluka Arbitražnog suda Privredne komore Ciriha br. 273/95 od 31. maja 1996. godine.

Odluka Arbitražnog suda Privredne komore Hamburga u predmetu *Chinese goods* od 21. marta 1996. godine (CLOUT case No. 166).
Odluka Međunarodne trgovačke arbitraže pri Privredno-industrijskoj komori Ruske Federacije br. 1/1993 od 15. aprila 1994. godine.
Odluka Međunarodne trgovačke arbitraže pri Trgovačko-industrijskoj komori Ruske Federacije br. 82/1996 od 3. marta 1997. godine.
Odluka Prijateljske arbitraže Hamburga u predmetu *Cheese*, od 29. decembra 1998. godine (CLOUT case No. 293).
Odluka Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije br. T-4/05 od 15. jula 2008. godine (CLOUT case No. 1021).
Presuda Federalnog suda Australije u predmetu *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace*, br. SG 3076 of 1993 FED No. 275/95 od 28. aprila 1995. godine (CLOUT case No. 308).
Presuda Apelacionog suda Kantona Ticino (Švajcarska) u predmetu *Cacao beans*, br. 12.97.00193 od 15. januara 1998. godine (CLOUT case No. 253).
Presuda Apelacionog suda u Parizu u predmetu *Société Productions S.C.A.P. v. Roberto Faggioni* od 14. januara 1998. godine (CLOUT case No. 312).
Presuda Apelacionog suda u Ticinu (Italija) u predmetu *Can bottling machine*, br. 15.2016.26 od 20. aprila 2016. godine (CLOUT case No. 1771).
Presuda Kasacionog suda Francuske u predmetu *Karl Schreiber GmbH v. Société Thermo Dynamique Service et al.* od 26. maja 1999. godine (CLOUT case No. 315).
Presuda Okružnog suda u Hajlbronu (Nemačka) u predmetu *Film coating machine*, br. 3 KfH O 653/93, od 15. septembra 1997. godine (CLOUT case No. 345).
Presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261).
Presuda Okružnog suda Južnog distrikta Njujork u predmetu *Filanto, S.p.A. v. Chilewich International Corp.* od 14. aprila 1992. godine (CLOUT case No. 23).
Presuda Privrednog suda Kantona Cirih u predmetu *Sunflower oil*, br. HG950347 od 5. februara 1997. godine (CLOUT case No. 214).
Presuda Saveznog suda Nemačke u predmetu *Computer printing system*, br. VIII ZR 306/95 od 4. decembra 1996. godine (CLOUT case No. 229).
Presuda Saveznog suda Nemačke u predmetu *German Buyer v. Dutch Seller of Spice,* br. I ZR 245/19 od 20. novembra 2020. godine (CLOUT case No. 2051).
Presuda Višeg regionalnog suda u Celeu (Nemačka) u predmetu *Used printing machines*, br. 20 U 76/94, od 24. maja 1995. godine (CLOUT case No. 136).
Presuda Višeg regionalnog suda u Diseldorfu u predmetu *Textile*, br. 6 U 32/93 od 10. februara 1994. godine (CLOUT case No. 81).
Presuda Višeg regionalnog suda u Frankfurtu na Majni u predmetu *Italian shoes* br. 5 U 15/93 od 18. januara 1994. godine (CLOUT case No. 79).
Presuda Višeg regionalnog suda u Hamburgu u predmetu *Jeans*, br. 1 U 31/99 od 26. novembra 1999. godine (CLOUT case No. 348).
Presuda Višeg regionalnog suda u Hamu (Nemačka) u predmetu *In-line skates*, br. 11 U 41/97 od 5. novembra 1997. godine (CLOUT case No. 295).

Presuda Višeg regionalnog suda u Karlsrueu, br. 19 U 8/02, od 19. decembra 2002. godine (CLOUT case No. 594).

Presuda Višeg regionalnog suda u Kelnu u predmetu *Dealer agreement*, br. 18 U 121/97 od 21. avgusta 1997. godine (CLOUT case No. 284).

Presuda Višeg regionalnog suda u Minhenu u predmetu *Italian cars*, br. 7 U 3771/97 od 28. januara 1998. godine (CLOUT case No. 288).

Presuda Višeg regionalnog suda u Minhenu u predmetu br. 7 U 1720/94 od 8. februara 1995. godine (CLOUT case No. 133).

Presuda Višeg regionalnog suda u Minhenu u predmetu 7 U 4419/93 od 2. marta 1994. godine (CLOUT case No. 83).

Presuda Višeg regionalnog suda u Oldenburgu (Nemačka) u predmetu *Leather seating arrangement*, br. 11 U 64/94 od 1. februara 1995. godine (CLOUT case No. 165).

Presuda Vrhovnog suda Austrije u predmetu *Wall panels*, br. 1 Ob 74/99k od 29. juna 1999. godine (CLOUT case No. 422).

Dragan T. Dakić*

Originalni naučni članak
UDK: 341.655(73)(497.6)
doi: https://doi.org/10.56461/SPZ_24303KJ
Primljeno: 24. 4. 2024.
Izmenjeno: 28. 7. 2024.
Prihvaćeno: 23. 9. 2024.

UNITED STATES SANCTIONS AGAINST INDIVIDUALS IN REPUBLIC OF SRPSKA AND LEGAL REMEDIES

Summary

The challenges posed by unilateral sanctions on the Sustainable Developmental Goals, financial stability, the service provision sector, and human rights have been increasingly debated in recent years. This research focuses on the economic sanctions enacted by the United States of America (USA) targeting individuals in the Western Balkans region, or specifically in the Republic of Srpska. The research is framed in this way for several reasons, including primarily the ongoing Stabilization and Association Process, supported by the effective Stabilization and Association Agreement (SAA) between the European Communities, their Member States, and Bosnia and Herzegovina (BiH). This has imposed the necessity to consider the relevant EU legislation governing sanctions and ways to navigate their adverse consequences. In addition, multilateral sanctions targeting individuals — such as those enacted by the UNSC — have been recognized under international law as part of the collective security framework provided by the UN Charter, while unilateral individual sanctions do not have the same international legal standing. Without intending to evaluate directly these sanctions in terms of international law or human rights law, irrespective of how it is presented, we have identified their key characteristics: they target top-ranking officials, with the legislative activities of the National Assembly as one of the grounds for sanctioning, and they affect untargeted entities including the business and NGO sectors. Those characteristics have decided the inquiry into

* PhD, Assistant Professor, Faculty of Law, University of Kragujevac, Serbia.
E-mail: *ddakic@jura.kg.ac.rs*
ORCID: *https://orcid.org/0000-0002-9612-4133*

** Rad je nastao kao rezultat finansiranja od strane Ministarstva nauke, tehnološkog razvoja i inovacija, po Ugovoru evidencioni broj 451-03-65/2024-03/ 200120 od 5. 2. 2024. godine.

the legal remedies available. In that sense, we have addressed legal remedies available to BiH and the Republic of Srpska, with a view to specific remedies available to the sanctioned individuals including private persons and legal entities.

Keywords: US sanctions, legal remedies, the Republic of Srpska.

SANKCIJE SJEDINJENIH AMERIČKIH DRŽAVA PROTIV LICA U REPUBLICI SRPSKOJ I PRAVNI LEKOVI

Sažetak

Poslednjih godina sve se više raspravlja o izazovima koje sa sobom nose jednostrane sankcije usmerene na očuvanje održivog razvoja, finansijske stabilnosti, te na sektor pružanja usluga i ljudskih prava. Predmet ovog rada tiče se ekonomskih sankcija uvedenih od strane Sjedinjenih Američkih Država (SAD), a koje su usmerene na lica u regionu Zapadnog Balkana, odnosno u Republici Srpskoj. Predmet istraživanja postavljen je na opisan način iz nekoliko razloga, uključujući pre svega tekući Proces stabilizacije i pridruživanja, propraćen efektivnim Sporazumom o stabilizaciji i pridruživanju (SSP) između Evropskih zajednica, njihovih država članica i Bosne i Hercegovine (BiH). Sve je to je nametnulo potrebu da se razmotri relevantno zakonodavstvo EU koje reguliše sankcije, kao i načini da se uoče i preduprede njihove štetne posljedice.

Multilateralne sankcije usmerene na lica – poput onih koje je doneo SB UN-a – priznate su prema međunarodnom pravu kao deo okvira kolektivne bezbednosti predviđenog Poveljom UN, dok jednostrane pojedinačne sankcije nemaju isti međunarodni pravni položaj. Bez namere da se ove sankcije direktno ocenjuju u smislu međunarodnog prava ili prava ljudskih prava, autor je nastojao da identifikuje njihove ključne karakteristike. Naime, one su usmerene na najviše zvaničnike, sa zakonodavnim aktivnostima u Narodnoj skupštini kao jednim od osnova za sankcionisanje. One, pritom, utiču na neciljane subjekte, uključujući fizička lica, poslovni i nevladini sektor. Pomenute karakteristike nametnule su pitanje o dostupnim pravnim lekovima. U tom smislu, u radu je posvećena pažnja pravnim lekovima koji stoje na raspolaganju BiH i Republici Srpskoj, sa osvrtom na konkretne pravne lekove dostupne sankcionisanim fizičkim i pravnim licima.

Ključne reči: Sankcije SAD, pravni lekovi, Republika Srpska.

1. Introduction

According to Article 41 of the UN Charter, sanctions are authorized as a means of enforcing international law without resorting to the use of armed forces. They are typically used when the UN Security Council decides that a country threatens international peace and security, allowing the member states to impose trade or economic sanctions that either partially or completely disrupt economic relations with the target country (Van Rooyen & Nath, 2020, p. 75). Sanctions, particularly within the context of international law, are measures taken by one or more countries to compel a change in the policy of another country, and can take many forms, including economic measures such as trade sanctions (embargoes and boycotts), financial sanctions such as asset freezes, and restrictions on financial transactions related to the targeted country. The form of sanctions depends on the enacting authority and their target and scope. While multilateral sanctions are implemented by multiple states within the United Nations (UN) (Orakhelashvili, 2015, p. 4), there are also unilateral sanctions that are enacted by a single state or by a group of states failing short of the UN Security Council (UNSC) authorization. In addition, the so-called regional sanctions include sanctions imposed by a regional organization, such as the European Union, against a country or a group within or outside of the region. Such sanctions are based on the regional organization's legal instruments and its member states' collective decisions. As such, they also depart from the established system within the ambit of the UN Charter.

Sanctions can be comprehensive, affecting nearly overall economic activity, or targeted (also referred to as "smart sanctions"), focusing on specific individuals, companies, or sectors, to minimize the humanitarian impacts and focus on the governing elite or specific policies (Park & Choi, 2022, pp. 3-4). Examples of targeted sanctions include asset freezes, travel bans, arms embargoes, and restrictions on particular goods (such as luxury items or dual-use technologies that can have military applications). The concept of smart or targeted sanctions has evolved to address concerns that broad sanctions can disproportionately impact the general population of a country rather than its leadership. It is considered that the evolution of smart or targeted sanctions has commenced with a fundamental shift in the international community's perception of conflict-related sexual violence (Biersteker & Hudáková, 2021, p. 112). This change in perspective now views such violence as a threat to international peace and security, warranting intervention by the UNSC.

Consequently, the UNSC has started imposing targeted sanctions against specific individuals and entities to deter sexual violence against civilians in

conflict zones. Targeted sanctions are considered a tool within the broader framework of the Women, Peace, and Security initiatives aimed at combating such forms of violence in conflicts. This approach to using targeted sanctions signifies the move from broader, all-encompassing sanctions to more focused measures that aim to penalize specific actors rather than having widespread effects on the general population. Instead of imposing sanctions on an entire country, targeted sanctions are intended to increase the cost of permitting or engaging in sexual violence during armed conflict directly for those responsible (Biersteker & Hudáková, 2021, pp. 112-113). The effectiveness of these targeted sanctions, however, requires improved implementation, which includes making actions against violators consistent, comprehensive, and transparent (Orakhelashvili, 2015, p. 19).

Another way to categorize sanctions that are relevant to our research is the distinction between primary and secondary sanctions. Primary sanctions refer to restrictions or prohibitions on economic transactions that a country imposes on its own nationals or entities within its jurisdiction. These sanctions primarily affect transactions involving the territory or nationals of the imposing country and the target country. On the other hand, secondary sanctions are imposed by a country on entities or individuals in a different country that are engaged in specific activities with the target of the sanctions. These sanctions target foreign entities or individuals conducting business with the primary target of the sanctions. Secondary sanctions have an extraterritorial impact as they influence the relations between a different country and the target country. Secondary sanctions aim to shape the behavior of third parties by limiting their access to the financial or commercial markets in the imposing country (Ruys & Ryngaert 2020, pp. 7-9).

Our main concerns in this research are the economic sanctions enacted by the United States of America (USA) targeting individuals in the Western Balkans region, or specifically in the Republic of Srpska. We will refer to those sanctions as unilateral, individual, targeted, economic, or secondary sanctions, as needed. The current research framework has been conditioned by the following circumstances. Namely, the countries in this region are facing the European Union (EU) integration process. The process of integrating the Western Balkans into the European Union is guided by a specific legal framework called the Stabilization and Association Process, which is supported by Stabilization and Association Agreements (SAA). These are comprehensive and bilateral agreements, establishing a formal partnership with the EU and involving shared responsibilities and privileges. In 2015, the Stabilization and Association Agreement was signed between the European Communities, their Member States, and Bosnia and Herzegovina. It encompasses various policy areas, such as economic policies, trade relations, industrial collaboration, and education. Within the EU legal system, SAAs are

considered primary sources of law and carry more weight than secondary legislation, underscoring their essential role. Additionally, the EU has recently opened accession negotiations with Bosnia and Herzegovina.

A core element of SAAs is aligning the country's laws with the EU legislation. Bosnia and Herzegovina has committed to gradually harmonizing its current and future legislation with the EU standards and ensuring proper implementation and enforcement of these laws. According to the complex constitutional structure of Bosnia and Herzegovina (BiH), the legislative jurisdiction is mostly divided between two entities, the Republic of Srpska and the Federation of Bosnia and Herzegovina, together comprising BiH. Therefore, according to the SAA, the Republic of Srpska is obliged to harmonize its relevant legislation, such as payment services legislation, and adopt the legislation governing sanctions in line with that of the EU.

Concerning payment services legislation, the EU Directive 2015/2366 still leaves some uncertainties regarding the responsibilities, the level of trust established among users and payment service providers, and the compensation procedures for losses arising from unregulated incidents in this sector (Palević, 2022a, pp. 202-204). Hence, the Republic of Srpska needs to address these gaps to enhance legal certainty. The issue of the right of recourse also poses challenges in terms of resolving such claims and needs to be addressed in the national legislation. Even though targeted sanctions are expected also to hurt the financial stability of the BiH, indirectly affecting the EU interests, this aspect will not be addressed here. Instead, we will analyze the prospective adoption of the legislation governing sanctions.

In addition, while multilateral sanctions targeting individuals — such as those enacted by the UNSC — have been recognized under international law as part of the collective security framework provided by the UN Charter,[1] unilateral individual sanctions do not have the same international legal standing and are

[1] The authority to impose sanctions by the Security Council is not influenced by the political decisions of the UN General Assembly or the legal oversight of the International Court of Justice (ICJ). In 2009, the Security Council established its Ombudsperson Office to deal with concerns regarding the sanctions regime that specifically focuses on individuals without adequate procedural safeguards. Serving as an autonomous and impartial entity within the framework of the UN, the Ombudsperson is tasked with receiving appeals from affected individuals under sanctions and carrying out unbiased assessments of their situations. The creation of the Ombudsperson Office aimed to ensure that those under UN sanctions have a means to contest their categorization in a just and equitable manner and seek recourse if they feel they have been unfairly sanctioned. This mechanism has played a role in alleviating concerns over the absence of appropriate procedural protections for individuals under UN sanctions, thus advancing equity and procedural fairness in the application of sanctions (Biersteker, Van der Herik & Brubaker, 2021, p. 5).

instead based on the national laws of the imposing state (Palević, 2022b, p. 109). The illegality of unilateral sanctions deprives the EU of legal tools that would enable the enforcement of contractual obligations to compel candidate countries to align with its foreign policy in this regard (Palevic, 2022b, p. 119). Following the present analysis of the international legal framework covering sanctions, the discussion will shift to a generalized analysis of unilateral economic sanctions against individuals. This will be followed by a more concrete examination of the US sanctions targeting individuals, before turning to a detailed investigation of the US sanctions imposed against individuals in the Republic of Srpska. The paper provides a systematic map of the available legal remedies to protect both financial stability, including financial institutions and operating banks, and the targeted individuals.

2. International Law Governing Sanctions

International law regulates the imposition of sanctions through a variety of sources and principles, which are intended to ensure that such measures are applied lawfully and respect the international standards. A general overview may include laws and principles that provide a framework for limiting the scope of sanctions to those that are lawful and aligned with the UN principles, including respect for human rights and due process (Nabti, 2015, pp. 63-66). In this regard, the Charter is the most significant source of authority for the imposition of sanctions. According to Article 41, the UNSC has the power to decide upon measures not involving the use of armed force to give effect to its decisions for the maintenance of international peace and security. The sanctions authorized by the UNSC are binding for all member states. This particular obligation arises from Article 25 of the UN Charter, prescribing the obligation of all UN member states to carry out the decisions of the UNSC, including those relating to sanctions. However, this obligation can be claimed only when such decisions comply with the provisions and principles of the UN Charter, introducing limitations on the member states to adopt or enforce sanctions that would be against the Charter. This includes the requirement of compliance with human rights: the application of sanctions by the UNSC must accord with the purposes and principles of the United Nations, including the promotion and encouragement of respect for human rights. Any application of sanctions that violates human rights law is deemed problematic.

Bearing in mind Article 41 and essentially exclusive power of the UNSC to impose sanctions, unilateral sanctions appear troublesome. Namely, unilateral

sanctions imply economic measures that one state imposes on another to compel a policy change. However, in international law, unilateral sanctions present a complex challenge. They may be seen to contradict the principle of non-intervention[2] and possibly violate international law, particularly if they affect the human rights of the civilian population or the legal intercourse among states. The United Nations General Assembly has expressed their concern on multiple occasions that unilateral coercive measures are contrary to international law, the principles of the UN Charter, and the rules of free trade and friendly relations among states. For instance, comprehensive economic sanctions, which could amount to collective punishment, have been noted as being in contradiction to the basic principles of justice and human rights. The right to life and adequate healthcare is part of the *jus cogens* of the general international law, or the fundamental principles that must be upheld under all circumstances.

That said, unilateral sanctions, especially those imposed by powerful nations, are often a controversial aspect of international relations. While they may be pursued by individual states as part of their foreign policy goals, their alignment with international law depends on specific circumstances, including their impact on international peace and security, humanitarian conditions, and whether they conform to the existing international legal norms (Simonen, 2015 pp. 239, 241).

3. Unilateral Economic Sanctions Targeting Individuals

Unilateral sanctions targeting individuals are a form of restrictive measures imposed by a single state that specifically targets designated persons rather than a country as a whole. These individuals might be political leaders, government officials, business people, or any persons who are believed to be involved in activities that are considered objectionable or detrimental to the sanctioning state's interests, such as human rights abuses, corruption, or activities that undermine democracy or international peace and security. Such sanctions aimed at individuals typically include asset freezes, where any assets held by the targeted persons within the jurisdiction of the sanctioning state are blocked. They can also include travel bans, which prohibit individuals from entering the sanctioning country. The intent behind these sanctions is to pressure individuals to change their behavior by restricting their access to financial resources and international travel.

[2] Over the years, the principle of non-intervention has featured in various UN General Assembly resolutions. Although UNGA resolutions are not legally binding, they can reflect existing customary international law or contribute to its development, thus shaping the international legal framework regarding unilateral actions such as sanctions

Unilateral targeted sanctions against individuals are often part of a broader foreign policy strategy and are employed as a means of exerting influence without resorting to military force. However, these sanctions may raise legal and ethical issues, particularly regarding their conformity with the international law principles such as state sovereignty and non-intervention, due process, and human rights considerations.

3.1. Unilateral Sanctions Targeting Individuals and State Sovereignty

The position of international law regarding unilateral sanctions that target individuals, particularly when it concerns state sovereignty, is complex. On one hand, any state has the sovereign right to deny entry to non-citizens and to regulate its own financial system. However, when a state imposes sanctions targeting the individuals of another state, it can be seen as an encroachment on that other state's sovereignty, especially if such sanctions have extraterritorial effects or aim to coerce another government by applying pressure on its nationals. The principle of non-intervention under international law suggests that a state should refrain from coercive measures that interfere in the internal affairs of another state, which includes equally the use of force and the use of economic and other forms of coercion (Kreća, 2022, pp. 214-225). Imposing unilateral sanctions, especially when they have extraterritorial application, can sometimes be viewed as a breach of this principle if they dictate policy outcomes or constrain the sovereignty and political independence of the targeted state. These sanctions often raise questions about the balance between enforcing international norms and respecting state sovereignty. While they can be seen as a means of upholding certain international standards, such as human rights and anti-corruption policies, they may also be perceived as unilateral attempts to exert pressure and leverage on other states, which could contravene the spirit of sovereign equality as enshrined in the United Nations Charter and international law.

3.2. Unilateral Sanctions Targeting Individuals and the Principle of Non-Intervention

The principle of non-intervention holds that a state should not interfere in the internal affairs of another state, and it is a fundamental element underpinning the sovereignty of states within the international system, as enshrined in the United Nations Charter. When an individual state decides to impose sanctions on the individuals of another state (such as government officials, business leaders, or other entities), it may be viewed as a form of intervention if such measures aim to

compel a change in policy or behavior of the target state. These sanctions can be seen as an attempt to influence internal matters, especially if they are intended to affect political or economic decisions. Concerns arise when unilateral sanctions have extraterritorial effects, such as when they penalize non-nationals or companies from third countries for their involvement with the sanctioned individuals or when they affect the targeted individuals' activities beyond the borders of the sanctioning state. Such actions may extend the impact of the sanctions into the jurisdiction of another state, potentially violating the principle of non-intervention (Bogdanova, 2022, p. 74). International law generally rests on the voluntary multilateral consent of states when it comes to obligations that constrain their sovereign actions. Unilateral sanctions, by definition, do not have such a broad-based international consent. Consequently, their legality can be contested, especially if they appear to coerce the target state in a manner that undermines its political independence or territorial integrity – the key aspects protected by the non-intervention principle.

However, imposing such sanctions is often justified by sanctioning states on various grounds including human rights protection, countering terrorism, and upholding international peace and security. It should be noted that while such unilateral actions may be legally justified under the sanctioning state's domestic law, their compatibility with international law is often debated and can lead to political and legal disputes on the international stage. The United Nations General Assembly has highlighted concerns regarding unilateral coercive measures, suggesting that such measures may not align with the international law principles (A/RES/68/8; Asian-African Legal Consultative Organization, 2013).

3.3. Unilateral Sanctions Targeting Individuals and Due Process

In the context of unilateral sanctions targeting individuals, due process concerns arise as these measures directly affect individuals' rights and freedoms, such as their ability to access financial resources and freedom of movement. Due process, a legal concept that is widely accepted as a fundamental part of international human rights law, suggests that individuals are entitled to fair treatment through a normal judicial process, especially when their rights are at stake. When a state imposes unilateral sanctions on the individuals from another state, issues of due process can include procedural guarantees such as notice, evidence, the right to be heard, and judicial review. Namely, individuals should be informed that they are being sanctioned and about the reasons for such measures, and they should have the right to know the evidence against them that has lead to the imposition of sanctions. Each person affected by sanctions should be granted the opportunity to

present their case and challenge the sanctions imposed on them before a mechanism to appeal or review the decision to sanction (Allen, 2024, p. 271).

When unilateral sanctions are imposed without adequate due process, the targeted individuals may have limited or no recourse to challenge the sanctions, especially if the sanctioning state does not provide a legal avenue for review (Moiseienko, 2021, p. 407). The lack of an international legal framework specifically governing unilateral sanctions means that assessing due process largely depends on the national laws of the state imposing the sanctions. This can be problematic as it may result in a lack of uniform standards on how the individuals targeted by sanctions can defend their rights. Ensuring that unilateral sanctions respect the principles of due process is essential to uphold the credibility and legality of the sanctions regime itself. When due process is not observed, there can be significant criticism and pushback from the international community, and such sanctions may be challenged in international or domestic courts where the individuals have standing or where the sanctioning acts have an effect (Moiseienko, 2021 pp. 412-413).

Unilateral sanctions are also assessed in terms of proportionality and necessity. The fundamental element of this assessment begins with the notion of a legitimate aim, which has material as well as procedural dimensions. In the material sense, the legitimate aims for imposing targeted sanctions generally align with the internationally recognized aims such as the preservation or restoration of peace and security, the protection of human rights, and the prevention of illegal activities. More particularly, legitimate aims for these sanctions may include countering terrorism, non-proliferation, combating international criminal activities, and conflict resolution. In the procedural sense, sanctions must be enacted within the UN collective system of security. No other actor, including states or international organizations, has any authority to act otherwise.

4. United States Sanctions Targeting Individuals

The United States leverages its position in the global economy to enforce secondary sanctions on foreign firms through various mechanisms and strategies. Perhaps one of the most influential mechanisms is restricting foreign firms' access to the US financial system. When it comes to technology, it should be borne in mind that it also refers to the Society for Worldwide Interbank Financial Telecommunication (SWIFT). SWIFT, which operates a global messaging network for financial institutions, uses its own technology and infrastructure. However, the US government has employed SWIFT as a tool to enforce economic sanctions against targeted individuals, entities, and countries as part of its foreign policy

and national security goals (Cipriani, Goldberg & La Spada, 2023, p. 23). Through its regulatory authority and influence, the US can restrict access to the SWIFT network for entities facing sanctions, limiting their international financial transaction capabilities. In various geopolitical scenarios, including actions against Iran, Russia, North Korea, and others, the US government has utilized SWIFT to enforce sanctions by designating specific entities or individuals for sanctions and restricting their access to SWIFT. As a cooperative entity, SWIFT must comply with the US sanctions regulations, potentially leading to the disconnection of sanctioned parties from its messaging system (Cipriani, Goldberg & La Spada, 2023, p. 25). Through its regulatory influence, the US can limit the sanctioned entities' access to the SWIFT network, thereby obstructing their participation in international financial transactions.

In addition, many international transactions are conducted in US Dollars or involve US financial institutions, giving the US significant leverage over global financial flows (Ruys & Ryngaert, 2020, pp. 15-16). By cutting off foreign firms from the US financial system, the US can effectively limit their ability to conduct business with the sanctioned countries or entities. Therefore, transactions in US Dollars, as well as the use of US technology, allow the US to exercise extraterritorial jurisdiction and apply its laws beyond its borders, targeting foreign firms that engage in the activities deemed detrimental to the US foreign policy goals. The US imposes severe civil and criminal penalties on non-US firms, including those with limited connections to the US, for violating the US sanctions laws. The threat of these penalties serves as a deterrent, compelling foreign firms to comply with US sanctions even if they have minimal ties to the US market (Ruys & Ryngaert, 2020, pp. 16-17). Potentially, even if they only relate to the US controlled technology.

Different countries have faced consequences of US secondary sanctions as a result of their economic activities involving countries or organizations under US sanctions (Ruys & Ryngaert, 2020, p. 41). Iran, for example, has been a major target of these secondary sanctions, particularly within the framework of the Iran sanctions regime.[3] Foreign companies engaging in business with Iran have been at risk of facing US secondary sanctions, prompting many to scale back or cease their operations in Iran to prevent any penalties. Additionally, entities involved

[3] The United States, under Iran sanctions, has enforced secondary sanctions on non-US individuals and organizations that participate in specific activities with Iran. The goal of these supplementary sanctions is to dissuade foreign entities from conducting business with Iran and to put strain on the Iranian administration. Some instances of US secondary sanctions operating under the Iran sanctions system encompass declining export-import bank loans, refusal of US military technology export licenses, declined US bank loans, ban on US government purchases, limitations on foreign exchange transactions, investment prohibition, and banishment from the United States (see: Bootwala, 2020, p. 139).

in trading or financial activities with North Korea in violation of international sanctions have also been subject to secondary sanctions. This strategy is aimed at economically isolating North Korea and applying pressure on its government to denuclearize. Concerning Venezuela, the US has enforced secondary sanctions on individuals and organizations supporting the Venezuelan government, particularly in light of human rights violations and anti-democratic practices. These sanctions target primarily areas such as oil, finance, and mining. The US has also imposed secondary sanctions on entities conducting business with Cuba, especially in the context of the enduring US embargo on the nation. These measures are intended to limit trade and financial transactions with Cuba to push the Cuban government on matters related to human rights and politics. Further, secondary sanctions have been placed on entities involved in transactions with the Syrian government or entities associated with the Syrian regime. The objective is to isolate the Syrian government and discourage backing for its actions in the ongoing conflict. In response to Russia's actions in Ukraine and the alleged interference in the US elections, the US has implemented secondary sanctions on entities participating in specific transactions with Russia, concentrating on the sectors such as energy, defense, and finance, with continual expansion.

Bearing in mind international law frameworks governing sanctions, unilateral sanctions fall out of the scope of international legality. Still, when assessing whether targeted sanctions imposed by the United States are in line with international human rights law several critical factors need to be considered. Fundamental to this is a strict adherence to due process, involving aspects such as giving ample prior notification, providing clear justifications for designations, presenting substantial evidence, granting a fair hearing, and guaranteeing access to review by an unbiased tribunal (Chachko, 2019, p. 159). Moreover, the legal framework supporting these sanctions must be in line with international human rights norms. The legal justification for sanctions, including the legislative statutes backing their imposition, must be consistent with international legal standards.

In this regard, the United States must harmonize its implementation of targeted sanctions with the emerging international human rights frameworks applicable to such measures (Chachko, 2019, p. 161). It must take into account the evolving standards and practices in the global community concerning the use of sanctions (Chachko, 2019, p. 162). Additionally, the principle of proportionality plays a significant role, stipulating that sanctions should be commensurate with the threat or misconduct they aim to address. They should not inflict unnecessary harm or limitations beyond what is essential to achieve their intended goals. In terms of procedure, the pivotal elements are transparency in the designation process and access to remedies. While considerations of national security may

warrant non-disclosure of classified information, there should be mechanisms in place ensuring both accountability and transparency in the sanctioning process. All individuals and entities affected by targeted sanctions should be provided with effective avenues for redress, including options for administrative and judicial review (Chachko, 2019, p. 162). This safeguards their rights and guarantees recourse in the event of unjust sanctions imposed.

5. United States Sanctions Targeting Individuals in Republica of Srpska

Milorad Dodik, President of Republic of Srpska, was officially sanctioned by the United States on 5 January 2022, under Executive Order 14033 (E.O.) recalling his alleged involvement in actions that have disrupted the Dayton Peace Agreement (DPA) and corrupt practices (US Department of the Treasury, 2022). This followed a previous designation on 17 July 2017, under E.O. 13304 for impeding the DPA. Several businesses based in the Republic of Srpska, including Global Liberty d.o.o. Laktasi (Global Liberty), Agro Voce d.o.o. Laktasi (Agro Voce), Agape Gorica Dodik i Ivana Dodik s.p. Banja Luka (Agape), and Fruit Eco d.o.o. Gradiska (Gradiska), belong to a group of enterprises operating across Bosnia and Herzegovina in the hospitality and wholesale trade sectors. These companies were qualified as benefiting from preferential treatment in receiving public assistance from the Republic of Srpska due to their connection to the Dodik family, and were sanctioned as well.

There is a notable situation regarding the US sanctions for legislative activities. Based on E.O. 14033, on 31 July 2023, the US Office of Foreign Asset Control (OFAC) designated Stevandic, Viskovic, Cvijanovic and Bukejlovic for their involvement in or complicity with actions that had allegedly hindered or threatened the enforcement of regional security, peace, cooperation, or mutual recognition agreements or frameworks related to the Western Balkans (US Embassy in Bosnia and Herzegovina, 2023). Namely, the adoption of the Republic of Srpska National Assembly (RSNA) law rendering the decisions of the BiH Constitutional Court (BiH CC) invalid in the RS was qualified as jeopardizing the enforcement of the Dayton Peace Agreement (DPA). Following the approval of the law by RSNA in June 2023, on 1 July, the High Representative for BiH utilized his authority to invalidate the legislation, publicly criticizing it for undermining the regional constitutional order, rule of law, and separation of powers. Despite the High Representative's efforts to annul the law, Dodik officially signed the law into effect on 7 July 2023. According to the OFAC, the process of passing laws, as illustrated on the RSNA website, indicates that the individuals implicated in the

current actions bear responsibility for initiating the special session of RSNA on 27 June to vote on this contentious legislation. Radovan Viskovic (RS Prime Minister), Nenad Stevandic (RSNA Speaker and Chairperson), and Zeljka Cvijanovic (Serb member of the BiH Presidency) are credited for having requested the special session on 27 June, while Milos Bukejlovic (RS Minister of Justice) presented the law to RSNA on behalf of the RS government. Consequently, these four individuals are held accountable for supporting the adoption of this legislation that allegedly endangers the implementation of the DPA.

All the sanctions imposed entail a freeze on all assets and interests in the United States belonging to the above designated individuals or held by US entities, which must be reported to the Office of Foreign Assets Control (OFAC). Moreover, entities that are owned 50 percent or more, directly or indirectly, by the blocked persons are also subject to blocking. Any transactions involving assets of the designated or blocked individuals within the US or passing through the US are prohibited unless authorized by OFAC through a general or specific license, or exempted. These restrictions cover financial contributions, provision of goods or services, or receipt of such from the blocked persons. The former note, comprising all the sanctions imposed, warned that financial institutions and other entities involved in transactions with the individuals under sanctions could potentially encounter sanctions or enforcement measures. Recent consequences of this warning have led to the shutdown of bank accounts held by the sanctioned individuals and their affiliated companies, as well as NGOs, effectively putting an end to their commercial (and humanitarian) operations.

6. Legal Remedies Against United States Targeted Sanctions

Without intending to evaluate the described US sanctions in terms of international law or human rights law presented above, it is possible to identify their key characteristics: they target top-ranking officials, and legislative activities of the National Assembly as one of the grounds for sanctioning, and they affect untargeted entities such as those in the business and NGO sectors. Those characteristics should frame further inquiries into the legal remedies available. In that sense, we can distinguish between the remedies available to Bosnia and Herzegovina from those available to the Republic of Srpska. In addition, it is possible to allocate distinct remedies available to sanctioned individuals that relate to private persons and legal entities.

6.1. Legal Remedies Available to Bosnia and Herzegovina

The practical application of the legal remedies accessible to Bosnia and Herzegovina is influenced largely by its complex political and constitutional structure. This framework translates into a fragmented decision-making process that requires agreement among numerous political representatives, making it difficult to establish effective and timely governance (Golić, 2020, p. 39). Nevertheless, it is important to acknowledge the remedies that exist, irrespective of Bosnia and Herzegovina's ability to implement them. Namely, along with diplomatic dispute settlement mechanisms, there are two additional remedial categories: judicial and quasi-judicial. Within the realm of judicial remedies, Bosnia and Herzegovina has the right to appear before the International Court of Justice. While private individuals, corporations, or non-governmental organizations cannot directly approach the ICJ to file cases against the US, Bosnia and Herzegovina is allowed to do so on behalf of its citizens or entities. Past instances have shown that states have taken this route, with the ICJ having established case law to inform such legal actions. One notable case is the *Belgium v. Spain* dispute in 1970 concerning the Barcelona Traction, Light and Power Company Limited, where Belgium lodged a complaint against Spain over its treatment of the Belgian company. This case brought attention to the concept of diplomatic protection, whereby a state acts in defense of its citizens whose rights have been violated by another state. Belgium contended that Spain's actions towards the Barcelona Traction constituted an infringement of international law, thus justifying a claim on behalf of the company. The ICJ ruling on the Barcelona Traction case delved into the intricacies of diplomatic protection, outlining the criteria for states to file claims on behalf of their nationals or companies. Through this decision, the Court shed light on the parameters of diplomatic protection and the interplay between states, individuals/entities, and alleged wrongdoings by foreign powers (Ruys & Ryngaert 2020, p. 18). Consequently, this case offers valuable perspectives on the legal principles surrounding diplomatic protection and the entitlement of states to seek justice for breaches of international law affecting their citizens or businesses.

Access to the European Court of Justice (ECJ) is an innovative judicial remedy. Namely, access to the ECJ is granted primarily to Member States, EU institutions, and individuals or entities directly affected by EU law (Court of Justice of the European Union – Procedure). As Bosnia and Herzegovina is not a Member State of the EU, it does not have direct access to the ECJ. Nevertheless, as a signatory to the Stabilization and Association Agreement – SAA (Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 2015). Bosnia and Herzegovina retains the option to navigate matters relevant to the ECJ or EU legalities indirectly through the

interpretation and implementation of EU regulations within the scope of the agreement. When disputes materialize either between the EU and a non-EU nation or within the SAA confines, the correct interpretation and application of EU law play a fundamental role. During such instances, if there are concerns regarding the conformity of actions or measures taken by the non-EU nation with EU legislation, these matters might indirectly involve the ECJ. Moreover, given the position of the SAA in the EU legal hierarchy, it is plausible to believe that individuals and entities from Bosnia and Herzegovina can cite the SAA regulations directly in legal cases before the courts of Member States and the ECJ. This aligns with a level of rights akin to those of the European Union citizens, as indicated by Radivojević (2012).

The guiding principles in this regard can be found in ECJ judgments dated 3 September 2008, in Joined Cases C-402/05 P and C-415/05 P, known as the *Kadi* case, Reports of Cases. 2008 I-06351 (Appeal Case before the General Court T-315/01). The ECJ judgment addressed the legality of the sanctions imposed by the European Union on Yassin Abdullah Kadi and Al Barakaat International Foundation, who were listed as individuals and entities associated with Al-Qaeda. This legal case brought up intricate matters regarding fundamental rights such as the right to a fair trial, the right to be heard, and the right to effective judicial protection within the sanctions systems. It emphasized the necessity of ensuring that sanctions are enforced in compliance with international human rights norms, guaranteeing fair trial rights and access to effective remedies. The judgment of the ECJ in this case underscored the need for robust procedural safeguards and mechanisms for individuals and entities affected by sanctions to challenge their designation and seek redress for any violations of their rights. Nonetheless, at present, the feasibility of this prospect is hindered by the absence of relevant domestic legislation and will not be further elaborated here.

In addition, the recent lifting of sanctions against Russian businessmen Petr Aven and Mikhail Fridman, on 10 April 2024, in cases T-301/22 (*Aven v Council*) and T-304/22 (*Fridman v Council*) offers valuable insights into the interpretation of the relevant EU legislation on sanctions and human rights by the European Court of Justice (ECJ), as discussed herein. These individuals, holding Russian and Latvian nationality, i.e., Russian and Israeli nationality, respectively, were designated by the Council as major shareholders of Alfa Group, which encompasses Alfa Bank, a prominent Russian financial institution. The sanctions imposed included asset freezes and economic restrictions due to alleged associations with other sanctioned individuals and ties to Vladimir Putin.

The Council justified the sanctions by asserting that Aven and Friedman had aided the Russian government financially and supported activities undermining Ukraine's sovereignty and territorial integrity. However, both the businessmen

contested the Council's evidence as unreliable and disputed the accuracy of its assessments using two main arguments (*Aven v Council*, paras. 38-39). The first argument questions the reliability and credibility of the evidence presented by the Council. The plaintiffs argued that the material evidence is outdated, inconsistent, sourced anonymously, lacks credibility, and was not thoroughly investigated or cross-examined. By raising this point, the plaintiffs effectively cast doubt on the validity of the evidence used against them, leading to the imposition of consequences. The evidence put forth by the Council failed to meet the standard of "beyond a reasonable doubt," (see: Shapiro, 2008, pp. 1033, 1035), necessary for legal disqualification. The second argument stems from the incorrect factual situation established in the case. The plaintiffs contested the Council's claims of actively supporting actions that could threaten Ukraine's territorial integrity, sovereignty, and independence. Furthermore, they disputed providing any active material or financial support to the Russian authorities involved in annexing Crimea and destabilizing Ukraine. By presenting these additional arguments, which are secondary to the first argument, the court logically concluded that the sanctions were unjustified.

The ECJ sided with the plaintiffs, annulling the original sanctions and extending the relief from sanctions for the period between 28 February 2022 and 15 March 2023. The General Court criticized the lack of credibility and reliability in the Council's justifications, deeming the sanctions unjustified. This critique applied equally to the extension of the initial sanctions. As stated by the General Court, the reasons provided by the Council could potentially justify the argument regarding the proximity of the appointees to the Russian Federation's leadership. However, this does not establish that the plaintiffs backed actions or strategies that weaken or endanger the territorial integrity, sovereignty, and independence of Ukraine. Nor does it demonstrate their involvement in offering material or financial aid to the Russian officials accountable for the annexation of Crimea or the destabilization of Ukraine, or their receipt of advantages from the decision-makers.

Among quasi-judicial remedies, Bosnia and Herzegovina could utilize the dispute settlement mechanism available within the World Trade Organization (WTO). While the WTO focuses mainly on resolving trade disputes, the enforcement of sanctions beyond national borders, such as secondary sanctions, can raise concerns regarding adherence to global trade regulations and commitments. It is crucial to consider that pursuing a resolution within the WTO for secondary sanctions may be affected by various factors, such as the level of willingness among member countries to participate in the resolution process and the availability of a fully functional Appellate Body. The intricate nature of extraterritorial sanctions and their interaction with international trade regulations could create

obstacles when seeking remedies within the WTO framework. Nevertheless, as a WTO member, Bosnia and Herzegovina has the option to contest the legality of targeted US sanctions by initiating dispute settlement procedures (see: World Trade Organization, Members and Observes). These procedures involve panels and the Appellate Body assessing whether the sanctions are in line with the WTO regulations and agreements (Bogdanova, 2021, p. 172).

Concerning the conformity of sanctions with the WTO laws, it is notable that only Article XXI of the GATT allows members to implement measures deemed necessary for safeguarding their vital security interests (Bogdanova, 2021, p. 179). Indeed, this provision offers a broad exception that can be utilized to justify specific trade-limiting actions, including economic sanctions, but exclusively if implemented for national security considerations. As evident from recent events, the US did not invoke this justification when imposing targeted economic sanctions on individuals from the Republic of Srpska.

The analysis and illustration of the relevant cases are presented in the following text (Bogdanova, 2021, p. 187). One notable instance is DS512, which involves Russia's Traffic in Transit (World Trade Organization, 2019a). In this particular case, a dispute arose between the Russian Federation and Ukraine, leading the panel to classify the situation as an "emergency in international relations." It was determined that Russia's trade-restrictive actions were a response to this emergency scenario. Another case worth mentioning is DS574, focusing on the United States Measures Relating to Trade in Goods and Services (World Trade Organization, 2019b). Here, Venezuela raised concerns regarding the compliance of certain US-imposed measures with the WTO regulations. Despite Venezuela's panel request, the US declined consultations and rejected the Dispute Settlement Body's agenda, resulting in Venezuela retracting its appeal. DS526, pertaining to the United Arab Emirates, addressed trade measures concerning goods, services, and intellectual property rights (World Trade Organization, 2022). This case sheds light on the growing trend of the WTO challenges related to unilateral economic sanctions. Lastly, DS567 spotlighted Saudi Arabia Measures Concerning the Protection of Intellectual Property Rights, further showcasing the intricate nature of disputes stemming from unilateral economic sanctions and their repercussions on trade relationships (World Trade Organization, 2020).

6.2. Legal Remedies Available to Republic of Srpska

Even threats of sanctions can have destabilizing effects on targeted individuals, potentially leading to political changes (Özdamar & Shahin, 2021, pp. 1652-1653). A prospective initiative of the Republic of Srpska toward the central

institutions of Bosnia and Herzegovina to utilize their powers and actions to safeguard the welfare of its citizens would be somewhere between political and legal instruments. Neglecting such an initiative could result in noteworthy legal ramifications. Currently, the Republic of Srpska is unable to represent its citizens or entities before international courts or dispute resolution forums outside the framework established by the Dayton Accords. Nevertheless, the Republic of Srpska has the constitutional capacity to pass laws governing key areas impacted by targeted economic sanctions, notably in the financial, banking, and security sectors. In addition, the Republic of Srpska is required to conform to EU regulations and the Blocking Statute should not be overlooked in this process.

In fact, blocking statutes should be the first consideration among the legal remedies at the disposal of the Republic of Srpska. Namely, blocking statutes are implemented by either the EU or third countries, and aim to prevent adherence to specific foreign sanctions with extraterritorial reach. These regulations are designed to safeguard the well-being of domestic companies and citizens by offsetting the impact of foreign sanctions. By proscribing compliance with particular foreign sanctions, blocking statutes intend to shield local entities from legal consequences when conducting lawful operations. The European Union Blocking Statute is a notable example, established in 1996 in reaction to the extraterritorial enforcement of US sanctions (Ruys & Ryngaert, 2020, p. 81). This statute is intended to shield the European enterprises and individuals from the repercussions of select extraterritorial sanctions imposed by other nations, notably the United States. Continuously revised and revived, the EU Blocking Statute responds to diverse instances of extraterritorial sanctions, such as those targeting Iran, serving as a mechanism for the EU to safeguard its economic interests and uphold its sovereignty against unilateral sanctions enacted by foreign states (Dakić, 2024, p. 675).

Key components of this statute comprise the restriction on compliance, which bars all EU individuals from abiding by parts of extraterritorial sanctions not endorsed by the EU; annulment of foreign rulings, which voids all foreign court verdicts linked to extraterritorial sanctions unrecognized by the EU; entitlement to seek compensation, providing all EU individuals with the right to claim damages due to the implementation of extraterritorial sanctions; and obligatory reporting, mandating all EU individuals to inform the European Commission about any impacts of extraterritorial sanctions on their operations (Ruys & Ryngaert, 2020, pp. 86-87). Perhaps the EU Blocking Statute could provide a model for the Republic of Srpska to protect its financial and banking sectors including business entities operating within its jurisdiction.

The imposition of secondary sanctions can impact security considerations at both international and domestic levels, disrupting the economic activities of

the entities or individuals within the sanctioning state who have business ties with the targeted entities or countries. This disruption can lead to financial losses, market instability, and supply chain disruptions for businesses as a result of restrictions on trade, investment, or financial transactions with the sanctioned entities (Nguyen & Ahmed, 2023, pp. 91-92). Job losses and economic uncertainty may occur in the industries or sectors heavily reliant on international trade or business relationships with the targeted entities. Additionally, the imposition of secondary sanctions can undermine business confidence and discourage foreign investment in the sanctioning state, as companies may perceive the increased risks associated with operating in a jurisdiction that enforces such measures. The uncertainty surrounding economic relations and potential retaliatory actions by targeted countries can influence investment decisions and economic development. All that makes secondary sanctions inextricable from the context of the security of the Republic of Srpska.

The most significant security challenge posed by secondary sanctions lies in the implications for financial sector stability. The financial stability of targeted states and the influence of sanction threats on financial sectors are important factors in determining the costs and ultimate impacts of sanctions (Özdamar & Shahin, 2021, p. 1648). The financial sector may face difficulties due to the impact of secondary sanctions on banking relationships, access to international markets, and compliance with regulatory standards. Domestic financial institutions may have to bear costs related to heightened due diligence, compliance with sanction regulations, and risk management associated with exposure to sanctioned entities. Financial institutions of the Republic of Srpska, as well as those operating within its jurisdiction, are not exempt from this general consideration. Furthermore, those institutions are increasingly vulnerable due to the lack of a domestic equivalent to the EU Blocking Statute.

6.3. Legal Remedies Available to Individuals From Republic of Srpska

This aspect of inquiry revolves around human rights remedies, as the most suitable remedies to facilitate the rights of individuals affected by targeted sanctions. In addition, under the human rights standards, both private persons and legal entities referred to as individuals enjoy protection. Here we can also allocate judicial and quasi-judicial remedies. Judicial remedies can be sought before domestic, foreign, and international courts. Our research does not focus on domestic remedies as the Republic of Srpska lacks a blocking statute that counteracts the adverse effects of unilateral sanctions on domestic businesses and individuals. If domestic financial institutions and banks adhere to extraterritorial

sanctions, they could face litigation for enforcing foreign legal jurisdiction. Opting to present the case before foreign courts seems like a more advantageous choice. This pertains to jurisdictions with legislation safeguarding their citizens or entities from extraterritorial sanctions. Such courts have the authority to assess the legality of the sanctions by considering various factors, including compliance with domestic laws, international treaties, customary international law principles, and fundamental rights (Ruys & Ryngaert 2020, pp. 94-96).

An option to consider is the US courts. Targeted sanctions imposed by the US government can be contested by individuals before the US courts. They have the opportunity to claim that the sanctions go beyond the scope of the government's power or are not aligned with international law. Through lawsuits, individuals can request injunctions or declaratory judgments to dispute the legality of the sanctions. All individuals from the Republic of Srpska injured by targeted sanctions who can prove an effective connection to the US can invoke constitutional rights directly before the US courts as safeguarded to the US citizens (Ruys & Ryngaert 2020, p. 86). Additionally, when conditions are met, individuals from the Republic of Srpska can bring the case before the regional human rights bodies (see: Palević & Dakić, 2013, pp. 86-88).

Certainly, the most significant human rights protection is provided within the universal human rights monitoring systems. The crucial protection of civil and political rights is ensured by the International Covenant on Civil and Political Rights (ICCPR), a vital international human rights treaty. Within the framework of the ICCPR, key guarantees such as freedom of expression and due process are safeguarded. Oversight of the ICCPR falls under the responsibility of the UN Human Rights Committee, which scrutinizes state reports, issues general comments, and assesses individual complaints (communications) that claim violations of rights enshrined in the Covenant. To address alleged violations of the rights protected by the ICCPR, individuals may lodge complaints, known as communications, with the UN Human Rights Committee. For a communication to be considered admissible, it must adhere to the criteria established by the Human Rights Committee, including exhausting all domestic legal remedies and adhering to procedural requirements.

With consideration to the impacts of sanctions, the International Covenant on Economic, Social and Cultural Rights (ICESCR) stands out as a crucial international agreement safeguarding the most impacted rights. The ICESCR acknowledges the right of all individuals to pursue a livelihood through freely chosen or accepted work. Additionally, the ICESCR upholds the right of all individuals to a satisfactory quality of life for themselves and their families, encompassing the provisions relating to sustenance, attire, shelter, and healthcare. This

right includes access to social security, the right to fair and favorable working conditions, and the right to an adequate standard of living ensuring dignity, welfare, and opportunities for personal growth. All private persons or groups of individuals have the right to submit communications or complaints to the UN Committee on Economic, Social and Cultural Rights (CESCR) if they believe that their economic, social, or cultural rights under the ICESCR have been violated by a state party. These communications can raise specific issues, cases, or patterns of violations related to rights such as the right to work, the right to education, the right to health, or the right to an adequate standard of living. It is worth noting that in its General Comment No. 8, the CESCR has discussed the effects of economic sanctions on the enjoyment of economic, social, and cultural rights. The document emphasizes that using economic sanctions to achieve political goals should not come at the expense of human rights. It stresses the significance of ensuring that sanctions are focused, fair, and do not unfairly affect the most vulnerable segments of society. Specifically, General Comment No. 8 emphasizes the importance of governments prioritizing the protection of at-risk groups — children, women, the elderly, persons with disabilities, and marginalized communities — when formulating and enforcing sanctions.

Perhaps the most comprehensive mechanism within the UN human rights protection system available to individuals from the Republic of Srpska is the Human Rights Council complaint procedure (Human Rights Council resolution 5/1 of 18 June 2007). Acknowledging the significance of private complaints, the resolution sets up a complaint process that empowers individuals and groups to raise allegations of human rights violations to the Council (Khaliq, 2018, p. 370). That allows victims and advocates to pursue justice for violations and hold states accountable for upholding human rights standards. Emphasizing a victims-oriented, efficient approach, the resolution underscores the need for timely handling of complaints, stipulating that the period from complaint submission to Council consideration should not exceed 24 months. This commitment to promptness and victim-focused action aims to swiftly address human rights abuses and handle grievances effectively. Furthermore, the involvement of both the complainant and the state in the complaint process ensures that all relevant parties can engage in the procedure and present their viewpoints (Khaliq, 2018, p. 371).

The complaint procedure of the Human Rights Council is the only universal complaint procedure addressing all human rights and fundamental freedoms in all United Nations member states. Any individual, group of individuals, or non-governmental organization can submit a complaint. Any of the 193 member states can be subject to a complaint, regardless of their ratification status of specific treaties or reservations made under particular instruments. In

order for a complaint to be accepted by the complaint procedure of the Human Rights Council, it must adhere to specific admissibility criteria. These criteria include the exhaustion of all domestic remedies and the avoidance of duplication. Domestic remedies should be pursued and utilized fully unless they prove to be inadequate or unreasonably prolonged. The principle of non-duplication is crucial, indicating that the complaint should not be simultaneously under review by a special procedure, a treaty body, or any other United Nations or regional complaints procedure related to human rights issues.

Since the establishment of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights by the Human Rights Council, the complaint procedure available before this body has gained significant importance. The mandate was established through the adoption of resolution 27/21 (A/HRC/RES/27/21/Corr.1) on human rights and unilateral coercive measures on 26 September 2014. The resolution was last renewed in October 2023 under HRC resolution 54/15. These resolutions emphasize that unilateral coercive measures and practices violate international law, international humanitarian law, the UN Charter, and the principles governing peaceful relations among states. They also point out that these measures can lead to long-term social problems and raise humanitarian concerns in the targeted states. It is sensible to expect that the Human Rights Council would follow those resolutions in its reasoning on individual complaints.

7. Conclusions

The research segment exploring the available legal remedies for Bosnia and Herzegovina delves into two additional categories of remedies beyond diplomatic dispute resolution mechanisms. These include judicial and quasi-judicial options. Under the judicial remedies umbrella, Bosnia and Herzegovina holds the authority to present cases before the International Court of Justice on behalf of individuals from the Republic of Srpska. Furthermore, as a signatory to the Stabilization and Association Agreement (SAA), Bosnia and Herzegovina may consider bringing a case before the European Court of Justice (ECJ) under specific circumstances. In terms of quasi-judicial remedies, Bosnia and Herzegovina could turn to the dispute settlement mechanism within the World Trade Organization (WTO). Regarding the compatibility of sanctions with the WTO regulations, it is pertinent to note that only Article XXI of the General Agreement on Tariffs and Trade (GATT) permits members to enforce measures deemed necessary to protect their essential security interests. Nonetheless, the United States refrained

from invoking this provision when imposing targeted economic sanctions on individuals from the Republic of Srpska, thus offering them the opportunity to contest the sanctions' compliance with the GATT regulations.

The research segment focusing on the legal remedies available to the Republic of Srpska highlights the potential obligation to compel the central institutions of Bosnia and Herzegovina to exercise their powers and initiatives in safeguarding the well-being of its citizens. Alternatively, the Republic of Srpska may request that the central institutions of Bosnia and Herzegovina represent its individuals directly before the ICJ and other relevant forums. Given the constitutional authority of the Republic of Srpska, the enactment of the so-called blocking statutes should be prioritized. This legislative measure could be strongly reinforced by the legal mandate for the Republic of Srpska to align its legislation with that of the European Union, thereby enhancing its ability to safeguard financial stability for both institutions and individuals within its jurisdiction. In light of the security implications of economic sanctions, the Republic of Srpska must address this aspect with due diligence.

Regarding the legal options open to individuals (both private individuals and legal entities) from the Republic of Srpska, they can seek defense of their rights before judicial and quasi-judicial bodies. Judicial remedies are accessible through national, foreign, and international courts. Concerning national judicial proceedings, if domestic financial institutions and banks comply with external sanctions, they may be subject to legal action for enforcing foreign legal authority unlawfully. Nevertheless, our analysis does not concentrate on local remedies due to the absence of a blocking statute in the Republic of Srpska, making presenting the case to foreign courts a more favorable alternative. This applies to jurisdictions with laws protecting their citizens or entities from foreign sanctions. Such courts are empowered to evaluate the legitimacy of the sanctions based on several factors, including conformity with local laws, international agreements, customary international law principles, and the basic rights.

One viable option is to appeal to the US courts. Individuals can challenge specific sanctions imposed by the US government before these courts. They can argue that the sanctions exceed the government's jurisdiction or are not in line with international law. Through legal actions, individuals can petition for injunctions or declaratory judgments to challenge the legality of the sanctions. All individuals from the Republic of Srpska affected by targeted sanctions, who can demonstrate a substantial connection to the US, have the right to invoke constitutional rights directly before US courts.

In the realm of quasi-judicial remedies, individuals from the Republic of Srpska have the opportunity to approach the UN Human Rights Committee concerning their rights under the ICCPR (such as freedom of expression and due process),

and the UN Committee on Economic, Social, and Cultural Rights regarding their rights under the ICESCR (such as the right to work and adequate standard of living). Arguably, the most comprehensive mechanism within the UN human rights protection system available to individuals from the Republic of Srpska is the complaint mechanism to the Human Rights Council. This procedure is the sole universal grievance mechanism dealing with all human rights and fundamental freedoms in all UN member states. Any individual, group, or non-governmental organization can lodge a complaint against any member state. The EU has adopted legal tools that would enable the enforcement of contractual obligations to compel candidate countries to align with its foreign policy in this regard.

References

Allen, I. 2024. Due Process Boundaries of US Economic Sanctions. *New York University Journal of Legislation & Public Policy*, 26(1), pp. 239-271.

Biersteker, T. J. & Hudáková, Z. 2021. UN targeted sanctions: Historical development and current challenges. *Research Handbook on Economic Sanctions*. Edward Elgar Publishing, pp. 107-124. https://doi.org/10.4337/9781839102721.00011

Biersteker, T., Van den Herik, L. & Brubaker, R. (2021). Enhancing due process in UN Security Council targeted sanctions regimes. Graduate Institute of International and Development Studies. https://www.graduateinstitute.ch/sites/internet/files/2021-09/report_enhancing_due_process_March2021_FINAL%20%281%29.pdf.

Bogdanova, I. 2021. Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception. *Legal Issues of Economic Integration*, 48(2), pp. 171-200. https://doi.org/10.54648/leie2021010

Bogdanova, I. 2022. Chapter 2 The Legality of Unilateral Economic Sanctions under Public International Law. In: Bogdanova, I. *(ed.), Unilateral Sanctions in International Law and the Enforcement of Human Rights*. Leiden: Brill | Nijhoff, pp. 59-158. https://doi.org/10.1163/9789004507890_004

Bootwala, M. 2020. The Iran problem: an evaluation of US sanctions on Iran and global reactions. *Georgetown Journal of International Affairs,* 21, pp. 136-141. https://doi.org/10.1353/gia.2020.0009

Chachko, E. 2019. Due Process Is in the Details: US Targeted Economic Sanctions and International Human Rights Law, *AJIL Unbound*, 113, pp. 157-162. https://doi.org/10.1017/aju.2019.25

Cipriani, M., Goldberg, L. S. & La Spada, G. 2023. *Financial Sanctions, SWIFT, and the Architecture of the International Payments System*. Staff Report No. 1047. FRB of New York. Available at: https://ssrn.com/abstract=4336483, http://dx.doi.org/10.2139/ssrn.4336483

Dakić, D. 2024. *Acquis* i ekonomske sankcije. In: Vujisić, D. (ed.), *Izazovi I otvorena pitanja uslužnog prava,* Tom II. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu, pp. 667-683.

Dupont, P. E. 2019. Human rights implications of sanctions. In: Asada, M. (ed), *Economic Sanctions in International Law and Practice*, pp. 39-61. https://doi.org/10.4324/9780429052989

Golić, D. 2020. Kolektivni šef države i sistem vlasti - bosanskohercegovačka rešenja u svetlu uporednog prava. *Strani pravni život*, 64(2), pp. 27-42. https://doi.org/10.5937/spz64-26529

Van Rooyen, J. & Nath, A. (2020). Trade Sanctions: A Minor Hindrance or Complete Disaster. *International Journal of Economic Behavior and Organization*, 8(3), pp. 74-80. https://doi.org/10.11648/j.ijebo.20200803.14

Khaliq, U. 2018. Human Rights Council Resolution 5/1: Institution Building of the United Nations Human Rights Council, 2007. In: Khaliq, U. (ed.), *International Human Rights Law Documents*. Cambridge: Cambridge University Press, pp. 368–389. https://doi.org/10.1017/9781316677117.047

Kreća, M. 2023. *Međunarodno javno pravo*. 14. dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Moiseienko, A. 2021. *Due process and unilateral targeted sanctions*. In: Beaucillon, Ch. (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*. Edward Elgar Publishing. https://doi.org/10.4337/9781839107856.00033

Nabti, N.M. 2015. Increasing the Cost of Rape: Using Targeted Sanctions to Deter Sexual Violence in Armed Conflict. In: Marossi, A. & Bassett, M. (eds) Economic Sanctions under International Law. The Hague : T.M.C. Asser Press, pp. 43-67. https://doi.org/10.1007/978-94-6265-051-0_3

Nguyen, L. Q. T. & Ahmed, R. 2023. The impact of economic sanctions on foreign direct investment: empirical evidence from global data. *Journal of Economics and Development*, 25(1) pp. 79-99. https://doi.org/10.1108/JED-10-2022-0206

Orakhelashvili, A. 2015. The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria. In: Marossi, A. & Bassett, M. (eds) Economic Sanctions under International Law. The Hague : T.M.C. Asser Press, pp. 3-21. https://doi.org/10.1007/978-94-6265-051-0_1

Özdamar, Ö. & Shahin, E. 2021. Consequences of Economic Sanctions: The State of the Art and Paths Forward. *International Studies Review*, 23(4), pp. 1646-1671. https://doi.org/10.1093/isr/viab029

Palević, M. 2022a. Regulatorna podrška platnim uslugama u Evropskoj uniji – odabrani pregled. In: Vujisić, D (ed.), *Sadašnjost i budućnost uslužnog prava*. Kragujevac: Institut za pravne i društvene nauke, pp. 197-205. Available at: http://institut.jura.kg.ac.rs/images/Projekti/7%20XXI%20vek/Sadasnjost%20i%20buducnost%20usluznog%20prava%202022.pdf (16. 9. 2024).

Palević, M. 2022b. Sankcije i obaveza države kandidata da uskladi spoljnu politiku sa Evropskom unijom. In: Sokolović, S. (ed.), *Usklađivanje pravnog sistema Srbije sa*

standardima Evropske unije. Kragujevac: Institut za pravne I društvene nauke, pp. 105-122. Available at: http://institut.jura.kg.ac.rs/images/Projekti/6%20Usklad-jivanje%20PSS/11.%20Uskladjivanje%20pravnog%20sistema%20Srbije%20sa%20standardima%20Evropske%20unije%20knj.%2010.pdf (15. 9. 2024).

Palević, M. & Dakić, D. 2013. Početak zaštite prava na život na Američkom kontinentu. *Nauka, bezbednost, policija*, 18(2), pp. 81-92.

Park, J. & Choi, H. J. 2022. Are smart sanctions smart enough? An inquiry into when leaders oppress civilians under UN targeted sanctions. *International Political Science Review*, 43(3), pp. 433-449. https://doi.org/10.1177/0192512120931957

Radivojević, Z. 2012. Sporazumi o stabilizaciji i pridruživanju u pravu Evropske unije. *Zbornik radova Pravnog fakulteta u Nišu* (62), pp. 53-72. Available at: http://www.prafak.ni.ac.rs/files/zbornik/sadrzaj/zbornici/z62/04z62.pdf (16. 9. 2024).

Ruys, T. & Ryngaert C. 2020. Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions. *British Yearbook of International Law*, 0(0), braa007, pp. 1-116. https://doi.org/10.1093/bybil/braa007

Simonen, K. 2015. Final Comment: Legal Review of New EU Sanctions Against Russia in Light of Recent Jurisprudence of the European Courts. In: Marossi, A. & Bassett, M. (eds) Economic Sanctions under International Law. The Hague : T.M.C. Asser Press, pp. 237-242. https://doi.org/10.1007/978-94-6265-051-0_13

Shapiro, B. 2008. The Beyond Reasonable Doubt Doctrine: 'Moral Comfort' or Standard of Proof?. *Law and Humanities*, 2, pp. 149-173. https://doi.org/10.1080/17521483.2008.11423749

Internet Sources

US Department of the Treasury. 2022. *Treasury Sanctions Milorad Dodik and Associated Media Platform for Destabilizing and Corrupt Activity*. Available at: https://home.treasury.gov/news/press-releases/jy0549 (15. 9. 2024).

US Embassy in Bosnia and Herzegovina. 2023. *US Treasury Targets Four Officials in Bosnia and Herzegovina for Undermining the Dayton Peace Agreement*. Available at: https://ba.usembassy.gov/u-s-treasury-targets-four-officials-in-bosnia-and-herzegovina-for-undermining-the-dayton-peace-agreement/?_ga=2.55850915.963575067.1712127291-635899093.1699044759 (15. 9. 2024).

Legal Sources

Court of Justice of the European Union, Procedure. Available at: https://curia.europa.eu/jcms/jcms/Jo2_7031/en/ (15. 9. 2024).

General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights 12 December 1997 E/C.12/1997/8 Available at: https://www.refworld.org/legal/general/cescr/1997/en/52393 (15. 9. 2024).

Human Rights Council resolution 5/1 of 18 June 2007, Available at: https://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_5_1.doc (15. 9. 2024).

International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI), Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (15. 9. 2024).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, General Assembly resolution 2200A (XXI), Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (15. 9. 2024).

Resolution 27/21 (A/HRC/RES/27/21/Corr.1), Available at: https://digitallibrary.un.org/record/788446?ln=en&v=pdf (15. 9. 2024).

Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, Official Journal of the European Union, 30. 6. 2015. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22015A0630(01) (15. 9. 2024).

World Trade Organization. Members and Observes. Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (15. 9. 2024).

World Trade Organization. 2020. Saudi Arabia appeals panel report regarding intellectual property measures. DS567. Available at: https://www.wto.org/english/news_e/news20_e/ds567apl_30jul20_e.htm (15. 9. 2024).

World Trade Organization. 2019a. Russia – Measures Concerning Traffic in Transit. DS512. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm (15. 9. 2024).

World Trade Organization. 2019b. United States Measures Relating to Trade in Goods and Services – DS574. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds574_e.htm (15. 9. 2024).

World Trade Organization. 2022. United Arab Emirates Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights – DS526. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm (15. 9. 2024).

Case Law

Aven v Council, T-301/22. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=284621&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=3620496 (16. 9. 2024).

C-402/05 P and C-415/05 P. Reports of Cases. 2008 I-06351, Appeal Case before the General Court T-315/01

Fridman v Council, T-304/22, available at https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=T-304/22 (15. 9. 2024).

Jelena Ž. Kostić*
Miloš R. Vasović**

Originalni naučni članak
UDK: 347.447: 339.5
doi: https://doi.org/10.56461/SPZ_24304KJ
Primljeno: 25. 6. 2024.
Izmenjeno: 29. 8. 2024.
Prihvaćeno: 23. 9. 2024.

PRAVILO O TRANSFERNIM CENAMA KAO ANTIABUZIVNA MERA U ZAKONODAVSTVU EU I PRAKSI SUDA PRAVDE EU***

Sažetak

U zakonodavstvu Evropske unije u oblasti poreza na dodatu vrednost pravilo o transfernim cenama predstavlja posebnu antiabuzivnu meru. Nasuprot tome, Zakon o porezu na dodatu vrednost Republike Srbije omogućava poreskim obveznicima prodaju robe ispod tržišne, odnosno nabavne cene ili cene koštanja. To bi u slučaju isporuke između povezanih lica moglo da deluje podsticajno na vršenje zloupotreba, dok u isto vreme navedeni zakon ne predviđa pravila o transfernim cenama koja se mogu primeniti kao sredstvo prevencije zloupotreba u domenu poreza na dodatu vrednost. Imajući u uvidu pozitivnopravne propise na nacionalnom nivou, u slučaju zloupotrebe, načelo fakticiteta je jedino alternativno sredstvo koje stoji poreskim vlastima na raspolaganju, ali ne bi bilo ispravno primeniti ga na usklađivanje poreske osnovice PDV-a sa tržišnom ili nabavnom cenom. Stoga bi propisivanje pravila o transfernim cenama bilo značajno ne

* Doktorka pravnih nauka, viša naučna saradnica, Institut za uporedno pravo, Beograd.
E-mail: *j.kostic@iup.rs*
ORCID: *https://orcid.org/0000-0001-6032-3045*
Dr Jelena Kostić je Odlukom Naučnog veća Instituta za uporedno pravo broj 343 od 22.04.2024. godine imenovana za mentora Milošu Vasoviću, M.A., istraživaču saradniku Instituta za uporedno pravo i doktorantu Pravnog fakulteta Univerziteta u Beogradu. Ovaj rad je jedan od rezultata mentorstva sa navedenim kandidatom.

** M.A., Istraživač saradnik, Institut za uporedno pravo, Beograd,.
E-mail: *m.vasovic@iup.rs*
ORCID: *https://orcid.org/0009-0007-4218-3350*

*** Rad je nastao u okviru naučnoistraživačkog rada Instituta za uporedno pravo koji finansira Ministarstvo nauke, tehnološkog razvoja i inovacija Republike Srbije prema Ugovoru o realizaciji i finansiranju naučnoistraživačkog rada NIO u 2024. godini (evidencioni broj: 451-03-66/2024-03/200049 od 5. 2. 2024. godine).

samo radi usaglašavanja nacionalnog zakonodavstva sa evropskim standardima već i sa apsekta zaštite nacionalnog fiskalnog sistema. Polazeći od pretpostavke da je nacionalno zakonodavstvo potrebno dodatno uskladiti sa zakonodavstvom Evropske unije u oblasti poreza na dodatu vrednost, u radu smo primenili dogmatsko-pravni i metod analize sadržaja sa posebnim osvrtom na praksu Suda pravde Evropske unije. Na taj način nastojali smo da damo preporuke za unapređenje nacionalnog zakonodavstva u oblasti poreza na dodatu vrednost.

Ključne reči: transferne cene, porez na dodatu vrednost, cena van dohvata ruke, poreska evazija, načelo fakticiteta.

OPEN MARKET VALUE PROVISION AS AN ANTI-ABUSE MEASURE IN SERBIAN VAT LEGISLATION

Summary

In the value-added tax system of the European Union, the open market value provision is considered as a special anti-abuse measure. Serbian Law on Value-Added Tax allows the taxpayers to make supplies for the consideration lower than the open market value. In addition, the Law does not stipulate any anti-abuse measure similar to the open market value provision in EU VAT legislation. Between the connected parties, this could become an incentive to taypayers to abuse VAT in certain situations. Within the current domestic legislation, the principle of facticity is the only alternative measure to combat VAT abuse, but it should not be used for the correction of the taxable amount following the open market value. The stipulation of the open market value provision in domestic VAT legislation would be highly beneficial from the point of harmonizing the Serbian regulations with those of the European Union, as well as from the point of the protection of national fiscal system. Following the hypothesis that national legislation needs to be further harmonised with the EU VAT legislation, the authors in this paper used the normative dogmatic and content analysis methods with particular reference to the case law of the Court of Justice of the European Union.

Keywords: open market value, value-added tax, price out of reach, tax evasion, the principle of facticity.

1. Uvod

Pravilo o transfernim, odnosno tržišnim cenama[1] predviđeno je članom 80 Direktive o zajedničkom sistemu poreza na dodatu vrednost 2006/112 (u daljem tekstu: PDV direktiva), a u kojem se navode tri situacije[2] u kojima se može vršiti korekcija poreske osnovice PDV-a suprotno principu subjektivne vrednosti naknade.[3] Cilj propisivanja takve odredbe jeste prevencija evazije[4] poreza na dodatu vrednost. Navedeni cilj se razlikuje od cilja koji se želi postići propisivanjem pravila o transfernim cenama koji uvode direktni porezi, a koji se tiče ispravne alokacije osnovice poreza na dobit kod multinacionalnih preduzeća između različitih poreskih jurisdikcija. Na nivou Evropske unije od značaja je i praksa Suda pravde Evropske unije koji je u više predmeta tumačio odredbu kojom je propisano pravilo o transfernim cenama u oblasti poreza na dodatu vrednost. Praksa ovog suda je od značaja i za postupanje sudova na nacionalnom nivou.

Zakon o porezu na dodatu vrednost Republike Srbije (u daljem tekstu: ZPDV) zasniva se na principu subjektivne vrednosti naknade i ne predviđa mogućnost izmene poreske osnovice prema tržišnoj, odnosno nabavnoj vrednosti, osim u slučaju da naknada ili deo naknade nisu izraženi u novcu, već u obliku prometa dobara i usluga, kao i kod prometa dobara ili usluga koji čine ulog u privredno društvo (čl. 17, st. 1, 4 i 5). S obzirom na to da su sve države članice Evropske unije, osim Malte, implementirale navedeno pravilo, trebalo bi da to učini i Republika Srbija, što bi se i očekivalo od Srbije budući da je potpisala Sporazum o stabilizaciji i pridruživanju Evropskoj uniji 2013. godine. Pravilo o transfernim cenama bi predstavljalo značajno antiabuzivno pravilo u nacionalnom zakonodavstvu kada se ima u vidu da najveći deo poreskih prihoda predstavljaju upravo prihodi od poreza na dodatu vrednost. Osim toga, Republika Srbija se potpisivanjem Sporazuma o stabilizaciji i pridruživanju Evropskoj uniji[5] obavezala da svoje nacionalno zakonodavstvo uskladi sa evropskim standardima, što podrazumeva i potpuno usklađivanje sa PDV direktivom.

[1] PDV direktiva koristi termin *open market value*, odnosno *tržišna vrednost*. U ovom istraživanju umesto navedenog koristimo termin *pravilo o transfernim cenama*, s obzirom na to da se princip korekcije poreske osnovice PDV-a odnosi na transakcije između povezanih lica.

[2] Vid. podnaslov 2.1.

[3] Princip subjektivne vrednosti naknade podrazumeva da se oporezivi iznos sastoji od subjektivnog a ne objektivnog iznosa koji neko lice prima ili treba da primi, zato što PDV pogađa realne rashode koje neko lice ima kako bi obezbedilo potrošnju.

[4] PDV direktiva u čl. 80 navodi da pravilo o transfernim cenama služi prevenciji izbegavanja plaćanja poreza. Vise o izbegavanju plaćanja poreza se može videti iz prakse Suda pravde Evropske unije (Lazarov, 2018, p. 90; Živković, 2022, p. 371) Više o poreskoj utaji vid. u: Kostić& Pavlović, 2020.

[5] Tekst Sporazuma o stabilizaciji i pridruživanju je dostupan na internet stranici: https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/ssp_prevod_sa_anexima.pdf (12. 5. 2024).

Imajući u vidu pozitivnopravne propise na nacionalnom nivou Republike Srbije, u slučaju zloupotrebe, načelo fakticiteta je jedino sredstvo koje stoji poreskim vlastima na raspolaganju, ali ono ne bi bilo ispravno primeniti na usklađivanje poreske osnovice PDV-a u skladu sa tržišnom ili nabavnom cenom i zbog nepostojanja objektivnih okolnosti koje opravdavaju takvu nižu cenu, što predstavlja dodatni razlog za propisivanje pravila o transfernim cenama. U radu polazimo od pretpostavke da je ovakav pristup ispravan sa aspekta prevencije zloupotreba, kao i da je pomenuti pristup, imajući u vidu navedene razloge, neophodno usvojiti na nacionalnom nivou.

U Izveštaju Evropske komisije o napretku Republike Srbije u procesu pristupanja EU za 2023. godinu (Izveštaj Evropske komisije o napretku Republike Srbije u procesu pristupanja EU za 2023. godinu, 2023, p. 115) navodi se da se od Srbije u narednim godinama očekuje da svoje nacionalno zakonodavstvo u oblasti poreza na dodatu vrednost dodatno uskladi sa evropskim standardima u navedenoj oblasti. U Izveštaju se navodi da je u prethodnom periodu Republika Srbija unapredila i povećala svoje operativne kapacitete u poreskoj administraciji u pogledu ljudskih resursa i adekvatne tehnike, što je doprinelo izvesnijoj naplati poreza na dodatu vrednost u slučajevima evazije (Izveštaj Evropske komisije o napretku Republike Srbije u procesu pristupanja EU za 2023. godinu, 2023, p. 115). Međutim, propisivanje pravila o transfernim cenama na nacionalnom nivou dodatno bi omogućilo poreskim vlastima da uspešnije pristupe prevenciji poreske evazije u oblasti poreza na dodatu vrednost.

Cilj ovog istraživanja jeste da se ukaže na razloge zbog kojih je potrebno da i Republika Srbija implementira pravilo o transfernim cenama u svoje nacionalno zakonodavstvo, kao i da se ukaže na prednosti rešenja koje postoji u evropskom zakonodavstvu.

Struktura rada je podeljena na tri dela. U prvom delu rada bavimo se analizom pravila o transfernim cenama u evropskom zakonodavstvu i ulogom koje ono ima u državama članicama Evropske unije. Sledi analiza presuda Suda pravde Evropske unije, koji je dodatno ustanovio pravila kojih države članice moraju da se pridržavaju u slučaju implementacije pomenutog pravila. U trećem delu rada ukazali smo na nedostatke u nacionalnom zakonodavstvu uz navođenje razloga za implementaciju pravila o transfernim cenama u zakonodavstvo u oblasti poreza na dodatu vrednost Republike Srbije. Na taj način nastojali smo da primenom dogmatsko-pravnog metoda i metoda analize sadržaja damo preporuku za unapređenje nacionalnog zakonodavstva u vezi sa prevencijom evazije poreza na dodatu vrednost.

2. Pravilo o transfernim cenama u zakonodavstvu EU u oblasti poreza na dodatu vrednost i praksi Suda pravde EU

Osnovni princip na kome se zasniva porez na dodatu vrednost prema odredbama PDV direktive podrazumeva da se oporezivi iznos sastoji od subjektivnog, a ne objektivnog iznosa koji neko lice prima ili treba da primi. Razlog za takav stav zakonodavca je u činjenici da porez na dodatu vrednost pogađa realne rashode koje neko lice ima kako bi obezbedilo svoju potrošnju (Terra & Wattel, 2012, p. 348; Milošević, 2014a, p. 33). To zapravo znači da, naknada koja je stvarno plaćena čini subjektivnu vrednost, dok se objektivna vrednost procenjuje na osnovu objektivnih kriterijuma (Value Added Tax Committee, 2017, pp. 12, 15). Prema tome, PDV direktiva se zasniva na načelu subjektivne vrednosti naknade. Takođe, Sud pravde Evropske unije (u daljem tekstu: SPEU) u nekoliko svojih presuda potvrdio je primenu načela subjektivne vrednosti u vezi sa naplatom poreza na dodatu vrednost na nivou Evropske unije. U predmetu *Gåsabäck*, SPEU je naveo u svojoj odluci da je činjenica da je cena plaćena u ekonomskoj transakciji viša ili niža od nabavne cene ili cene koštanja dobara, odnosno usluga, irelevantna za odgovor na pitanje da li se transakcija smatra „isporukom uz naknadu", a što je definisano članom 2 PDV direktive (*Hotel Scandic Gåsabäck AB v Riksskatteverket*, para. 22). Sud pravde Evropske unije je takođe u predmetu *Campsa Estaciones de Servicio* naveo da nije bitno sa stanovišta poreza na dodatu vrednost da li su dobra ili usluge isporučene po ceni višoj ili nižoj od nabavne, odnosno cene koštanja, već je bitno da postoji direktna veza između isporuke dobra, odnosno usluga i naknade koja je zaista primljena od strane poreskog obveznika (*Campsa Estaciones de Servicio*, para. 25).

U nastavku rada najpre se bavimo analizom pravila o transfernim cenama u PDV direktivi, a zatim analiziramo sadržaj presuda SPEU u kojima su sadržane dodatne smernice od značaja za primenu navedenog pravila na nivou država članica Evropske unije.

2.1. Definicija i karakteristike pravila o transfernim cenama u PDV direktivi

Nekoliko meseci pre usvajanja PDV direktive, usvojena je Direktiva 2006/69/EC koja je uvela pravilo o transfernim cenama u PDV sistem EU. PDV direktiva je preuzela iz nje pravilo koje se odnosi na transferne cene između povezanih lica (čl. 80). Državama članicama Evropske unije data je mogućnost da dobrovoljno implementiraju pomenuto pravilo iz PDV direktive,[6] što im je omogućavalo da

[6] Jedina država članica EU koja nije implementirala čl. 80 PDV direktive jeste Malta. Ceo tabelarni prikaz svih država koje su implementirale pravilo o transfernim cenama sadržan je u: Annacondia, 2022, pp. 842-844.

procenjuju iznos naknade i na taj način da se u velikom obimu udalje od principa subjektivne vrednosti na kome počiva PDV sistem u Evropskoj uniji (Terra & Wattel, 2012, p. 350). Razlog za primenu pravila o transfernim cenama za suzbijanje abuzivnih situacija u oblasti poreza na dodatu vrednost na nivou Evropske unije, između ostalog, jeste i činjenica da se Evropska unija od početka 1975. godine delimično finansira i iz prihoda od PDV-a koji se generiše u državama članicama (Milošević, 2014b, p. 522).

PDV direktiva propisuje da u slučaju evazije PDV-a, i ukoliko su lica povezana lica, PDV osnovicu čini tržišna vrednost, ili ukoliko se ona ne može utvrditi, nabavna vrednost dobra ili usluge. Primena pravila o transfernim cenama je moguća samo u tri slučaja (čl. 72 i 80 PDV direktive):

1) kada je naknada niža od tržišne vrednosti i primalac isporuke nema puno pravo na odbitak prethodnog poreza;
2) kada je naknada niža od tržišne vrednosti i dobavljač nema puno pravo na odbitak prethodnog poreza i
3) kada je naknada viša od tržišne vrednosti i dobavljač nema puno pravo na odbitak prethodnog poreza.

Dakle, ukoliko postoji opasnost od evazije poreza na dodatu vrednost kod povezanih lica, i samo za tri navedene situacije, cene „van dohvata ruke" se mogu primeniti na osnovicu poreza na dodatu vrednost (Terra & Wattel, 2012, p. 350). Opasnost od evazije postoji samo kada jedno od povezanih lica nema pravo da u potpunosti odbije prethodni porez, odnosno ulazni PDV. Ukoliko oba povezana lica, učesnici transakcije, imaju pravo na odbitak prethodnog poreza u potpunosti, ne postoji opasnost od evazije jer je porez na dodatu vrednost fiskalno neutralan porez, odnosno svako povećanje ili smanjenje osnovice u odnosu na tržišnu, odnosno nabavnu cenu je praćeno korespondirajućom ispravkom prethodnog poreza sa potpuno neutralnim ekonomskim efektom, kako po obveznike tako i za budžet (Milošević, 2014a, p. 45). Dakle, porez koji obračunava na sopstvene izlaze, obveznik će umanjiti za iznos poreza koji mu je obračunat u prethodnoj fazi prometnog ciklusa, odnosno koji je plaćen prilikom uvoza dobara (Milošević, 2014a, p. 45).

2.2. Pravilo o transfernim cenama u sistemu PDV-a u okviru prakse Suda pravde EU

Postupajući u jednom predmetu, SPEU je u presudi naveo ograničenja kojih države članice moraju da se pridržavaju prilikom primene pravila o transfernim cenama (Judgment of the 26. of April 2012, ECLI:EU:C:2012:248, paras. 45-46). Prvo, primena tržišne vrednosti je posebno pravilo u odnosu na opšte pravilo PDV direktive

(čl. 73 Direktive) prema kojem poresku osnovicu čini naknada koju prodavac prima ili treba da primi za isporučena dobra ili usluge. Drugo, pravilo o transfernim cenama, odnosno tržišna vrednost, može se primeniti samo u slučajevima evazije, do koje ne može doći ukoliko oba učesnika transakcije imaju puno pravo na odbitak prethodnog poreza (Judgment of the 26. of April 2012, ECLI:EU:C:2012:248, paras. 42, 43, 47,48). Prema tome, do manipulacije cenom može doći samo u slučaju maloprodaje sa krajnjim potrošačem i u slučaju kada jedan od učesnika transakcije ne može da odbije ulazni PDV u potpunosti (Judgment of the 26. of April 2012, ECLI:EU:C:2012:248, para. 47). Pravila o transfernim cenama ne mogu se primenjivati na slučajeve koji nisu propisani u PDV direktivi. To znači da se navedeno pravilo može primeniti isključivo na tri situacije propisane Direktivom (Judgment of the 26. of April 2012, ECLI:EU:C:2012:248, paras. 51-52). Dakle, SPEU je u svojim presudama zauzeo stav da porez na dodatu vrednost na nivou Evropske unije mora da se zasniva na opštem načelu subjektivne vrednosti naknade i da se pravilo o transfernim cenama mora tumačiti restriktivnije u okviru specijalnog pravila (Judgment of the 26. of April 2012, ECLI:EU:C:2012:248, para. 45). Međutim, SPEU navodi da ovakav zaključak ni u kom slučaju ne može zabraniti državi članici da uvede druge obaveze kako bi se izbegla evazija PDV-a, a u skladu sa uslovima iz čl. 273 PDV direktive[7] (Terra & Kajus, 2024, p. 420). Takođe, Sud je potvrdio da čl. 80 PDV direktive koji propisuje pravilo o transfernim cenama ima direktan efekat (Terra & Kajus, 2024, p. 420).

3. Izuzeci od primene načela subjektivne vrednosti naknade prema odredbama Zakona o porezu na dodatu vrednost

Zakon o porezu na dodatu vrednost Republike Srbije propisuje da ukoliko naknada ili deo naknade nije izražena u novcu, već u obliku prometa dobara i usluga, kao i kod prometa dobara ili usluga, koje čine ulog u privredno društvo, osnovicom se smatra tržišna vrednost tih dobara i usluga na dan njihove isporuke u koju nije uključen PDV (čl. 17, st. 4 i 5). Ukoliko se tržišna vrednost ne može utvrditi, u obzir se uzima cena koja nije niža od nabavne cene dobara, odnosno od iznosa utvrđenih troškova pružanja usluge koje snosi poreski obveznik (čl. 17, st. 8 Zakona o porezu na dodatu vrednost). To je jedini izuzetak od primene načela subjektivne vrednosti naknade koji propisuje zakon, a gde je moguća primena tržišne cene. Međutim njime se ne propisuju dalji uslovi koji ograničavaju

[7] „Države članice mogu da propišu i druge obaveze koje smatraju potrebnim da bi se osigurala pravilna naplata PDV-a, i da bi se sprečila utaja poreza, uz poštovanje jednakog postupanja sa domaćim transakcijama i transakcijama koje obavljaju poreski obveznici između država članica, i pod uslovom da te obaveze, u trgovini između država članica, ne prouzrokuju formalnosti povezane sa prelaskom preko granice."

primenu navedenog načela. Prema tome, u svim ostalim slučajevima zakon omogućava prodaju ispod tržišne, odnosno nabavne cene, pri čemu u tom slučaju nije propisana mogućnost ispravke odbitka prethodnog poreza (Tatić *et al*., 2021, p. 504). Imajući u vidu navedeno, budžet može u određenim situacijama biti u gubitku.[8] Mišljenja Ministarstva finansija Republike Srbije takođe potvrđuju isključivu primenu načela subjektivne vrednosti naknade.

U mišljenju iz 2019. godine (Mišljenje Ministarstva finansija br. 413-00-00030/2019-04, 2019, pp. 59-61) navodi se da ako je kupoprodajna cena stanova (bez PDV-a) niža od cene koštanja tih stanova (bez PDV-a), ta okolnost ne utiče na utvrđivanje osnovice za obračunavanje PDV-a za prvi prenos prava raspolaganja na navedenim stanovima. To znači da osnovicu za obračunavanje PDV-a čini iznos naknade koju obveznik PDV-a, investitor, prima ili treba da primi za promet predmetnih dobara, bez PDV-a. Dakle, Ministarstvo finansija je zauzelo stav da je prodaja ispod nabavne cene u ovom slučaju moguća, iako je ovakav vid evazije vrlo realan u građevinskom sektoru u Srbiji.[9]

Godinu dana kasnije, Ministarstvo finansija je objavilo još jedno mišljenje (Mišljenje Ministarstva finansija br. 011-00-144/2020-04 od 3. 3. 2020, 2020, pp. 92-94) navodeći da ukoliko poreski obveznik koji smrznuta dobra drži u hladnjači, usled kvara na njoj smrznute proizvode prodaje znatno ispod nabavne cene, osnovicu za obračunavanje PDV-a čini iznos naknade koju obveznik PDV-a prima ili treba da primi za isporučena dobra, u koju nije uključen PDV. U istom mišljenju izričito se navodi da propisima kojima se uređuje PDV nije predviđen drugačiji način određivanja osnovice za obračunavanje PDV-a u slučaju prometa dobara za koji obveznik prima ili treba da primi naknadu u iznosu nižem od iznosa nabavne vrednosti predmetnih dobara. Čini nam se da Ministarstvo finansija, kao razlog

[8] Na primer: poreski obveznik koji je registrovan za PDV, kupuje dobro sa ulaznim PDV-om od 1.000.000 dinara, a prodaje ga sa izlaznim PDV-om od 1.000 dinara. Poreski obveznik može tražiti povraćaj PDV-a u iznosu od 999.000 dinara ili ga iskoristiti kao poreski kredit za naredne svoje isporuke dobara ili usluga. Time postoji direktan odliv sredstava u pomenutom iznosu iz budžeta Republike Srbije ka poreskom obvezniku koji je zloupotrebio čl. 17 Zakona o porezu na dodatu vrednost i iskoristio nepostojanje antiabuzivne mere poput pravila o transfernim cenama u PDV sistemu.

[9] Ukoliko investitor želi da proda stan za 100.000 evra, prodajna cena sa PDV-om bi iznosila 110.000 evra. Kako bi uštedeo na ime izlaznog PDV-a, investitor prodaje stan povezanom licu, koje neće imati pravo da ulazni PDV odbije pri sledećoj prodaji, jer je u pitanju promet oslobođen od plaćanja PDV-a bez prava na odbitak prethodnog poreza. Prodajna neto cena je 60.000 evra, dok PDV iznosi 6.000 evra. Dalje, povezana firma prodaje stan fizičkom licu za cenu od 110.000 evra. PDV koji je prvobitno obračunat na prodaju stana iznosi 6.000 umesto 10.000 evra, dok prodajna cena ostaje ista. Na taj način je investitor zajedno sa povezanim licem, na ime budžeta, uštedeo 4.000 evra. Povezano lice može, zbog ušteđenog PDV-a, stan prodavati i za 106.000 evra, čime su ova lica konkurentnija od investitora koji prodaju direktno kupcima. Vid. čl. 23, st. 2, tač. 14; čl. 25, st 2, tač 3; čl. 56a; čl. 25, st. 2, tač. 3 i čl. 52 Zakona o porezu na dodatu vrednost.

omogućavanja prodaje ispod cene navodi i kvar na hladnjači. Međutim, ukoliko bi se u mišljenju čak i navelo da se ne može uvažiti prodaja ispod nabavne cene za svrhu PDV-a, zato što je u pitanju očigledna zloupotreba jer, na primer, nije postojao nikakav kvar na hladnjači, treba imati u vidu da mišljenja Ministarstva ne obavezuju poreskog obveznika, kao ni Upravni sud, već samo poresku administraciju. Takođe, moguće je da se o relativno istoj stvari donesu različita mišljenja. U konačnom ishodu, Upravni sud bi konsultovao Zakon o porezu na dodatu vrednost koji dozvoljava prodaju ispod nabavne cene bez ograničenja, čak i u slučaju zloupotrebe.

Pored Zakona o porezu na dodatu vrednost, Zakon o poreskom postupku i poreskoj administraciji na neki način takođe potvrđuje primenu načela subjektivne vrednosti poreza na dodatu vrednost, ne dozvoljavajući primenu tržišne vrednosti. Zakon o poreskom postupku i poreskoj administraciji propisuje procenu poreske osnovice metodom parifikacije koja se može vršiti i upoređivanjem sa podacima drugih poreskih obveznika koji obavljaju sličnu ili istu delatnost na istoj ili sličnoj lokaciji, pod približno jednakim uslovima (čl. 58a, st. 1, tač. 3). Međutim, metoda parifikacije ne može se koristiti za procenu osnovice PDV-a. Ministarstvo finansija je u svom mišljenju potvrdilo ovaj stav navodeći da činjenica da jedan obveznik PDV-a prodaje dobro po višoj ceni od drugog obveznika PDV-a ne može biti osnov da se obvezniku PDV-a koji prodaje to dobro po nižoj ceni utvrdi osnovica za obračunavanje PDV-a za prodaju tog dobra kao da je predmetno dobro prodao po višoj ceni (Mišljenje Ministarstva finansija br. 430-00-44/2019-04, 2019, p. 20). Razlog za ovakvo mišljenje leži upravo u primeni načela subjektivne, a ne objektivne vrednosti, koje je karakteristično za porez na dodatu vrednost u Republici Srbiji.

S obzirom na to da domaće zakonodavstvo ne predviđa izuzetak od primene načela subjektivne vrednosti naknade, odnosno člana 17 Zakona o porezu na dodatu vrednost, a u vidu pravila o transfernim cenama, čini se da postoji mnogo razloga za implementaciju navedenog pravila u sistem poreza na dodatu vrednost Republike Srbije, a u skladu sa evropskim standardima.

4. Razlozi za implementaciju pravila o transfernim cenama

Udeo PDV-a u sveukupnom poreskom opterećenju za period 2020–2022. godina iznosio je između 24,3% i 25,3% (Ministarstvo finansija, 2023, pp. 37-38). To ukazuje na činjenicu da je PDV jedan od najizdašnijih poreza u Srbiji i da bi trebalo više pažnje posvetiti prevenciji njegove zloupotrebe. U primeru sa prodajom preko investitora, prikazano je kako se u ovoj grani industrije lako može uštedeti na ime PDV-a.[10] S druge strane, Ministarstvo finansija u svom mišljenju

[10] Vid. fn. 12.

za isti primer navodi da se primenjuje cena po principu subjektivne, a ne tržišne (objektivne) vrednosti (Mišljenje Ministarstva finansija br. 413-00-00030/2019-04, 2019, pp. 59-61). Dakle, Zakon o porezu na dodatu vrednost omogućava poreskim obveznicima prodaju ispod tržišne, odnosno nabavne vrednosti, dok se to istovremeno negativno odražava na državni budžet. Konkretnije, evazija poreza na dodatu vrednost, koju omogućava primena instituta prethodnog poreza, svakako doprinosi povećanju bogatstva poreskog obveznika, dok istovremeno pogoršava bilans države, odnosno postoji odliv novca iz budžeta (Popović, 2016, pp. 445-446).

Potpisivanjem Sporazuma o stabilizaciji i pridruživanju 2013. godine Republika Srbija je preuzela obaveze da uspostavi zonu slobodne trgovine i uskladi svoje nacionalno zakonodavstvo sa pravom Evropske unije.[11] Prema tome, trebalo bi da Srbija implementira i pravilo o transfernim cenama u oblasti poreza na dodatu vrednost. Nacionalno zakonodavstvo bi u potpunosti trebalo da preuzme rešenje iz evropskog zakonodavstva. Crna Gora, koja se takođe nalazi u procesu pristupanja Evropskoj uniji, propisala je pravilo o transfernim cenama (čl. 20, st. 8, tač. 1 Zakona o porezu na dodatu vrijednost).[12] Međutim, ta odredba nije u skladu sa PDV direktivom i praksom SPEU.

Postojeće mere koje se primenjuju na nacionalnom nivou na korekciju poreske osnovice PDV-a usled prodaje ispod tržišne, odnosno nabavne cene, čak i ukoliko bi objektivne činjenice ukazivale na postojanje zloupotrebe, odnosno da je svrha transakcije poreska ušteda su neadekvatne. Pre svega mislimo na načelo fakticiteta koje se može primeniti na sve vrste poreza. Može se postaviti pitanje da li ukoliko lice kupi neko dobro za 100.000 evra i proda ga za 1 evro povezanom licu, što je u skladu sa ZPDV-om, načelo fakticiteta može da utiče na korekciju poreske osnovice PDV-a? Pre svega, potrebno je reći da je malo verovatno da se ovakva transakcija izvrši između nepovezanih lica jer nedostaje ekonomski *ratio* za dogovor prodavca i kupca oko visine stvarne naknade na štetu jedne od ugovornih strana (Milošević, 2012, p. 276). S obzirom na to da povezana lica učestvuju u transakciji, rizik od zloupotrebe se povećava. Ukoliko ne postoje nikakve spoljne objektivne okolnosti[13] koje bi uticale na takvo

[11] Čl. 2, st. 1 Sporazuma o stabilizaciji i pridruživanju. Dostupan na https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/ssp_prevod_sa_anexima.pdf (12. 5. 2024).

[12] Prema zakonodavstvu Crne Gore u oblasti poreza na dodatu vrednost, osnovica ne može biti manja od nabavne cene, odnosno cene koštanja, bez obzira na to da li jedan od učesnika ima ili nema pravo da odbije prethodni porez u potpunosti. Takođe, Zakon o porezu na dodatu vrijednost Crne Gore je propisao pravilo o tržišnoj ceni nezavisno od odnosa lica koja učestvuju u transakciji.

[13] Mišljenje Ministarstva finansija br. 011-00-144/2020-04 od 3. 3. 2020, pp. 92-94. U navedenom mišljenju se navodi kvar hladnjače kao objektivna činjenica.

spuštanje cene, moglo bi se zaključiti da je svrha transakcije evazija poreza na dodatu vrednost. Međutim, ZPDV dozvoljava ovakve situacije jer se oslanja na načelo subjektivne vrednosti naknade. Primena načela fakticiteta u navedenom primeru u vezi sa usklađivanjem poreske osnovice PDV-a ne bi bila ispravna iz nekoliko razloga. Navedeno načelo je posebno u svom prvom stavu dosta nejasno i široko postavljeno (Kostić, 2016, p. 126).[14] Takođe, u literaturi se može naći mišljenje da načelo fakticiteta uopšte i nije antiabuzivno sredstvo i da se primenjuje nezavisno od postojanja poreske uštede ili namere da se izbegne plaćanje poreza (Živković, 2023, pp. 83-100). Prema tome, ukoliko bi u prethodnom primeru postojale objektivne okolnosti koje bi ukazivale da je namera poreskih obveznika poreska ušteda, odnosno da je svrha transakcije zloupotreba PDV-a, one ne bi bile od uticaja na primenu načela fakticiteta. Dakle, s obzirom na to da načelo fakticiteta ne zahteva utvrđivanje da je svrha određene transakcije bila realizacija poreske uštede, odnosno izbegavanje plaćanja poreza (Kostić, 2016, pp. 116, 117, 125,127) i da je to tek jedan od razloga zbog kojih se može dovesti u pitanje kvalifikacija načela fakticiteta kao opšteg antiabuzivnog pravila (Živković, 2023, p. 84), smatramo da i usled postojanja objektivnih okolnosti koje ukazuju na zloupotrebu i poresku uštedu kao svrhu transakcije, pomenuto načelo ne bi bilo ispravno primeniti na korekciju poreske osnovice PDV-a usled prodaje ispod tržišne, odnosno nabavne cene. Čak i ukoliko bi se načelo fakticiteta od strane poreske administracije primenilo kao opšte antiabuzivno sredstvo, jer objektivne okolnosti ukazuju da je svrha transakcije poreska ušteda, postavlja se nekoliko pitanja: Kako bi se uskladila i obračunala poreska osnovica PDV-a? Koji parametri/metode bi se koristili za obračun tržišne vrednosti? Da li bi se tržišna vrednost uopšte uzela u obzir ili bi se koristila samo nabavna vrednost? Da li bi se tržišna, odnosno nabavna cena koristile za promet između svih ili samo povezanih lica? Ako bi se u obzir uzela samo povezana lica, kako bi se definisala takva kategorija? Ovo su samo neka od pitanja na koja jedna opšta i nedovoljno jasna odredba ne daje odgovor. To bi moglo dovesti do pravne nesigurnosti. Takođe, na ovaj način, sudije Upravnog suda bi stvarale novo pravo, odnosno primenjivalo bi se pravilo o transfernim cenama za porez na dodatu vrednost, dok to propisi koji regulišu oblast poreza na dodatu vrednost ne propisuju, i u isto vreme predviđaju opšte pravilo koje je u suprotnosti sa korekcijom osnovice poreza na dodatu vrednost u skladu sa tržišnom vrednošću.

[14] Čl. 9, st. 1 Zakona o poreskom postupku i poreskoj administraciji, *Službeni glasnik RS*, br. 80/2002…138/2022). Pomenuta odredba može da navede na pogrešan zaključak o antiabuzivnoj prirodi načela fakticiteta. Vid. Živković, 2023, pp. 83-84.

5. Zaključak

Svrha postojanja pravila o transfernim cenama u zakonodavstvu Evropske unije u oblasti poreza na dodatu vrednost jeste prevencija evazije i uspešna naplata PDV-a. Sve države članice Evropske unije, osim Malte, implementirale su navedeno pravilo u svoja nacionalna zakonodavstva. PDV direktiva je definisala osnov primene, dok je SPEU u svojim presudama dao dodatna objašnjenja u vezi sa primenom pravila o transfernim cenama. Porez na dodatu vrednost čini najveći deo prihoda u ukupnom poreskom prihodu Srbije, što ukazuje na neophodnost implementacije dodatnih mera koje bi mogle da posluže efikasnoj prevenciji evazije i naplati poreza na dodatu vrednost. Navedena vrsta poreza je pre svega zbog instituta prethodnog poreza dodatno podložna evaziji. Osim toga, članom 17 Zakona o porezu na dodatu vrednost omogućena je prodaja ispod nabavne cene bez ispravke odbitka prethodnog poreza, dok antiabuzivna mera u vidu pravila o transfernim cenama ne postoji. Upravo zbog toga postoji mogućnost zloupotrebe navedene odredbe od strane poreskih obveznika. Imajući u vidu da se prema Izveštaju Evropske komisije o napretku Republike Srbije u procesu pristupanja Evropskoj uniji očekuje da Srbija dodatno uskladi svoje nacionalno zakonodavstvo sa evropskim zakonodavstvom u oblasti poreza na dodatu vrednost, čini se da bi propisivanje pravila o transfernim cenama trebalo da bude jedan od prioriteta.

Imajući u vidu pozitivnopravne propise na nacionalnom nivou, u slučaju zloupotrebe poreza na dodatu vrednost načelo fakticiteta je jedino alternativno sredstvo koje stoji na raspolaganju poreskim vlastima, ali ono ne bi bilo ispravno primeniti na usklađivanje poreske osnovice PDV-a u skladu sa tržišnom ili nabavnom cenom.

Prilikom implementacije čl. 80 PDV direktive, trebalo bi povezana lica definisati propisima koji uređuju oblast poreza na dodatu vrednost, ne oslanjajući se na one kojima se uređuje porez na dobit. Dakle, metode za utvrđivanje tržišne cene trebalo bi definisati Zakonom o porezu na dodatu vrednost ne oslanjajući se na čl. 61 Zakona o porezu na dobit pravnih lica, uz navođenje da se izveštaji o transfernim cenama za porez na dobit mogu koristiti i u svrhu poreza na dodatu vrednost, a u cilju manjeg opterećenja privrede i poreske administracije. To znači da ukoliko bi, na primer, Zakon o porezu na dodatu vrednost predvideo primenu metode uporedive cene kao jedinu metodu i ukoliko bi povezana lica u izveštaju o transfernim cenama za svrhu poreza na dobit primenjivala istu metodu, taj izveštaj bi se mogao primeniti i za obračun tržišne vrednosti transakcije za svrhu poreza na dodatu vrednost. Ukoliko izveštaj ne bi primenjivao metodu uporedive cene ili se iz njega ne bi mogla sa sigurnošću utvrditi tržišna vrednost za svrhu PDV-a, primenila bi se nabavna cena dobra, odnosno cena koštanja usluge.

Literatura

Annacondia, F. (ed.). 2022. *EU VAT Compass 2022/23.* Amsterdam: IBFD.

Kostić, S. 2016. Načelo fakticiteta u srpskom poreskom pravu. *Harmonius*, 5, pp. 112-129.

Kostić, J. & Pavlović, Z. 2020. Poreski delikti u zakonodavstvu Savezne Republike Nemačke. *Strani pravni život*, 64(1), pp. 141-153. https://doi.org/10.5937/spz64-25515.

Lazarov, I. 2018. The Relevance of the Fundamental Freedoms for Direct Taxation. In: Lang, M. *et al.* (eds.). *Introduction to European Tax Law on Direct Taxation.* Vienna: Linde, pp. 61-103.

Milošević, M. 2012. Cena van dohvata ruke kao antievaziona mera u PDV zakonodavstvu EU. *Anali Pravnog fakulteta u Beogradu*, 60(2), pp. 276-291.

Milošević, M. 2014a. *Nezakonita evazija poreza na dodatu vrednost*. Beograd: Univerzitet u Beogradu, Pravni fakultet, Centar za izdavaštvo i informisanje.

Milošević, M. 2014b. Značajnija odstupanja Zakona o porezu na dodatu vrednost od komunitarne PDV regulative. *Pravni zapisi*, 5(2), pp. 505-533.https://doi.org/10.5937/pravzap0-7110

Popović, D. 2016. *Poresko pravo*. Beograd: Univerzitet u Beogradu, Pravni fakultet, Centar za izdavaštvo i informisanje.

Tatić, I. *et al.* (ur.). 2021. *Knjiga o porezu na dodatu vrednost*. Beograd: Poreska kancelarija Tatić doo.

Terra, B. J. M. & Wattel, P. J. 2012. *European Tax Law*. 6th edition. Alphen aan den Rijn: Kluwer Law International.

Terra, B. J. M. & Kajus, J. 2024. *A Guide to the European VAT Directives. Volume 1: Introduction to European VAT*. Amsterdam: IBFD.

Value Added Tax Committee. 2017. *Possible VAT implications of Transfer Pricing*. Working Paper No. 923. Brussels.

Živković, L. 2023. *Opšta antiabuzivna pravila,* doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

Živković, L. 2022. O rešenjima koje donosi predlog Unshell Direktive. *Strani pravni život*, 66(4), pp. 367-386.https://doi.org/10.56461/SPZ_22402KJ

Pravni izvori

Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations, *OJ L* 221 of 12/8/2006.

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ L* 347 of 11/12/2006.

Commission Staff Workig Document, Serbia 2023 Report, SWD(2023) 695 final, Brussels, 8.11.2023.

Zakon o porezu na dodatu vrednost (ZPDV), *Službeni glasnik RS*, br. 84/2004, 86/2004 - ispr., 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 - usklađeni din. izn., 68/2014 - dr. zakon, 142/2014, 5/2015 - usklađeni din. izn., 83/2015, 5/2016 - usklađeni din. izn., 108/2016, 7/2017 - usklađeni din. izn., 113/2017, 13/2018 - usklađeni din. izn., 30/2018, 4/2019 - usklađeni din. izn., 72/2019, 8/2020 - usklađeni din. izn., 153/2020 i 138/2022.

Zakon o poreskom postupku i poreskoj administraciji (ZPPPA), *Sl. glasnik RS*, br. 80/2002, 84/2002 - ispr., 23/2003 - ispr., 70/2003, 55/2004, 61/2005, 85/2005 - dr. zakon, 62/2006 - dr. zakon, 63/2006 - ispr. dr. zakona, 61/2007, 20/2009, 72/2009 - dr. zakon, 53/2010, 101/2011, 2/2012 - ispr., 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015 - autentično tumačenje, 112/2015, 15/2016, 108/2016, 30/2018, 95/2018, 86/2019, 144/2020, 96/2021 i 138/2022.

Zakon o porezu na dodatu vrijednost, *Službeni list Republike Crne Gore*, br. 065/01 od 31.12.2001, 012/02 od 15. 3. 2002, 038/02 od 26. 7. 2002, 072/02 od 31. 12. 2002, 021/03 od 31. 3. 2003, 076/05 od 16. 12. 2005, 004/06 od 27. 1. 2006, *Službeni list Crne Gore*, br. 016/07 od 27. 12. 2007, 073/10 od 10. 12. 2010, 040/11 od 8. 8. 2011, 029/13 od 22. 6. 2013, 009/15 od 5. 3. 2015, 053/16 od 11. 8. 2016, 001/17 od 9. 1. 2017, 050/17 od 31. 7. 2017, 046/19 od 7. 8. 2019, 073/19 od 27. 12. 2019, 080/20 od 4. 8. 2020, 008/21 od 26. 1. 2021, 059/21 od 4. 6. 2021.

Zakon o porezu na dobit pravnih lica, *Službeni glasnik RS*, br. 25/2001, 80/2002 - dr. zakon, 80/2002, 43/2003, 84/2004, 18/2010, 101/2011, 119/2012, 47/2013, 108/2013, 68/2014 - dr. zakon, 142/2014, 91/2015 - dr. propis, 112/2015, 113/2017, 95/2018, 86/19, 153/20, 118/21, Prečišćen tekst zaključno sa izmenama iz *Službeni glasnik RS*, br. 118/21 koje su u primeni od 1. 1. 2022.

Ostali izvori

Mišljenje Ministarstva finansija broj 430-00-44/2019-04 od 11. 2. 2019, *Bilten*, 2, god. LIX, februar 2019.

Mišljenje Ministarstva finansija broj 413-00-00030/2019-04 od 3. 4. 2019, *Bilten*, 3, god. LIX, april 2019.

Mišljenje Ministarstva finansija broj 011-00-144/2020-04 od 3. 3. 2020, *Bilten*, 3-5, god. LX, mart–maj 2020.

Ministarstvo finansija Republike Srbije 2023. *Bilten javnih finansija*, 12(220), 220.

Sudska praksa

CJEU, C-412/03, *Hotel Scandic Gåsabäck AB v Riksskatteverket* (Judgement of the Court of Justice of the European Union of 20 January 2005, ECLI:EU:C:2005:47).

CJEU, C-285/10, *Campsa Estaciones de Servicio* (Judgement of the Court of Justice of the European Union of 9 June 2011, ECLI:EU:C:2011:381).

CJEU, Joined Cases C-621/10 and C-129/11, *Balkan and Sea Properties ADSITS and Provadinvest OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' — Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Judgement of the Court of the European Union of 26 April 2012, ECLI:EU:C:2012:248).

Internet izvori

Sporazum o stabilizaciji i pridruživanju EU. Dostupan na: https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/ssp_prevod_sa_anexima.pdf (12. 5. 2024).

Marko B. Dimitrijević*

Pregledni naučni članak
UDK: 502.14:341
doi: https://doi.org/10.56461/SPZ_24305KJ
Primljeno: 5. 5. 2024.
Izmenjeno: 8. 7. 2024.
Prihvaćeno: 23. 9. 2024.

THE IMPORTANCE OF ENVIRONMENTAL PROTECTION CONCEPT IN EUROPEAN CENTRAL BANK LAW**

Summary

The subject of this paper is the introduction of the environmental protection concept in the central banking law to preserve natural resources and contribute to ensuring sustainable economic development. In that sense, the author will attempt to describe the potential contribution of green central bank legislation in managing and mitigating environmental issues, aiming to identify the ecological dimension of the European Central Bank (ECB) mandate, as the supreme monetary institution of the European Union (EU). The following text focuses on the functional analysis of the ECB's potential legal mandate for environmental activities, their scope, limitations, and practical justification where the introduction of these new activities must be carefully managed without creating a collision with its primary task of maintaining monetary and financial stability.

Keywords: central banking law, ECB, lex monetae, monetary legislation, environmental protection.

* Associate Professor and Jean Monnet Module for European Monetary Law Academic Coordinator, Chair for Law and Economics, Faculty of Law University of Niš, Serbia.
E-mail: *markod1985@prafak.ni.ac.rs*
ORCID: *https://orcid.org/0000-0003-4406-9467*

** The research presented in the paper was funded by the Serbian Ministry of Science, Technological development and Innovation under the Agreement Reg. No. 451-03-65/2024-03/200120, dated 5 February 2024.

ZNAČAJ KONCEPTA ZAŠTITE ŽIVOTNE SREDINE U PRAVU EVROPSKE CENTRALNE BANKE

Sažetak

Predmet analize u radu jeste utvrđivanje značaja i opravdanosti koncepta zaštite životne sredine u monetarnoj legislativi Evropske centralne banke (ECB) kao vrhovne monetarne institucije EU zadužene ze implementaciju jedinstvene monetarne politike i očuvanje monetarne stabilnosti kao javnog dobra. U tom smislu, u radu se želi ukazati na razloge koji opravdavaju tenedenciju "ozelenjivanja" savremene monetarne legislative na primeru mandata Evropske centralne banke, identifikovanjem potencijalnog pravnog osnova za vršenje ekoloških funkcija, dometa i ograničenja zelenog centralnog bankarstva. Iako se u pravu Evropske centralne banke uočava jasna tendencija širenja njenih nadležnosti, koja se pored cenovne stabilnosti, danas odnosi i na očuvanje opšte finansijske stabilnosti, autor je mišljenja da aktivnosti ECB u rešavanju ekoloških problema ne mogu predstavljati primarno polje njenog delovanja, već sekundarne aktivnosti, ali da se time njena uloga u optimalnom upravljanju ekološkim problemima ne umanjuje i ne isključuje, uzimajući u obzir kompleksnost i dinamičnost događaja u oblasti očuvanja prirode koji impliciraju angažovanje svih institucija iz domena javnog prava gde centralne banke svakako pripadaju. Takođe, Evropska centralna banka svojim aktima i merama usmerava delanje ne samo centralnih banaka država članica, već i centralnih banaka drugih zemalja koje usled saradnje sa njom u međunarodnom monetarnom poretku moraju ne samo da poznaju, već i da prilagođavaju svoja zakonska rešenja po ugledu na akte ECB. U takvim okolnostima ozelenjivanje mandata ECB može poslužiti kao primer dobre prakse i drugim centralnim bankama da ekološke komponetete uključe u svoje monetarne strategije i ujedno stvoriti uslove za bolju koordinaciju ciljeva monetarne i ekološke politike u praksi.

Ključne reči: monetarna legislativa, EU, Evropska centralna banka, životna sredina.

1. Introduction

Environmental disasters have direct implications for monetary and economic stability, which has become particularly prominent in the context of greenhouse effects and devastating natural disasters. The authorities in charge of the monetary policy implementation can intervene at the level of both individual institutions and the financial system as a whole (Jovanić, 2022, pp. 1-2). Consequently, international monetary law can no longer be isolated from the environmental framework, and its main agents, such as the International Monetary Fund (IMF), the European Central Bank (ECB), and the World Bank, must make their regulatory contribution to controlling this problem. The role of the ECB in this context is indispensable, considering that only with their monetary authority and *de lege artis* action the monetary policy could be made more "biodiversity friendly". Today more than ever, economic preferences in the domestic and international context are conditioned by environmental circumstances, and it has to be noted that the central bank competencies are not clearly shaped and should be viewed realistically, leaving ample maneuvering space for extending their competencies beyond those prescribed. The environmental issues facing humanity today justify the introduction of the ecological component in monetary legislation and new central bank powers, which the author claims would only refine the central bank and show it not only as an inviolable monetary law agent, but also as a social institution "defending" the primordial bond between man and nature in conditions of dynamic technological progress and financial globalization. This "ecological" moment in the reshaping of the monetary policy means, instruments, and measures shows that new long-term economic development goals based on the capital market (especially securities and other financial derivatives) can be pursued without renouncing or ignoring the existential prerogatives, such as a healthy life (Dimitrijević, 2023, p. 255).

Today, sustainable development has become an important aim for all states. It has found its place in law as a relatively new concept, which has been developed in the face of challenges relating to global politics, economy, and environmental protection (Rodina, 2022, p. 410). That is best illustrated by a large number of climate change laws that have been passed (Todić, 2023, p. 75). The pandemic crisis has additionally highlighted the importance of timely identifying and implementing sustainable economic development measures, which can only be achieved with an optimized combination of legal and economic instruments in a credible international political environment, with the main goal to provide greater good, such as long-term sustainability, constraining self-interested choice to induce beneficial actions from other players.

The long-standing interest shown by lawyers in this area has resulted in the emergence of new disciplines, such as the central banking law, which deals with this problem focusing on the provision of additional capital for the transition to a greener, more ecologically resistant and circular economy, which must be normatively regulated and encouraged through appropriate instruments. However, considering the scarce public sector funds, there is a need to secure additional financing from the private sector (Pellegrini & Pellegrini, 2022, pp. 37-39). At the international level, the European Bank for Reconstruction and Development (EBRD) has taken significant activities and adopted a very ambitious platform for the period 2021-2025 aiming to revive green banking finance, where the transformation of the classical economic system into an environment friendly economy must not go at the expense of increased costs of other production factors used as inputs in the process. In addition, there is a need for "greening" of the monetary system, due to the increasing insistence on ecologically sustainable and socially responsible investments, where the investor is interested not only in the financial return of the invested funds, but also in their social value, which can be more far-reaching than the financial one (Kilpatrick & Williams, 2021, pp. 395-397). That value includes healthier food production and good business practices in land, air and biodiversity protection that influence positively their reputation. In a general sense, the process of greening the monetary system (monetary finances) is quite similar to greening the financial system (corporate finances) as a broader concept, and as such refers to the introduction of new measures, tools, procedures, and regulations to influence the monetary system to take due account of climate and environmental considerations in financial risk management and, consequently, in investment decision-making. In the field of monetary finances, that usually refers to calculating the environmental risk in bank investments and eco-friendly bank loans for investing in green business.

While the sustainable development concept is fundamentally multi-layered and has legal, economic, and sociological aspects, successfully controlling environmental pollution, which is also a constitutionally protected citizens' right, and addressing this existential issue requires a joint approach based on synergy (Ekardt, 2020, p. 241). Until recently, central banking law, understood as the law governing the operation and competencies of central banks (Gortsos, 2023, pp. 1-3), has had no direct or indirect impact on the implementation of the environmental policy goals. Nowadays, the right to a healthy environment is constitutionally protected, and the central bank involvement in this regard is not that unexpected due to the natural resources' protection being conditioned by monetary stability (which is provided by the central bank as the guardian of monetary sovereignty and the supreme monetary institution) as a public good. While

monetary stability refers, *inter alia*, to the citizens' right to enjoy the benefits of a stable and solid domestic currency, these rights remain a solitude concept in a world where there are no conditions for a healthy life and economy based on environmental concerns, and at the same time protecting the environment and gross domestic product. That is why the right to a healthy environment is, in a certain sense, a prerequisite for the enjoyment of the right to a solid currency.

Climate-related and environmental risks in macroeconomic decision-making are commonly understood to comprise physical risk and transition risk (European Central Bank, 2020, pp. 27-28). While physical risk refers to the financial impact of a changing climate, including more frequent extreme weather events and gradual change in climate, transition risk refers to an institution's financial loss that can result, directly or indirectly, from the adjustment process to a lower-carbon and more environmentally sustainable economy. In addition to the above risks, liability risk describes climatic or environmental risks that arise due to uncertainty regarding potential financial losses and compensation claims for damages caused by climate changes in the form of the so-called ecological hazards (Carney, 2015). That is why institutions that make macroeconomic decisions must determine which climate-related and environmental risks are material in the short, medium, and long term with special regard to their business strategy by using (stress) scenario analyses. There is a real and logical need to adopt a strategic approach to managing and mitigating climate-related and environmental risks in line with the business strategy and adopt policies, procedures, risk limits, and risk management mechanisms accordingly. For example, in the sphere of banking credit risk management, institutions are expected to consider climate-related and environmental risks at all stages of the credit granting process and monitor the risks in their portfolios (European Central Bank, 2020, p. 29).

1. The Monetary Legislator's Contribution to Environmental Protection

Although studies on the climate-related financial risks impacting banking operations are only at the initial stage of development, the central bank has already initiated certain activities in this regard. As an indicative example, we can cite the actions of the Bank of England, which has adopted the position in its announcements that the conditions have not yet been met to talk about climate-related financial risks as a special category of financial risks impacting banking operations, but that it is certainly possible to talk about the negative climate impact on the already existing structure of financial risks, including the banking market (Migliorelli & Lamarque, 2022, pp. 188-189).

In the sphere of the so-called cooperative banking, the center of interest is the individual, i.e., the needs of man as an individual (his preferences regarding the provision of a wide range of banking services). The public's expectation that the central bank gets involved in solving environmental problems can also be explained to some extent by its role in creating the conditions for the sound banking framework, where that system also shows the characteristics of a pure public good such as monetary stability. Although this goal has existed since the initial conception of contemporary monetary policy as an area of sovereign action of the central bank, it has always been in the shadow of the primary goal of price stability and has shown elements of a secondary goal. In today's circumstances, the classification of primary and secondary goals is diluted (as these goals often complement each other) and all targets must be achieved simultaneously, or if this is not possible, without a large time gap in implementation (Enoch & Green, 1997, pp. 3-4).

The European Central Bank is the main agent of the European monetary law, which can be defined as a set of EU primary and secondary legal provisions that govern the 'M' of the Economic and Monetary Union (Gortsos, 2023, p. 208). Consequently, the main roles of the ECB traditionally relate to price stability and inflation control, but in the last ten years, there has been a visible tendency of its regulatory competencies evolution (especially in the field of general financial and cohesion policy). That tendency of the ECB to acquire new competencies in various subsystems of economic policy is, on the one hand, natural, because of its expected role in managing economic activity in the EU, while on the other hand, it contradicts the proclaimed principle of narrow determination of jurisdiction, which otherwise is not line with the constitutional principles of the central bank regulations, where it is always determined in a more general way, and which gives enough space for justifying new tasks (Lamandini, Ramos & Solana, 2016, pp. 5-6). It is important to point out that every ECB intervention in new segments of economic policy is not an expression of arbitrariness in action, but a thoroughly organized and complex legal-economic action to preserve monetary stability.

2. Greening the ECB Legislation: Legal Mandate, Scope and Limitations

The importance of finance in green transition is defined by Article 2.1(c) of the Paris Agreement,[1] with the commitment to the goal of reorienting the financial flows framework to mitigate climate change, with green (monetary) finance having become a very subtle legislative priority for the EU in recent years (De

[1] Paris Agreement, *O.J.* 2016, L 282/4.

Arriba-Sellier, 2021, pp. 1097-1100). This is also shown by the unique (although limited) change in the mandate of the European supervisory authorities. Immediately after the adoption of the Paris Agreement, a special EU expert group created potential mechanisms for business and banking finance development that takes into account the state of the environment and submitted their "green finance" proposals to the Commission, which served as a basis for the first green reforms initiated in the area of general financial policy, opening up space for the issuance of guidelines for the inclusion of ecologically sustainable economic development components in business strategies and financial operations (EU HLEG on Sustainable Finance, 2018).

Due to the global environmental crisis, there has been an evolution of the ECB's roles, which as the guardian of monetary sovereignty and financial legitimacy in the European Economic and Monetary Union (EMU) must contribute to solving environmental challenges. At this point, we must bear in mind that the ECB's competence cannot be viewed as a static category because, in practice, it often had to be modified by current circumstances (crises), and at the same time, it has acquired new dimensions determined by the secondary legislation. Environmental disasters that correspond to the previously explained risks to financial and monetary stability are examples of such crisis moments. The ECB's new measures are aimed at suppressing opportunities for financial crime, and the full implementation of active and passive procedural legitimation (monetary legal disputes) best confirms this, because until recently, the ECB's position in this area has been only secondary (intermediate), but there are clear indications of a concentration of new competences, as a result of which the ECB will become far more active in that regard. Following the aforementioned changes in the ECB's regulatory competence, it is not difficult to imagine a greater concentration of competence in the field of environmental policy.

The potential legal basis for environmental competence stemming from the obligation to support the EU economic policies highlights the importance of the institutional balance issues in the EU. Namely, at the community level, competence for environmental protection is shared by the Commission, the Council and Member States. As Article 3 TFEU stipulates that one of the tasks of the institutions of the Union is preserving the environment, since the adoption of the Treaty of Lisbon, the ECB has been classified as one of those institutions, although its role in the field of environmental policy is not to "create it (as it would not be able to so), but to support it." When interpreting support for the general economic policies, at first glance, it may seem unclear what is meant by "general", because the Treaty does not differentiate between social, environmental, and economic policies in the more narrow sense, which forces the conclusion

that the term "general economic policies" also includes the other two terms mentioned, and this becomes clear through the interpretation of Article 127(1-2). At this point, it is important to point out that the European Climate Law regulation, which aims to reduce the effects of harmful gas emissions to net zero levels by the end of 2050, foresees the responsibility and joint action of the European and national institutions.[2] This law clearly states which institutions participate in its implementation, and while the ECB is not mentioned in any part, there is its indirect involvement through the aforementioned secondary tasks related to the contribution in the field of the general economic policy of the Union.

When it comes to the ECB's legal mandate to participate more actively in solving environmental issues, it could be found in the provisions of the primary contracts. Namely, according to Article 127(1) TFEU, it is explicitly established that "without prejudice to its primary objective, the ECB shall support the general economic policies of the Union as laid down in Article 3 TFEU", because the environmental policy is an integral part of the general economic policy. The ECB, acting within the limits of its powers, seeks to create conditions and provide general support for a gradual transition to a low-carbon economy by defining the rules of the game and supporting monetary reforms. It is notable that the ECB strongly supports the ongoing work in various international and European forums aimed at identifying "the production costs of climate change" and the transition risks by simultaneously promoting the reorientation of financial flows towards sustainable and healthy investment products. In addition, the ECB has delegated the right to vote to its proxies for capital investments, which it has committed to under the United Nations principles for responsible investment, which are developed by an international group of institutional investors reflecting the increasing relevance of environmental, social and corporate governance issues to investment practices (United Nations, Principles for Responsible Investment). In addition, the ECB is currently considering specifying the best possible scenario for buying green bonds from a large number of eligible issuers (as long as this does not affect market structure and liquidity).

The greening of the ECB legislation must be carried out on an independent basis. This independence raises the question of guaranteeing the functional independence of central banks, and not only institutional, financial, and administrative independence. The main arguments for such an understanding are based on the need to reduce the influence of the political factor in meeting the citizens' public needs but with the simultaneous contribution of the central bank to

[2] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 ("European Climate Law"), *O.J.* 2021, L 243/1–17.

achieving the previously established goals in the field of public services (specifically, this relates to price stability). In addition, functional independence must have the constitutional foundation, because the central bank is evolving increasingly in the conditions of globalized economic flows, and consequently it also contributes to the maintenance of general financial stability (which has never been its primary goal), which is why today it can also be seen as a special fiscal agent.

Acknowledgment of climate change is increasingly present in all pillars of the European Economic and Monetary Union, which is undergoing a transformation from a market-neutral regime to a market-efficient management. The EMU institutions' mandate pertaining to water, air, land conservation, biodiversity conservation, flora, and fauna should not be interpreted as a competence in the classical sense of the word, but rather as an additional task and activity that contributes to these goals (as no interpretation of the primary and secondary monetary legislation can support of the existence of jurisdiction in the narrower sense). Nevertheless, the legislator must continue to invest additional efforts in creating a soft law framework that can further activate the potential of the ECB in this field. Unlike monetary policy, the contribution of fiscal policy measures and instruments in the EMU is much more immediate, which is why the implementation of the so-called Green Fiscal Deal offers a clearer picture of the contribution expected from changes in the budgetary and tax policy (Steinbach, 2022, pp. 330-332). In addition, the ECB and the European Insurance and Occupational Pensions Authority (EIOPA) have worked together on ways to enhance the insurance for households and companies against climate-related catastrophes such as floods or wildfires.

When it comes to the ECB's role in the field of environmental policy, Zilioli and Ioannidis consider that it should be clearly emphasized that the ECB does not have the mandate to determine what is an environmental goal and what is not, as that can be decided only by competent expert bodies, and that its role in that field is only supplementary, considering that, in accordance with the provisions of the founding acts, undertaking environmental policy measures and instruments remains the exclusive competence of Member States (Zilioli & Ioannidis, 2022, pp. 363-366). Considering the seriousness of the consequences of global environmental crisis, the additional competencies, i.e., contributions, are much more desirable than the non-undertaking of any activities by the institutions, as the time of "monetary nihilism" remained only a relic of monetary history and a period when it seemed that central banks existed for their own sake as untouchable and self-sustaining institutions of the state. With respect to the ECB's role in environmental protection, it is important to emphasize that the ECB cannot be

an environmental co-legislator and bear the responsibility that the Treaties place on the Union and Member State political institutions in environmental concerns. However, that does not mean that the ECB should not be environmentally conscious and persistent and try to make prudent use of natural resources, to preserve the quality of the environment, and protect human health in the production and supply of euro banknotes. Its task in the field of environmental policy is secondary, but every contribution to environmental protection is equally important and that is why the author is of the opinion that the distinction between primary and secondary tasks is not that relevant in practice in this area. In addition, we must remember that the influence of soft legislation in the international monetary management was crucial in times of crises (financial, economic, and pandemic) because it is more flexible to the actual problems and effective for fulfilling legal gaps. Without the ECB's soft legislation, the consequences of the financial crises would have been much greater, and its influence in the field of environmental protection might be important as well.

Currently, the most prominent influence of environmental factors on the common monetary policy is reflected in the purchase of corporate bonds issued by the non-financial sector, which the Eurosystem purchases under the corporate sector purchase program. The Eurosystem buys bonds in an amount that is generally proportional to the outstanding qualified bonds. The issuers of these bonds must meet certain minimum eligibility requirements to protect the central bank's balance sheet. These purchases represent a form of market capitalization aimed at preserving the stability of the market mechanism, and initially did not take into account the impact of climate risks, but this has changed after the ECB's announcement of the adaptation of the program to entities that prefer production that is less dependent on carbon dioxide emissions and exhibit a strict environmental awareness in their business operations. This announcement has had significant legal repercussions, as the question arose as to who would define the environmental criteria for the application of the program, whether the ECB had the mandate to do so on its own, and why, in the circumstances of the pandemic crisis, is it important to create only environmental criteria, and not the other criteria that are essential for sustainable and humane economic development.

The answers to these questions imply a far-reaching normative analysis of the provisions regulating the legal basis for the ECB's competence. Namely, taking into account its main task, i.e. maintaining price stability, and the previous judicial practice, the question arises as to whether environmental risks could be a precondition for the performance of that task (the European Court of Justice has found in several judgments that the ECB, when implementing its main objective, also takes into account the preconditions that may have direct or indirect

connections with it). If the ECB considers that climate risk could affect the implementation of its tasks, by applying the proportionality principle under Article 127 TFEU and the provisions of its Statute, and taking into account that the precondition is the implementation of the free–market economy principles, it would ensure that there is no obstacle to "greening" of its mandate.

The ECB's role in the field of environmental policy is most evident in the second pillar of the banking union, i.e., in the sphere of application of the Single Rulebook and the provisions of the Capital Requirements Directive (CRD) IV, Article 114 TFEU, which directs its activities to preserve the integrity of the single market and ensure equality in the banking sector. Nevertheless, the ECB's role in the field of green policy (at least for the moment) cannot produce any epoch-making effects, as the ECB is not sovereign in the field of supervisory function and performs its tasks together with the national central banks of Member States. In addition, the ECB cannot require the banks in Member States to include environmental standards in their operational regulations as there is no adequate legal basis that would allow it to do so. It is still not entirely clear what the order of taking into account environmental standards should be, that is, who should be the first to notice their importance and insist on their integration into the monetary norms (either the ECB or national central banks), and that needs to be determined and regulated as soon as possible in the coming period.

A significant step on that path is the judgment of the EU Court in the case of Crédit Mutuel Arké (General Court of the European Union, 2017)[3], establishing the right of the ECB to broadly consider the field of potential risks, which ultimately includes climate risks. Namely, this case relates to the appeal filed by the French decentralized bank group Crédit Mutuel against the decision of the ECB, which determined in the prudential supervision procedure that the banking group failed to fulfill its obligations relating to reserve requirements, ordering it to do so within the clearly specified deadlines. The Court found that the ECB has the right to exercise prudential supervision over the operations of all financial institutions that are established and operate in the EU, regardless of whether they have the status of credit institutions or not because the provision regulating the subject of audit uses only the generic term "financial entity". On that occasion, the Court emphasized that the ECB may control, monitor, and evaluate all types of risks that may appear as potentially problematic for the performance of the functions of the financial market as a whole, which points to the conclusion that their explicit non-enumeration and nomenclature is not a matter of the legislator's omission, but leaves room for the inclusion of new risks that do not only

[3] Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v. European Central Bank* [2019] EU:C:2019:810.

have a direct economic nature but can also be ecological or social (which, viewed in a broader context, can also have economic shocks as indirect consequences).

Despite the Single Rulebook not having a binding effect, the ECB insists very strongly on its application. In addition, the so-called macroeconomic climate controls have indicated a high risk that the greenhouse effect will have a significant impact on the banking finance sphere, which is why it will continue its activities in that direction (De Arriba-Sellier, 2021, p. 1140). Thus, it becomes clear that, although in the field of the ECB law there has not been a real genuine change that *de jure* obligates monetary subjects to take into account environmental risks under the threat of sanctions, in practice, nevertheless, the ECB takes this seriously and assumes its environmental responsibility, which it successfully attaches to the financial supervision function.

3. Green Central Banking Concept Justification and Rollout

Surely the preservation of monetary stability as a public good must remain the main objective of the monetary law agents. However, this cannot be achieved in isolation, nor can it be meaningful in a world where there are no basic conditions for life and health. While greening the monetary policy and law may at first glance seem controversial, it has to be emphasized that the newly established function of the last resort bank was prohibited by the hard law provisions. The new green competencies of monetary entities are best illustrated by the amendments to the law on the operations of the central banks in China, the Netherlands, and France, specifying for the first time the term and category of the financial risks that are directly caused by climate change (and all to prevent investor lawsuits similar to those in the case of the Australian central bank). In this sense, there is a need to emphasize the great contribution of the Bank of England in promoting the link between monetary-fiscal and environmental policy. This is best demonstrated by the formation of a special research department for analysis and monitoring of climate change and green finance trends (Dimitrijević & Golubović, 2021, p. 1156). An example of good practice, *inter alia*, is the Irish central bank, which in the coming period plans to include the problem of the spread of pollution caused by excessive carbon emissions in its monetary strategy, as it is increasingly becoming a determinant of macroeconomic results (Lane, 2019, pp. 1-10).

The concept of central banking that respects environmental conditions (the so-called green central banking) is based on a system in which the central bank in its operations respects and takes into account when shaping and adopting the monetary strategy the relevant environmental risks (especially climate-related

risks) that have a material influence on the short-term and long-term macro-economic decision-making and the financial sector development (Dikau &Volz, 2018, pp. 1-9). The monetary law theory makes a distinction between the central bank's direct and indirect role in implementing the environmental policy goals. The direct role relates to encouraging green investments and greening the domestic economic system, while the indirect role relates to the inclusion of environmental factors in the traditional monetary strategies (Dafe & Volz, 2015, p. 2).

While central banks may have a potentially large number of instruments that influence the allocation of capital for green investments, they should not be asked to do everything they can in the field of environmental policy, as this competence cannot be interpreted too extensively. There is a need to find the right measure of environmental responsibility for central banks, which must not be overemphasized because, as it has been stated many times, monetary stability must remain the central bank's main task. Analyzing the existing central bank mandates (which differ between countries and monetary regions) with full respect for the factor of tradition, the question that necessarily arises regards organizing a public and transparent discussion on the extent to which central banks should support their government's sustainable development policies. The outcomes of such discussions are likely to differ in different countries and will depend on institutional legacies and citizens' reactions to potential "new" competencies.

In December 2017, the European Central Bank, together with the British, French, Belgian, Spanish, and Dutch central banks, identified the objectives of the Network, which currently has 47 members (central banks and other financial institutions). The Network is one of the most influential monetary legislation greening initiatives to date and gathers the most reputable monetary and regulatory institutions under the declared common goal of supporting the transition to "greener" economies. The Network's objectives could hypothetically be included in the work of the existing international regulatory bodies to enrich the existing competencies with ecological dimensions. The diverse membership within the Network enables close coordination between various ongoing international initiatives on issues of common interest. To this end, the Network establishes and nurtures close contacts with similar entities such as the Sustainable Banking Network, the Sustainable Insurance Forum, and the recently launched Sustainable Finance Network (Network for Greening the Financial System – NGFS, 2019, pp. 4-5).

The Network's objectives relate to performing micro-prudential supervision, macro-prudential supervision, and encouraging and directing green investments where bank loans and tax investment credits can appear as suitable monetary and fiscal policy implementation instruments (NGFS, 2019, p. 6). The point of conducting micro-prudential supervision also lies in recognizing current

supervisory practices, encouraging the disclosure of climate-related risks, and defining the differences in financial risk between "green" and "brown" (understood in the context of ordinary) assets. Generally, the tasks of central banks within the Network traditionally relate to price stability, general financial stability, and harmonization of the national fiscal framework with the international financial standards.

Already in the first years of its operation, the Network adopted six recommendations addressed to central banks, audit bodies, public policymakers, and other financial institutions to better meet environmental standards in their operations. (NGFS, 2019, pp. 9-10). The recommendations refer to integrating climate risks into the monitoring of financial stability and micro-prudential supervision, integrating sustainability factors into the management of one's portfolio of actions, bridging gaps in data, strengthening awareness and intellectual capacities through encouraging technical assistance and knowledge exchange, achieving robust and international consistent climate and environmental policies, and discovering and supporting the development of the taxonomy of economic activities. While the recommendations are not legally binding, they are respected in practice considering the strength of their resulting moral components and the authority of the agent who adopted them. The importance of these recommendations lies in the fact that they provide the best way to facilitate the financial sector's role in environment protection and partially substitute the incapacity of even the best-developed macroeconomic models to accurately predict the economic and financial impact of climate change. Implementation of these recommendations is important both on a macro and micro level. On the macro level, the states should intensify their efforts to implement effective policies that foster sustainable practices, while on the micro level, companies should develop business strategies and risk management controls that ensure sustainability in the long term.

4. Conclusion

The ECB law can undoubtedly provide a visible contribution to resolving and managing environmental challenges, taking into account the flexibility of its provisions and new tendencies in the development of the regulation on monetary transmission mechanisms, which again points to unused potential on that front. Of course, its task in this context can never be its primary task, but that does not mean that it should be abandoned, as even the smallest contribution in regulating environmental issues, in cohesion with all other contributions, however large or small, can ensure the much-needed balance in the use of these sensitive resources

in every society in the world today. Although the extensive interpretation of the provisions on the ECB's economic policy goals can provide a solid basis for its interventions in the field of nature conservation, one has to keep in mind that the addition of new competences must never undermine the primary task of the central bank. Therefore, the primary aim should be to support the already established priorities, and that is where more open economic dialogue with other institutions is particularly important, as a form of open coordination and exchange of opinions, experiences, and attitudes about the planned and achieved results. Therefore, the soft law provisions could potentially specify the activities on that level, with the emphasis on the provision that the central bank cannot be responsible for all economic challenges that might arise in a country.

The hybridization of the competencies of the main European monetary law agencies stems from their involvement in the global environmental management system and as such does not present an obstacle in the implementation of the main monetary targets. Although studies on the relationship between monetary law and environmental issues are still in the early stages of development, it is important to note that the ECB is intensively increasing efforts toward a clearer identification of cause-and-effect mechanisms that will serve as a potential justification for the adoption of green monetary legal frameworks in the future.

References

Carney, M. 2015. Breaking the Tragedy of the Horizon – Climate Change and Financial Stability. London. Available at: www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx (20. 7. 2023).

Dafe, F. & Volz, U. 2015. *Financing Global Development: The Role of Central Banks*. The Briefing Paper 8. Bonn: German Development Institute. https://dx.doi.org/10.2139/ssrn.2797226

De Arriba-Sellier, N. 2021. Turning Gold into Green: Green Finance in the Mandate of European Financial Supervision. *Common Market Law Review*, 58(4), pp. 1097–1140, https://dx.doi.org/10.2139/ssrn.3792975

Dikau, S. & Volz, U. 2018. *Central Banking, Climate Change and Green Finance*. ADBI Working Paper 867. ADB Institute.

Dimitrijević, M. & Golubović, S. 2021. O tendenciji ozelenjivanja međunarodnog monetarnog prava. Zbornik radova Pravnog fakulteta Novi Sad, 55(4), pp. 1155-1172. https://doi.org/10.5937/zrpfns55-34249

Dimitrijević, M. 2023. *Pravo Evropske centralne banke*. Niš: Centar za publikacije Pravnog fakulteta u Nišu.

Ekardt, F. 2020. *Sustainability – Transformation, Governance, Ethics, Law*. Munich: Springer. https://doi.org/10.1007/978-3-030-19277-8

Enoch, C. &. Green, J. H.(eds.). 1997. *Banking Soundness and Monetary Policy*. Washington: IMF Press.

Gortsos, C. V. (2023). *The European Banking Regulation Handbook, Volume I: Theory of Banking Regulation, International Standards, Evolution and Institutional Aspects of European Banking Law.* Cham: Palgrave Macmillan. https://doi.org/10.1007/978-3-031-32859-6

Jovanić, T. 2022. Rizici povezani sa klimatskim promenama i nova uloga centralnih banaka. U: Radović, V. (ed.), *Tematski zbornik radova „Usklađivanje poslovnog prava Srbije sa pravom Evropske unije*". Beograd : Pravni fakultet Univerziteta u Beogradu, pp. 155-189.

Kilpatrick, A. & Williams, K. 2021. *Transforming Markets, A Development Bank for the 21st Century A History of the EBRD Volume 2*. Budapest: Central European University Press. https://doi.org/10.7829/9789633864128

Lamandini, M., Ramos, D. & Solana, J. 2016. The European Central Bank (ECB) as Catalyst for Change in EU Law, Part 1: The ECB's Mandate. *Columbia Journal of European Law*, 23(2), pp. 1-54.

Lane, P. R. 2019. Climate Change and the Irish Financial System. *Economic Letter Central Bank of Ireland*, 1, pp. 1-15.

Migliorelli, M. & Lamarque, E. 2022. *Contemporary Trends in European Cooperative Banking –Sustainability, Governance, Digital Transformation, and Health Crisis Response*. Munich: Springer. https://doi.org/10.1007/978-3-030-98194-5

Pellegrini, B. C. & Pellegrini. L. 2022. *Climate Change Adaptation: Governance and New Issues of Value Measuring the Impact of ESG Scores on CoE and Firm Performance*. New York: Palgrave Macmillan.

Rodina, A. (2022). Interaction of Sustainability and Environment in the Case Law of the Latvian Constitutional Court. *Strani pravni život***,** 66(4), pp. 410-429. https://doi.org/10.56461/SPZ_22404KJ

Steinbach, A. 2022. The Greening of the Economic and Monetary Union. *Common Market Law Review*, 59(2), pp. 329-362. https://doi.org/10.54648/COLA2022028

Todić, D. 2023. Zakoni o klimatskim promenama – potreba ili normativno pomodarstvo (primer Srbije i Hrvatske). *Strani pravni zivot***,** 67(1), pp. 75-89. https://doi.org/10.56461/SPZ_23105KJ

Zilioli, C. & Ioannidis, M. 2022. Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies. *Common Market Law Review*, 59(2), pp. 363-394. https://doi.org/10.54648/COLA2022029

Legal sources

General Court of the European Union. 2017. The ECB may exercise prudential supervision of the Groupe Crédit Mutuel through the Confédération nationale du Crédit Mutuel, including in respect of the Crédit Mutuel Arkéa, Press Release No 135/17 Luxembourg, 13 December 2017 Judgment in Cases T-712/15 and T-52/16 Crédit Mutuel Arkéa v ECB.

EU HLEG on Sustainable Finance. 2018. Financing a Sustainable European Economy – Final Report.

European Central Bank. 2020. Banking Supervision. Guide on climate-related and environmental risks Supervisory expectations relating to risk management and disclosure.

Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa v European Central Bank* [2019] EU:C:2019:810.

Network for Greening the Financial System (NGFS). 2019. A Call for Action Climate Change as a Source of Financial Risk, Executive summary, First Comprehensive Report.

Paris Agreement, *O.J.* 2016, L 282/4.

Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 ("European Climate Law"), O.J. 2021, L 243/1–17.

Internet Sources

United Nations, Principles for Responsible Investment. Available at: https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment (23. 7. 2023).

Milica D. Kovačević*

Pregledni naučni članak
UDK: 43.62-053.2
doi: https://doi.org/10.56461/SPZ_24306KJ
Primljeno: 19. 7. 2024.
Izmenjeno: 19. 9. 2024.
Prihvaćeno: 23. 9. 2024.

SPECIAL MEASURES FOR SEX OFFENDERS AND POTENTIAL HUMAN RIGHTS VIOLATIONS**

Summary

Child sexual abuse has attracted enormous attention and occupied significant media space in recent decades. This increased attention has resulted in the creation of strategies aimed at responding to sexual abuse in general, and has been motivated by both the need to prevent reoffending and the desire to adequately respond to the expectations of the wider public. Measures aimed at responding to sexual offenses have become fertile ground for the introduction of various innovations. This may result in the violation of sex offenders' human rights, and any state based on the rule of law should not allow this. This paper is devoted predominantly to the analysis of the Croatian and Serbian current legal frameworks related to the application of specific measures aimed at sex offenders to establish whether these frameworks are aligned with the relevant human rights protection standards. It has been established that the level of compliance of the two national legislations with the international legal framework is high although there is room for additional corrections. The objective of the paper is to give recommendations for harmonizing the above area with the modern legal acquis, and primarily with the standards established through the case law of the European Court of Human Rights.

Keywords: sexual offenses, registries, supervision, human rights, European Court of Human Rights.

* PhD, Associate Professor, University of Belgrade, Faculty for Special Education and Rehabilitation.
E-mail: *milica.kovacevic@fasper.bg.ac.rs*
ORCID: *https://orcid.org/0000-0002-0458-8193*

** This paper is a result of the project supported by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia, contract number 451-03-47/2023-01.

POSEBNE MERE ZA SEKSUALNE PRESTUPNIKE I MOGUĆE POVREDE LJUDSKIH PRAVA

Sažetak

Seksualno zlostavljanje, osobito dece, poslednjih decenija privlači veliku pažnju građana i medija, usled čega je osmišljavanje strategija za regovanje na ovaj fenomen motivisano ne samo potrebom da se on suzbije i drži pod kontrolom, već i željom da se adekvatno odgovori na očekivanja javnog mnjenja. Reagovanje na ponašanje seksualnih prestupnika stoga predstavlja oblast u kojoj se obilato uvode raznovrsni noviteti, i to neretko bez adekvatne naučne i iskustvene argumentacije. Ovakav pristup može rezultirati narušavanjem ljudskih prava seksualnih prestupnika, iako država zasnovana na vladavini prava to ne sme tolerisati. Rad je prevashodno posvećen analizi hrvatskog i srpskog pozitivnopravnog okvira koji se odnosi na primenu specifičnih mera usmerenih ka seksualnim prestupnicima, a kako bi se ustanovilo da li su ovi okviri usklađeni sa internacionalnim standardima u sferi zaštite ljudskih prava. Ustanovljeno je da je nivo usklađenosti dvaju nacionalnih prava sa međunarodnim pravnim okvirom visok, iako postoji prostor za dalja usavršavanja. Cilj rada jeste da se osmisle izvesne preporuke u cilju usaglašavanja navedene materije sa savremenim pravnim tekovinama, te u prvom redu sa principima ustanovljenim u praksi Evropskog suda za ljudska prava.

Ključne reči: seksualni delikti, baze podataka, nadzor, ljudska prava, Evropski sud za ljudska prava.

1. Introductory Considerations

Until the 1970s, the topic of sexual abuse of children received sporadic attention as was considered a relatively rare phenomenon (Finklelhor & Araji, 1986, p. 15). The first extensive research on the prevalence of child sexual abuse conducted during the 1970s and 1980s revealed intriguing data. A survey conducted with male respondents from the San Francisco County in the United States (hereinafter: the USA) has indicated that as many as 38% of the survey participants had experienced some form of sexual abuse before the age of 18 (Nurse, 2020, p. 62). In 2014, an extensive survey on the violence against women in Europe confirmed, *inter alia*, that 12% of the respondents under the age of 15 had experienced some form of sexual violence perpetrated by an adult (FRA, 2015, p. 121).

It has been pointed out in the literature that there is a connection between sexual victimization during childhood and various negative consequences such as anxiety, depression and suicidal thoughts (Deblinger *et al.*, 2015).

When it comes to the informal and formal responses to sexual offenses, and especially sexual abuse of minors, the understanding of this topic is undeniably burdened by numerous prejudices. One of the prejudices is that sexual abuse predominantly involves an older man unknown to the victim, while the abused child is primarily an infant, approached by the offender in a public place. On the other hand, scientific literature states that in most cases the perpetrator is already known to the victim, and that many sex offenders are young, even minors (Horowitz, 2015, p. xii). A widespread prejudice is that sex offenders are mostly unrepentant multi-recidivists, and that they should all be treated the same way, even though they could have diametrically different needs (Matijašević Obradović & Dragojlović, 2020, p. 110). Along with the preconception that recidivism among sex offenders is inevitable, there is also the presumption that the rate of recidivism among this population is significantly higher than among perpetrators of other crimes, although scientific studies indicate that this is not true. In support of this, a study conducted in the USA indicated that the recidivism rate among 9.000 sex offenders over the three years following the conviction was 5.3%, while a similar Canadian study, which included 30,000 offenders from North America and the United Kingdom, indicated a recidivism rate of 14% over a four to six-year period (Levenson *et al.*, 2007, p. 142).

In addition to the deep-rooted prejudices, the system is inevitably influenced by the public's strong emotional response to the phenomenon of child sexual abuse. It is also interesting that the rate of sexual offenses has mostly been decreasing since the 1990s, although the media interest, with a focus on sensationalism, has only increased (Cochran *et al.*, 2021, p. 79; Kovačević, 2021, p. 74). In such a climate, the idea to preventively supervise dangerous sex offenders first came into life in the USA, as the result of "moral panic" and "penal populism" demands, and has subsequently spread to Europe (Mrvić-Petrović, 2015a, p. 211). Such an approach was also influenced by the mass media covering the topic of "sex monsters", after the discovery of the *networks* of *pedophiles* and brutal murders of minor victims in the last decades of the 20th century in Great Britain, France, Belgium and other countries (Mrvić-Petrović, 2015a, p. 212).

Unlike the USA, European countries do not allow open access to sex offender databases, nor are there measures aimed at informing the public about their whereabouts. For the most part, data on sex offenders is available only to the police and the judiciary. The exceptions are Poland and North Macedonia, which have publicly available sex offenders databases. However, in Poland, the general

public can only access data on offenders convicted of the gravest sex offenses. Therefore, in Europe, the confidentiality of criminal records data is generally insisted upon, whereby each European country decides, according to its own circumstances and needs, on whether to establish a sex offenders register. The laws of numerous European countries provide for the possibility of applying various measures with the primary purpose of monitoring sex offenders. Supervision is also applied after the completion of criminal sanctions, and the restriction of freedom can vary. In this regard, surveillance measures may be necessary, as part of a proactive and strategically designed approach to prevent the victimization of children, and consequently restrictions on human rights and freedoms in a given context may be completely legitimate and efficient.

Apart from the fact that such rigorous supervision and making sex offenders databases available to the general public is in contradiction to the protection of the right to privacy, it may also have detrimental effects. Thus, research in the USA indicates that offenders whose data has been published have faced the following consequences: loss of job and inability to advance in the workplace, loss of residence, public insults, expulsion from public places and harassment in public and by phone/email (Tewksbury, 2005, p. 70). Although the registration, public notification and supervision were established with the purpose of protecting children and adults, some of the listed consequences could be related to the offenders' social withdrawal, which could make it even more difficult for them to access a support system and could ultimately contribute to reoffending.

Bearing in mind the above, the following part provides a normative-comparative analysis of the relevant Croatian and Serbian regulations in the field of responding to sexual crimes to examine the compliance of the above national legal frameworks with the standards arising from the European Court of Human Rights practice.

2. Croatian and Serbian Current Legal Frameworks in the Field of Combating Sexual Crimes

2.1. Croatia

While Croatia still does not have a special sex offenders database established, there is a universal criminal records database maintained by the Ministry of Justice. However, the Law on Legal Consequences of Conviction, Criminal Records and Rehabilitation, under Article 13(4), stipulates that courts, public authorities and institutions involved in the procedures for the protection of the

rights and interests of the child, may, upon a reasoned request, be provided with certificates on convictions for offenses such as child sexual abuse and exploitation, and other similar crimes listed in the Criminal Code of the Republic of Croatia. At the same time, the Law stipulates, under Article 14(1), that no one has the right to require citizens to submit their criminal records data, with an exception of the aforementioned special certificates that the employer must obtain before hiring a person who will be entrusted with tasks and duties involving children.

It should be emphasized that the criminal records data are to be permanently deleted after the expiration of the deadlines specified by the Law. Legal rehabilitation occurs automatically after the expiration of the appropriate deadlines, the duration of which is determined by the type of sanction and the duration of the imposed prison sentence. However, for those convicted of sexual crimes against minors, rehabilitation occurs after the expiration of the double duration deadlines compared to those foreseen for the rehabilitation in case of persons sentenced to the same criminal sanctions, but for other offenses (Article 19(8)). After the expiration, the person is considered unconvicted, while the rehabilitated person himself has the right to deny his conviction.

Furthermore, appropriate "special obligations" may be imposed on sex offenders including: prohibition of visiting certain places, facilities or events that may provide an opportunity or incentive for reoffending; prohibition of associating with a certain person or group of persons; prohibition of employment, teaching or accommodation of certain persons and regular reporting to the probation service, social welfare services, court, police or other relevant authority, all in accordance with the Criminal Code, Art. 62(2). However, unlike the current Serbian law solution, it is the court that establishes special obligations. Special obligations are not imposed according to the principle of automaticity, and the legislator has foreseen that unreasonable obligations may not be imposed, including obligations that offend one's dignity.

In Croatia, there is the possibility of imposing protective supervision if the offender needs the support and guidance of a probation officer to refrain from reoffending and to be integrated more easily into society. Protective supervision includes: reporting to the probation officer, seeking the judge's consent for traveling abroad and informing the probation officer of any change of employment or address (Criminal Code, Art. 64). As a rule, the court orders protective supervision with a conditional sentence, community service and conditional release, for all sentences exceeding six months duration imposed on offenders under 25 years of age (Criminal Code, Art. 64(3)).

On the other hand, as a measure of additional supervision over those who have served a full prison sentence, as part of the "safety measures", the Croatian

criminal legislation has introduced a measure of protective supervision. This special protective supervision can be imposed by the court if the offender has received a prison sentence of five or more years for a premeditated crime, two or more years for a premeditated violent crime, or a prison sentence for sexual crimes against minors, all in accordance with Article 76 of the Criminal Code. For perpetrators of crimes against children, the probationary period is one to five years, and the court can extend this period for one additional year at the proposal of the probation service if there is a risk of reoffending. Every year, the court reviews the justification for continued application of this measure. The review can also be initiated by the offender himself, but not before six months have passed since the last review. The literature points out that this measure was designed to provide post-penal care and prevent reoffending, with the annotation that its practical application thus far has been extremely scarce, and it is impossible to evaluate its scope and results (Vuletić, Salitrežić & Sajter, 2021, p. 555).

2.2. Serbia

Serbia established their special sex offenders register in 2013, under the Law on Special Measures for Preventing Sexual Offenses against Minors. The Law is also known as "Marija's Law", since the initiative for its adoption was directly related to the tragic death of eight-year-old Marija Jovanović. The database is administered by the Administration for the Execution of Criminal Sanctions. The legislator enumerates the crimes from the Criminal Code of the Republic of Serbia that condition the application of special measures, including: rape, child sexual abuse, illicit sexual acts, intermediation in prostitution, and use of computer networks or communication by other technical means for the commission of sexual crime against a minor. Experts have justifiably expressed doubts as to why the Law does not also apply to other offenses against minors such as human trafficking, incest and sexual harassment (Miladinović-Stefanović, 2014; Đorđević, 2018, p. 120). It should be emphasized that Marija's Law applies only to adult perpetrators of sexual crimes against minors.

A significant innovation is the introduction of certain special measures for sex offenders whose victims were minors. Article 7 of Marija's Law foresees that, following the prison sentence for the enumerated crimes, special measures are implemented in the form of: mandatory reporting to the police and the Administration for the Execution of Criminal Sanctions/Probation Services; bans on visiting places where minors gather (kindergartens, schools and similar); mandatory visits to professional counseling centers and institutions; mandatory notification of authorities on changes of residence, place of residence or workplace

and mandatory notification of travel abroad. Measures can be implemented over a period of no longer than 20 years following the end of the prison sentence, which implies that they are reserved only for those sentenced to prison. The question can be raised as to why special measures could not be applied in case of other criminal sanctions imposed, given that the legislator emphasized that the measures should serve to prevent reoffending.

At the end of every four years of applying the measures, the court *ex officio* decides on the need for their continued implementation, whereby the person to whom the measures refer to can also submit a request for review every two years. Article 8 of Marija's Law stipulates that the mandatory reporting measure implies the offender's duty to report to the police and the probation officer every month and no later than by the 15th of the current month. In addition, the offender is required to personally notify the police and the Probation Service of any change of residence or workplace within three days from the date of the change, with the same obligation also relating to a notification of travel abroad, whereby the police must be notified no later than three days before the planned trip, with the submission of information about the country of destination and about the place and length of stay outside Serbia. If the convicted person ignores the prescribed restrictions, i.e., if he fails to fulfill his duties, he could be charged with a misdemeanor and punished by imprisonment for a period of 30 to 60 days.

It could be argued that Article 10 of Marija's Law introduces a new type of special measure, or one might even say treatment, into the already existing and well-known system of "safety measures" in the Serbian criminal legislation. Thus, the sex offender is required to report to professional counseling centers, according to the program determined by the Probation Service. It should be underlined that this special measure is automatically applied to every sex offender sentenced to prison. However, despite being functionally similar, there is a basic difference between special measures and safety measures, because safety measures are ordered by the court, just as all other criminal sanctions, which is not the case with special measures (Miladinović-Stefanović & Knežević, 2018, p. 112). In the theoretical and general sense, the measure of post-prison supervision of dangerous offenders can be disputed: it is not known whether it is a punishment, a safety measure or a legal consequence of the conviction (Mrvić-Petrović, 2015b, p. 42). Most likely, in Serbia, the intention was to create a measure similar to the conditional sentence/probation with protective supervision which already exists in the Serbian criminal legislation.

When it comes to maintaining sex offenders database, it should be emphasized that it includes a large volume of personal data recorded, with a permanent retention period. Therefore, the register will keep the following data related to a

convicted person: name and surname, personal identification number, address of residence, employment data, physical recognition data and photographs, DNA profile, data on the criminal offense and the imposed sentence, data on the legal consequences of the conviction, and data on the implementation of special measures (Art. 13 of Marija's Law). However, at the same time, it has been foreseen that the data from this register is available only to a limited number of agencies. Thus, the register data can be shared with the court, public prosecutor, probation service, and the police in connection with criminal proceedings. In addition, upon a reasoned request, the data can be shared with the state authority, company, other organization or entrepreneur, if the legal consequences of the conviction are still ongoing and if they have is a justified interest based on the law, while other subjects and authorities and legal entities working with minors are required to request information on whether a person who is supposed to perform work with minors is registered in the sex offenders database. In addition, the data can be shared with foreign states, if it is in accordance with the relevant international agreements. Therefore, according to the Serbian law, the data on sex offenders is not available to the general public.

Unlike the solution present in the Croatian legislation, in Serbia, supervision and special measures are applied by force of law and without a prior assessment by a court, although there is an obligation to periodically reevaluate their justification. In addition, the possibility of deleting personal data from the sex offenders register has not been foreseen.

3. Special Measures for Sex Offenders and Human Rights Review of the European Court of Human Rights Practice

Although the introduction of various databases and measures to monitor sex offenders appears to be inevitable and necessary, the experts have singled out practices that can be problematic from the point of view of respecting human rights.

Let us start from the obvious: regardless of the pronounced social danger of the crimes committed by sex offenders and the strong emotional reaction their behavior causes among the public, just like everyone else, they must enjoy their inviolable human rights (Perlin & Cucolo, 2020, p. 430). Therefore, we must not lose sight of the fact that sex offenders are not only lawbreakers but also the beneficiaries of these rights, and that the state is required to both prevent and punish sexual crimes, and ensure the preconditions for the rehabilitation of sex offenders, while the right to rehabilitation also indicates a proactive attitude towards the problem of recidivism (Easton, 2001, p. 72). If violations of complex special

measures result mainly in the repeated punishment, they can result in an *circulus vitiosus* of restrictions of human rights, in which the individual factors that cause the crime are not taken into account (Mrvić-Petrović, 2015b, p. 42).

Bearing in mind that there are generally no special measures for controlling other groups of offenders, nor special databases containing their personal data, the question can be raised as to whether that is a discriminatory treatment against sex offenders. For many years, the argument has been made in literature that sex offenders around the world have been singled out as a special category on which various measures of an extensive and innovative character can be imposed. Although the argument for the necessity of protecting potential victims, especially minors towards whom society and the state have a number of complex obligations, is rightly emphasized, this does not invalidate the unacceptability of restricting human rights without a clear basis in scientific research and the phenomenological characteristics of sexual crimes. As already discussed, it cannot be denied that the creation of measures is often based on various prejudices about the sex offenders' characteristics and behaviors.

Furthermore, the specific response to sexual crimes calls into question the entire concept of the criminal law reaction, which is essentially aimed at rehabilitation, however unattainable that goal may be (Kovačević, Maljković & Bogetić, 2020, p. 146). If, as in the case of sex offenders, the focus is officially on controlling their behavior through the engagement of various repressive mechanisms, even after the sentence has been served, the question naturally arises as to whether this negates their personal dignity by *a priori* excluding the possibility of their change for the better.

The analysis of the European Court of Human Rights case law points to several areas where respect for the human rights of sex offenders could be questionable.

The first group of endangered rights could include the rights to humane and dignified treatment and the prohibition of inhumane treatment in accordance with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (adopted in Rome, 1950, hereinafter: the ECHR). In this regard, there is a large number of cases considered before the European Court of Human Rights related to the potential inhumanity of life imprisonment, such as *Petukhov v. Ukraine* and *Murray v. Netherlands*. Namely, the inhumanity of sentencing someone to life imprisonment, without the possibility of parole, is reflected in the denial of the possibility of rehabilitation, and in the utter deprivation of hope that comes with the impossibility of release. Concerning the above, if the possibility of the sex offender improving for the better is excluded, this could perhaps be considered

a degrading treatment too. In this case, it would be illusory to expect the sex offender to have the will and desire to participate actively in the treatment. It should be borne in mind that the concept of rehabilitation has changed over time, moving from the original perception of rehabilitation as a form of redemption, through rehabilitation in the form of returning to the community in the role of a socially useful member, to the today's widespread attitude about rehabilitation implying that it, in itself, represents the specific right of the offender independent of the favorable effects on the broader social community (Martufi, 2018, p. 673). If, after the sentence has been served, supervision measures are imposed by force of law, and regardless of the efforts the convicted person has invested in his treatment, is that not equal to negating the meaningfulness of the previously received treatment? Is it fair that different offenders suffer the same level of restrictions even after having served their sentence, just because they were convicted of the same group of crimes?

In the Marcello *Viola v. Italy* (no. 2) case, the European Court of Human Rights has concluded that even with a life sentence there must be an option for early release/parole, and a sentence review in order to assess whether there are legitimate penological grounds for the continuing imprisonment. The European penal policy places an explicit emphasis on rehabilitation as the main purpose of punishment. In the above case, the applicant was sentenced to a life sentence for organized crime, while the Italian legislation demanded cooperation with the prosecution in an ongoing investigation in order to obtain parole. However, convicts, including Viola, often refused to cooperate due to fear for their safety and the safety of their family members, which at the same time did not have to imply that they did not undergo a personal transformation during the serving of their sentence. Therefore, the court was of the opinion that it is unacceptable to equate refusal to cooperate with authorities with the perpetrator's undiminished social danger. In the specific case, the question was raised as to whether Viola's personal progress had been taken into account at all, or whether early release was simply excluded as a possibility just because of the type of offense. The European Court of Human Rights further notes that personality traits are not an immutable category, because personality can change and develop during the serving of a sentence primarily through a process that enables a critical review of the past. In connection with the above, we could pose the question as to whether sex offenders, who are subject to different measures even after having served the prison sentence, could also refer to the inhumane treatment they have been subjected to, if it is simply assumed that all of them, regardless of their individual circumstances, must go through various types of control and restrictions because they did not "improve". In Croatia there is no possibility to automatically impose such

measures, without evaluating the circumstances in each individual case, while in Serbia these measures are applied automatically.

Furthermore, when it comes to Article 5 of the ECHR, and the protection of the right to freedom, the question arises as to whether sex offenders are exposed to inappropriate restrictions, primarily in the domain of freedom of movement. If extensive restrictions over freedom of movement are applied, it is possible that the restrictions will come close to a deprivation of freedom, and the question arises as to whether such action is justified and acceptable. Article 5 of the ECHR stipulates that everyone has the right to freedom and personal security, and that no one can be deprived of these rights except in cases defined by law and in accordance with the procedure prescribed by law, which also requires enabling the initiation of proceedings for the court to urgently examine the legality of such deprivation and order release if the deprivation was illegal. However, Protocol No. 4 to the ECHR (adopted on 16 September 1963) stipulates, under Article 2, that freedom of movement also implies the right to choose the place of residence and to leave the country, in which case state cannot place any restrictions on the exercise of these rights other than those which are in accordance with the law and which are necessary in a democratic society in the interests of national security or public safety, for the preservation of public order, for the prevention of crime, for the protection of health or morals or for the protection of the rights and freedom of others. Therefore, Protocol No. 4 specifies more closely the rules regarding the freedom of movement, beyond situations in which a person is detained or is serving a prison sentence, which means that the freedom of movement can be limited, legally or illegally, even in situations where a person is not physically confined within a specific fenced area. Article 2(4) of Protocol No. 4 foresees that these rights may be subject to restrictions introduced in accordance with the law and justified by the public interest in a democratic society. Bearing in mind the above provisions, it is clear that there is a possibility to determine by law specific grounds which allow the limitation of the freedom of movement beyond the conduct of criminal proceedings and the execution of a prison sentence, but it is also indisputable that when conceiving such grounds one should be very careful in assessing those interests that justify restrictions of freedom. The question arises as to whether it is acceptable to require all persons who have served a prison sentence for a sexual offense to report to the police monthly and inform the authorities about traveling abroad.

In particular, the prohibition of visiting certain places can be controversial if it is not clearly defined what type of places constitute the prohibited zone. Thus, in *De Tomasso v. Italy* the court states that the legitimacy of restricting the freedom of movement is not proven by the fact that there is a legal basis for

limiting the freedom of movement, but rather by the quality of the specific law and the predictability of the restrictions on the freedom of movement that may result from it (*De Tomasso v. Italy*, §106). In this particular case, the law provided for an absolute ban on attending public gatherings, while it did not provide for more specific spatial or temporal restrictions. As the provisions of the national law were not explicit enough, it could not be clear to the applicant what was actually expected of him, thus violating the provisions of Protocol No. 4. On the other hand, when the law precisely specifies the conditions under which the movement of certain citizens can be restricted, such restrictions can be legitimate. Within the described context, a special measure from Article 9 of the Serbian Marija's Law, foreseeing the prohibition of visiting places where "minors gather such as school buildings, school yards, kindergartens, playgrounds, children's events and similar" can be disputed if it is taken into account that the prohibited places have been vaguely defined.

In addition, the question arises as to whether the application of the same measures to the entire group of offenders is in line with the right to review the decision and the right to a fair trial in the spirit of Article 6 of the ECHR. Namely, Article 6 of the ECHR stipulates that everyone has the right to a fair and public hearing within a reasonable period, before an independent and impartial court. Given that the application of specific measures may imply significant restrictions on the rights and freedoms, the question of the legitimacy of the application of such measures without any prior discussion and explanation may be raised. Furthermore, if the special measures are imposed to sex offenders by force of law, the question of respecting the right to an effective legal remedy also arises. Therefore, if imposing special measures requires the restriction of specific freedoms and rights, it is debatable whether such measures can be imposed without prior verification and assessment of their justification. It should be borne in mind that the laws on special measures for sex offenders often provide for a periodic verification of the appropriateness of the measures, which can be initiated by the person to whom the measures apply. However, there is often no initial justification of the imposed restrictions, which is also a characteristic of the current Serbian law solution. When it comes to Croatia, the circumstances are somewhat more favorable, bearing in mind that the application of specific measures rests on a court decision, as well as the fact that sex offenders also enjoy the right to have their personal data deleted from the sex offenders register.

In addition, Article 7 of the ECHR, which guarantees that everyone can be held accountable only for the offence that was prescribed by law at the time of the commission and cannot be sentenced to harsher penalties than those applied at the time of commission, also points to the dilemma of the acceptability of the application of

additional measures that are often not provided for by the criminal law or that were introduced by laws that came into force after the crime was committed. The question arises as to whether such measures are considered preventive or punitive by nature, whereby the application of additional punitive measures could be disputed. The European Court of Human Rights took their position on this issue in *Gardel v. France*, stating that a registration in the database and the six-monthly mandatory reporting to the police with notification of a change of residence, even if the measures were introduced by a law that came into force after the applicant was convicted, does not constitute additional punishment beyond the *nullum crimen, nulla poena sine lege* rule. A preventive measure is ordered with the aim of protecting peace and safety, and consequently the limitation of freedom on such a modest scale cannot be considered a punitive measure (*Gardel v. France*, §46).

Finally, Article 8 of the ECHR, which guarantees the right to privacy and family life, may be in conflict with personal data recording, storage and regular reporting, with the possibility of public data disclosure particularly controversial. While certain limitations of privacy are legitimate, at the same time, the question arises as to whether every sex offender case justifies personal data series recording and re-obtaining. In this context, the possibility of storing DNA profiles in different registries is a key issue, especially considering the abundance of genetic and health data arising from it. In *S. and Marper v. the United Kingdom*, the European Court of Human Rights determined that the permanent storage of the DNA profile of a person who was suspected of having committed an offense, but not found guilty, cannot be acceptable when, during retaining the data, there was no evaluation of the severity of the offense, previous (non)conviction, and individual circumstances that refer to a specific person whose data is permanently stored. The storage of DNA profiles can be very useful in detecting and solving crime, but when restricting human rights, the authorities cannot be guided only by what facilitates the criminal procedure, regardless of the scope and nature of the human rights restriction. If we apply the analogy, mandatory and permanent storage of every sex offender's personal data would not be acceptable.

It should be emphasized that neither in Serbia, nor in Croatia, nor in most European countries, is there a possibility of public display of the sex offenders register data, and that the aforementioned registers serve only for the purposes of detecting crime and conducting criminal proceedings. This eliminates the fear that the privacy of sex offenders would be violated. On the other hand, in Serbia, entries in the sex offenders database are of a permanent nature, which raises other controversial issues, which are not the focus of our interest at this moment.

4. Conclusion

While the prevention of sexual abuse is a topic of great social importance, it also arouses public attention and very strong emotional reactions. Due to such circumstances, sex offenders can easily find themselves in a position where the wider public approves the restriction of their rights guaranteed by international law. At the same time, that is a straw man argument, as the impression is created that the victims got something special through the application of ever harsher retribution towards offenders, although in reality, the needs of the victimized for help and support remain in the background. This increases the risk of introducing populist measures, which not only fail to produce the promised favorable effects, but also reduce the resources that could be used for a strategic and evidence-based crime prevention.

To enable the realization of the crucial values embodied in the best interest of the child, on one hand, and respect for the human rights of all citizens, on the other, in this matter, we should strive to respect international standards. The contemporary civilization development cannot tolerate the unlimited and unargued limitation of anyone's rights, including the rights of sex offenders, while they, just like all other citizens, have the right to a second chance and rehabilitation. Through the rehabilitation of this category of offenders, the common social interest is achieved by these persons returning to everyday social flows, rather than having a situation that their compliance with law depends predominantly on the continuous and active monitoring. Therefore, instead of lamenting over the incurability and intractability of sex offenders, the authorities have a duty to ensure a sufficiently branched and well-organized post-penal care network, whereby the available measures cannot be limited to the threat of restricting the rights and freedoms. The aforementioned highlights the complex issues of post-penal support and the allocation of resources for the provision of various types of assistance, from counseling and housing to health care. At the same time, before designing any measures and innovations, one should take a deep look at the current situation, evaluate the effects of the measures that have already been implemented, and review the experiences of other countries, whereby the focus should be on the comparable countries. A detailed understanding of the state of affairs may indicate the need and justification for more intense restrictions on the rights and freedoms of sex offenders after the completion of the criminal sanction, but even then such restrictions should be specified for each case individually. In this sense, while there is room for the improvement of laws and bylaws which should precisely stipulate when, why, according to whom, and to what extent restrictions on human rights are acceptable, it is also necessary to specify who will implement the designed measures, given that both in Serbia and in Croatia, there is a lot of ambiguity at the moment.

Last but not least, the prevention of sexual abuse should also take place through the process of continuous education, both with children and parents, as well as with guardians, teachers and others who frequently come into contact with children, to ensure early detection of sexual violence and appropriate and timely response in case of its manifestation. The role of the media in responsible reporting on sexual offenses is also crucial. The essential advocacy for the realization of the best interests of the child would thus be achieved through the synergistic action of all entities that participate in the formal and informal response measures to the sexual abuse of children. In contrast to that, focusing on limiting offenders' rights, retribution and shaming gives only the appearance of a responsible attitude towards the safety and future of children and other potential victims.

References

Cochran, J., Toman, E., Shields, R. & Mears, D. 2021. A Uniquely Punitive Turn? Sex Offenders and the Persistence of Punitive Sanctioning. *Journal of Research in Crime and Delinquency,* 58(1), pp. 74-118. https://doi.org/10.1177/0022427820941172

Deblinger, E. *et al.* 2015. *Child Sexual Abuse: A Primer for Treating Children, Adolescents, and Their Nonoffending Parents*. New York: Oxford University Press. https://doi.org/10.1093/med:psych/9780199358748.001.0001

Đorđević, Đ. 2018. Krivično delo polnog uznemiravanja. In: Ignjatović, Đ. (ed.), *Kaznena reakcija u Srbiji, VIII deo.* Beograd: Pravni fakultet, pp. 113-122.

Easton, S. 2001. Punishing Sex Offenders: discrimination or justifiable treatment?. *International Journal of Discrimination and the Law,* 5(1), pp. 71-97. https://doi.org/10.1177/135822910100500104

Finklelhor, D. & Araji, S. 1986. *A Sourcebook on Child Sexual Abuse.* Newbury Park: Sage Publications.

FRA-European Union Agency for Fundamental Rights. 2015. *Violence against women: an EU-wide survey-Main results*. Luxembourg: Publications Office of the European Union.

Horowitz, E. 2015. *Protecting Our Kids?: How Sex Offender Laws Are Failing Us*. Santa Barbara: Praeger. https://doi.org/10.5040/9798216002260

Kovačević, M., Maljković, M. & Bogetić, D. 2020. Kazna doživotnog zatvora-Opšta razmatranja i uporednopravni pregled. In: Čelić, D. (ed). *Zbornik radova sa naučnog skupa sa međunarodnim učešćem-Pravna tradicija i integrativni procesi, I tom.* Kosovska Mitrovica: Pravni fakultet Univerziteta u Prištini sa privremenim sedištem u Kosovskoj Mitovici, pp. 145-156.

Kovačević, M. 2021. Izveštavanje dnevnih novina u Srbiji o nasilju nad decom. *Politeia*, 11(21), pp. 69-81. https://doi.org/:10.5937/politeia0-30489

Levenson, J. *et al.* 2007. Public Perceptions about Sex Offenders and Community Protection Policies. *Analyses of Social Issues and Public Policy,* 7(1), pp. 137-161. https://doi.org/10.1111/j.1530-2415.2007.00119.x

Martufi, A. 2018. The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?. *Maastricht Journal of European and Comparative Law,* 25(6), pp. 672-688. https://doi.org/10.1177/1023263X18820678

Matijašević Obradović, J. & Dragojlović, J. 2020. Criminological analysis of pedophilia and a review of the penal treatment of sexual offenders. *Kultura polisa*, 17(1), pp. 103–114.

Miladinović-Stefanović, D. 2014. Krivičnopravna zaštita maloletnih lica od seksualnog iskorišćavanja i zlostavljanja – Evropski standardi i pravo Republike Srbije. *Zbornik radova Pravnog fakulteta u Nišu,* 68, pp. 567-584. https://doi.org/10.5937/zrpfni1468567M

Miladinović-Stefanović, D. & Knežević, S. 2018. Special measures for preventing the commission of sex crimes against minors: The example of Serbia. *Facta Universitatis, Series: Law and Politics*, 16 (2), pp. 109-120. https://doi.org/10.22190/FULP1802109M

Mrvić-Petrović, N. 2015a. Legal problems in using preventive detention or preventive supervision of offenders dangerous to society. In: Kolarić, D. (ed.). I*nternational Scientific Conference "Archibald Reiss Days" Thematic Conference Proceedings, volume II*. Beograd: Kriminalističko-policijska akademija, pp. 211-217.

Mrvić-Petrović, N. 2015b. Preventivne mere prema osuđenicima opasnim po društvo u pravima Sjedinjenih Američkih Država i Velike Britanije. *Strani pravni život*, 2, pp. 41-52.

Nurse, A. 2020. *Confronting Child Sexual Abuse: Knowledge to Action*. Amherst: Lever Press. https://doi.org/10.3998/mpub.12085149

Perlin, M. & Cucolo, H. 2020. See This Empty Cage Now Corrode: The International Human Rights and Comparative Law Implications of Sexually Violent Predator Laws. *New Criminal Law Review.* 23(3), pp. 388-433. https://doi.org/10.1525/nclr.2020.23.3.388

Tewksbury, R. 2005. Collateral Consequences of Sex Offender Registration. *Journal of Contemporary Criminal Justice,* 21(1), pp. 67-81. https://doi.org/10.1177/1043986204271704

Vuletić, I., Salitrežić, A. & Sajter, I. 2021. Osvrt na zaštitni nadzor po punom izvršenju kazne zatvora-uz kriticizam i skepticizam. *Hrvatski ljetopis za kaznene znanosti i praksu,* 28(2), pp. 551-567. https://doi.org/10.54070/hljk.28.2.13

Legal Sources

Criminal Code of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, br. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22.

Criminal Code of the Republic of Serbia, *Official Gazette of RS*, No. 85/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.
Law on Legal Consequences of Conviction, Criminal Records and Rehabilitation of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, br. 143/12, 105/15, 32/17, 53/22.
Law on Special Measures for Preventing Sexual Offenses against Minors, *Official Gazette of RS*, No. 32/13.
Protocol No. 4 to the European Convention on Human Rights, Strasbourg, 1963.

Case Law

De Tomasso v. Italy, Application No. 43395/09, ECHR 23 February 2017.
Gardel v. France, Application No. 16428/05, ECHR 17 March 2010.
Murray v. Netherlands, Application No. 10511/10, ECHR 10 December 2013.
Marcello Viola v. Italy (no. 2), Application No. 77633/16, 2, ECHR 13 June 2019.
Petukhov v. Ukraine, Application No. 41216/13, ECHR 12 March 2019.
S. and Marper v. the United Kingdom, Application No. 30562/04 and 30566/04, ECHR 4 December 2008.

Rebeka Kotlo*
Ivan Tomić**

Pregledni naučni članak
UDK: 341.645.5: 551.583
doi: https://doi.org/10.56461/SPZ_24307KJ
Primljeno: 13. 5. 2024.
Izmenjeno: 15. 7. 2024.
Prihvaćeno: 23. 9. 2024.

EVOLUTIVE INTERPRETATION WITH REFERENCE TO RECENT EUROPEAN COURT OF HUMAN RIGHTS CLIMATE CHANGE CASE LAW

Summary

Evolutive interpretation is one of the most important principles of interpretation that has enabled the Court to interpret the Convention in the light of present-day conditions, expanding the scope of protection under the Convention, and at the same time, raising the question of the permissible limits of interpretation. In the recent climate change case law, the Court has found a violation due to the failure of the respondent state to develop and implement a normative framework that would mitigate the consequences of climate change. The Court has applied evolutive interpretation considering that the Convention does not guarantee the right to a healthy environment or a similar right. The authors use the normative and casuistic methods to determine whether the Court's recent climate change case law provides clearer parameters for the application of the evolutive interpretation. The research results indicate that judicial case law is not coherent with regard to these conditions, and consequently, the limits of the Convention's evolutive potential remain unclear.

Keywords: evolutive interpretation, European consensus, limits of evolutive interpretation, climate change case law, the right to a healthy and clean environment.

* PhD, Full Professor, Faculty of Law, "Džemal Bijedić" University of Mostar.
E-mail: *rebeka.kotlo@unmo.ba*
ORCID: *https://orcid.org/0000-0003-4030-8088*

** LL.M., Senior Teaching and Research Assistant, Faculty of Law, University of Mostar.
E-mail: *ivan.tomic@pf.sum.ba*
ORCID: *https://orcid.org/0000-0003-2058-5272*

EVOLUTIVNO TUMAČENJE S OSVRTOM NA RECENTNU PRAKSU EVROPSKOG SUDA ZA LJUDSKA PRAVA U KLIMATSKIM PREDMETIMA

Sažetak

Evolutivno tumačenje jedno je od najvažnijih načela interpretacije koje je omogućilo Sudu da Konvenciju tumači u svjetlu današnjih uvjeta. Na takav način proširuje se opseg zaštite Konvencije, ali se istodobno otvara pitanje dopuštenih granica tumačenja. U recentnoj praksi Sud je utvrdio povredu Konvencije uslijed propusta odgovorne države da razvije i provede normativni okvir kojim bi se ublažile posljedice klimatskih promjena. U tim predmetima Sud je primijenio evolutivno tumačenje s obzirom na to da Konvencija ne jamči pravo na zdrav okoliš ili drugo slično pravo. Autori primjenom normativne i kazuističke metode ispituju je li Sud u svojoj recentnoj praksi u klimatskim predmetima dao jasnije kriterije za primjenu evolutivnog tumačenja. Rezultati istraživanja ukazuju da sudska praksa nije koherentna u pogledu ovih uvjeta pa su granice evolutivnog potencijala Konvencije ostale nejasne.

Ključne riječi: evolutivno tumačenje, europski konsenzus, granice evolutivnog tumačenja, klimatski predmeti, pravo na zdrav i čist okoliš.

1. Introduction

The European Court of Human Rights (hereinafter: the Court) has ruled recently in three cases related to the violation of human rights due to climate change. Although such violation was found in only one case, the Court's reasoning in all the three cases could have far-reaching consequences. The Court has applied evolutive interpretation and extended the scope of protection of the Convention, although the right to a healthy and clean environment is guaranteed by neither the European Convention on Human Rights (hereinafter: the Convention) nor the additional protocols to the Convention.

The Court formulated the evolutive interpretation in 1978, stating that the Convention should be interpreted in the light of present-day conditions. Such argumentation has enabled the Court to develop the convention rights and freedoms by adapting the original text to new conditions. Consequently, evolutive

interpretation is often qualified as judicial activism by which the Court creates new rights and freedoms against the will of the contracting parties. As such, the evolutive interpretation was strongly contested, even by the judges themselves.

Nowadays, evolutive interpretation is a generally accepted interpretative principle of the Convention. The focus of legal scholars and practitioners is directed towards establishing cleared boundaries of evolutive interpretation. In this paper, the authors will analyse three climate change cases in order to determine whether the Court, in its recent practice, has provided clearer parameters for the application of this method. A clear formulation of the conditions is in the interest of legal certainty, and it can contribute to the legitimacy of the Court. The authors will use the normative and casuistic methods to establish the relation between the original text of the Convention and the meaning of specific Convention standards developed in the Court case law when applying evolutive interpretation. Based on the established relation, conclusions will be drawn about the permissible limits of evolutive interpretation.

2. Evolutive Interpretation Concept and Application in the European Court of Human Rights Case Law

There are three approaches to the interpretation of international treaties: textual, subjective and teleological (Dothan, 2019, p. 766). The Convention does not set any rules for interpretation, specifying only that the Court has jurisdiction in all issues concerning its interpretation and application (Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 32). The Court has developed special interpretative rules based on the general rule of interpretation under the UN Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, Art. 31). The principle of evolutive interpretation is derived from the rules on subsequent practice since the Court used practice between states as a basis for evolutive interpretation (Marochini Zrinski, 2018, p. 427).

Evolutive interpretation is a method of interpretation that bridges the gap between the date of adoption and the date of application of the Convention. It implies the interpretation in the light of present-day conditions (Marochini, 2014, p. 77). Evolutive interpretation enables realization of its "*spiritus movens* - effective protection of human rights" (Hadži Stević, 2021, p. 75). The principle of effectiveness is the basis of the evolutive interpretation (Tulkens, 2011, p. 8). Due to the possibility of expanding the scope of protection (Lubura, 2021, p. 163), there are claims that evolutive interpretation represents a manifestation of judicial activism (Đajić, 2019, p. 376), and that in a certain sense it is not an interpretation, but a judicial

creation of law (Schabas, 2015, p. 48). This principle of interpretation enables overcoming the outdated concepts in the event of changed European public opinion (Greer, 2010, p. 6). In other words, evolutive interpretation enables the evolution of the Convention in accordance with the conditions that exist at the time of its application. Therefore, it can be claimed that this principle, although it is classified as a secondary principle of interpretation (Greer, 2006, p. 213), has had a key role in the development of the entire convention system (Hariri, 2022, p. 13).

Even the judges themselves have initially contested the evolutive interpretation (Mihelčić & Marochini Zrinski, 2018, p. 134). Nowadays, this principle is still subject to a strong and often justified criticism. The core of the criticism refers to the legitimacy of the Court to change the original text of the Convention against the will of the contracting states. Evolutive interpretation implies a certain change that may be contrary to the requirements of legal certainty and coherence, especially in cases where it is not based on the evolution that has taken place in the legislation and practice of the member states. Mihelčić & Marochini Zrinski (2018, p. 135) especially emphasize the importance of the coherence of case law for the Court's legitimacy. Dzehtsiarou (2011, p. 1730) believes that the European consensus is a key factor in achieving the Court's legitimacy. The European consensus can be seen as a tacit consent of the states to the evolutive interpretation (Dzehtsiarou, 2011, p. 1743). Letsas (2012, pp. 21-24) believes that the evolutive interpretation corresponds to a moral reading of the Convention, whereby the legitimacy derives primarily from the Convention itself, since the states undertook to abide by the final judgment of the Court. Therefore, the legitimacy of the Court derives from this obligation, whereby the Court has the duty to develop a morally coherent system of interpretation principles.

The Court formulated the evolutive interpretation for the first time in the Tyrer case,[1] referring to the fact that the Convention is a living instrument that must be interpreted in the light of present-day conditions based on the developments and commonly accepted standards in the contracting states (*Tyrer v The United Kingdom*, Application No. 5856/72, Judgment ECHR, 25 April 1978, para. 31). Although it would appear from the Court's wording that it invoked a well-established principle for the interpretation, it is the first case in which the Court has applied evolutive interpretation. Most criticisms of the application of this principle would be weaker if the Court explained what it means by this principle and when it can be applied. However, the Court set the conditions only implicitly. When evaluating whether

[1] Although the majority of authors cite the Tyrer case as the origin of the evolutive interpretation, Professor Helgesen (2011, p. 19) states that the evolutive interpretation began with the Golder case, in which the Court found that the right of access to the court is an integral part of the procedural guarantees under Article 6 of the Convention.

the punishment represented a humiliating behaviour, the Court referred to the developments and commonly accepted standards in the member states. This position of the Court represents the origin of the later developed standard for the application of evolutive interpretation, the European consensus. The European consensus in the Tyrer case was a clear given that corporal punishment had been abolished everywhere except on the island in question, which made it easier for the Court to formulate this principle (Djeffal, 2016, p. 303).

Since the *Tyrer* case, the Court has applied the evolutive interpretation in numerous cases. However, judicial reasoning has not always been consistent. One of the examples of the inconsistent use of evolutive interpretation is the *Marckx* case. In this case, the Court referred to the need to interpret the Convention in the light of present-day conditions. Nevertheless, the problem lies in the way these conditions were determined. The Court determined such conditions not on the basis of practice or legislation in the member states, but on two conventions, regardless of the fact that only a few countries had acceded to these conventions. According to the Court, the mere existence of these two conventions implied the existence of a clear common basis among modern societies (*Marckx v Belgium*, Application no. 6833/74, Judgment ECHR, 13 June 1979, para. 41).[2]

Evolutive interpretation is a particularly suitable means of interpretation the Court has used in controversial cases, e.g. cases related to homosexuals. In the *Dudgeon* case, which concerned a domestic law that criminalized homosexual acts between men, the Court redefined consensus so that it was relevant for the existence of consensus that, compared to the time when the law was passed, now the majority of member states does not consider it necessary or appropriate to criminalize homosexual practices (*Dudgeon v The United Kingdom*, Application no. 7525/76, Judgment ECHR, 22 October 1981, para. 60).

The European consensus can lead to the opposite result, a static interpretation. (Sonnleitner, 2022, p. 30). If the European consensus is a condition for an evolutive interpretation, by concluding an *argumentum a contrario,* it is justified to claim that the absence of consensus makes an evolutive interpretation

[2] This interpretation was strongly opposed, among others, by Judge Fitzmaurice. Fitzmaurice specifically emphasized his disagreement with the claim that the distinction between legitimate and illegitimate children is vanishing. Judge Fitzmaurice also emphasized the need to allow a certain margin of appreciation to the states, which, according to the established case law, should be wider if there was no European consensus on the matter. Finally, the remarks of Judge Fitzmaurice, in which he denounces the Court for abuse of power to hold domestic authorities guilty of a breach of the Convention merely by virtue of the existence or application of a law which is not itself unreasonable or manifestly unjust, are also significant (*Marckx v Belgium*, Application no. 6833/74, Judgment ECHR, 13 June 1979, Dissenting opinion of Judge Gerald Fitzmaurice, para. 31).

impossible. Such a conclusion was also confirmed in the case *of Sheffield and Horsham*. The Court found that there was still no common approach on how to deal with the consequences which legal recognition of gender reassignment may have had for other areas of law. For this reason, the Court refused to apply the evolutive interpretation and change the existing case law (*Sheffield and Horsham v The United Kingdom*, Application nos. 22985/93 23390/94, Judgment ECHR, 30 July 1998, paras. 57- 58).

The application of the evolutive interpretation raises another legal question. Although the Court does not apply the doctrine of precedent, as a rule, it refers to the earlier cases (Omejec, 2014, p. 1285). In the *Christine Goodwin* case, the Court pointed out that it should not depart from the case law without good reason. However, in the same case, the Court made it clear that it must take into account changing conditions within the Contracting States and respond to "any evolving convergence as to the standards to be achieved" (*Christine Goodwin v The United Kingdom*, Application no. 28957/95, Judgment ECHR, 11 July 2002, para. 74). Therefore, although the Court generally follows its own case law, it is not an obstacle to evolutive interpretation if there has been a change in conditions within the member states. The *Christine Goodwin* case is significant for another reason. As in the *Marckx* case, the Court has determined the existence of consensus based on a continuous international trend that compensated for the lack of a common approach in the member states.

The Court also used the so-called virtual consensus for justifying the evolutive interpretation. The Court referred to this type of consensus in the *Soering* case, where it established the existence of consensus because the death penalty was not *de facto* executed even if it existed in the legislation. In addition, as evidence of the European consensus, the Court cited Protocol no. 6, which at that time was not signed by the respondent state (*Soering v The United Kingdom*, Application no. 14038/88, Judgment ECHR, 7 July 1989, para. 102). That is why some authors label this type of consensus as emerging consensus (Sonnleitner, 2022, p. 31). When determining this type of consensus, the Court tends to rely on specialized international instruments in a certain area. The Court sometimes does not elaborate in detail the evidence of the existence of such a consensus, but refers to the general formulation that the Convention must be interpreted in the light of the ideas that prevail in democratic states (*Bayatyan v Armenia*, Application no. 23459/03, Judgment ECHR, 7 July 2011, para. 102).

The coherence of the Court case law is particularly questionable in cases where the Court did not apply the evolutive interpretation despite the existence of consensus, and in cases where the Court applied the living instrument doctrine despite the lack of consensus. In the case of *A, B and C v Ireland*, the Court found

that there was a consensus among a substantial majority of the member states to allow abortion on broader grounds than those allowed by the Irish law. However, the Court did not apply an evolutive interpretation (*A, B and C v Ireland,* Application no. 25579/05, Judgment ECHR, 16 December 2010, para. 235-236). Marochini (2014, p. 78) states that this particular case proves that the Court refrains from using this method of interpretation in sensitive cases. According to Etinski (2022, p. 25), this case indicates that there may be certain special interests that nullify the effect of the European consensus. While restraint in using the living instrument doctrine in sensitive cases can be justified, the use of this doctrine when there is an obvious lack of consensus brings evolutive interpretation closer to judicial lawmaking. For example, in the case related to the legal recognition of gender change in the birth certificate, the Court applied an evolutive interpretation by referring to the very essence of the Convention - respect for human dignity and human freedom, although there was no European consensus (*I. v The United Kingdom*, Application no. 25680/94, Judgment ECHR, 11 July 2002, para. 70). Sonnleitner (2022, p. 35) considers that this avoidance of the relevance of the European consensus reduces the persuasiveness of the judicial approach to evolutive interpretation.

3. Limits of Evolutive Interpretation

Evolutive interpretation can undermine the fundamental legal values, such as foreseeability, coherence, and legal certainty. This is why both academia and practitioners focus on determining the limits of evolutive interpretation. The authors start from the limits of evolutive interpretation established by Judge Sicilianos because the criteria determined by him essentially summarize the criteria stated by the majority of authors who researched this topic.[3] In addition to the limits set by Judge Sicilianos, the different criteria proposed by other authors will also be analysed.

According to Sicilianos, evolutive interpretation has three limits: it must not be *contra legem*, it must be in accordance with the object and purpose of the Convention in general and with the purpose of a specific provision, and it must reflect present-day conditions (*Magyar Helsinki Bitzottsät v Hungary*, Application no. 18030/11, Judgment ECHR, 8.11.2016, Concurring Opinion of Judge Sicilianos, para. 10).

[3] Sicilianos was a judge of the European Court of Human Rights in respect of Greece between 2011 and 2020. Having been elected as a judge of the European Court of Human Rights as from 18 May 2011, Linos-Alexandre Sicilianos served as Section President from 1 February 2017 to 4 May 2019. and Vice-President of the Court from 1 May 2017 to 4 May 2019. He has been President of the Court since 5 May 2019.

The first limit, the prohibition of interpretation contrary to the Convention, has been repeatedly confirmed in case law, and it is often considered to be an aspect of the prohibition of judicial legislation (Etinski, 2022). The prohibition implies that the Court may not, by interpretation, create a new right. Judge Myer points out that, although the Convention is a living instrument, the Court cannot create rights that are not set out in the Convention, however expedient or even desirable those rights may be (*Muñoz Díaz v Spain*, Application no. 49151/07, Judgment ECHR, 8 December 2009, Dissenting Opinion of Judge Myer). For example, the Court found that the right to marry does not include the right to divorce (*Johnston and Others v Ireland*, Application no. 9697/82, Judgment 18 December 1986, para. 52) and that Article 2 does not include the right to die (*Pretty v The United Kingdom*, Application no. 2346/02, Judgment ECHR, 29 April 2002, para. 39). Contrary to this, Djeffal (2016, p. 313) believes that the formula of new rights gives hardly any guidance with regard to the conflicting requirements between the prohibition of the creation of a new right and an unjustified restriction of the rights. It is paradoxical that the *Magyar Helsinki Bitzottsät case*, in which Judge Sicilianos defined the prohibition of interpretation *contra legem* as the limit of evolutive interpretation, is also cited as an example of judicial legislation, i.e., as the creation of a new right that is not specified in the Convention (Etinski, 2022, p. 8). The problematic nature of this criterion is reflected in its vagueness and dependence on the judge's subjective interpretation. While in the *Magyar Helsinki Bitzottsät* case, Judge Sicilianos held that Article 10 also included the freedom to seek information (*Magyar Helsinki Bitzottsät v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Concurring Opinion of Judge Sicilianos, para. 13), Judges Spano and Kjølbro maintained that Article 10 did not, and had not meant to encompass the right to access information held by public authorities that they were not willing to impart or were obliged to disclose under domestic law (*Magyar Helsinki Bitzottsät v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Dissenting Opinion of Judge Spano Joined by Judge Kjølbro, para. 12).

Another limit of evolutive interpretation refers to the object and purpose of the Convention. Sicilianos states that an interpretation contrary to the object and purpose of the Convention would be tantamount to betraying the party's intentions and undermining the Convention system (*Magyar Helsinki Bizottság v Hungary*, Application no. 18030/11, Judgment ECHR, 8 November 2016, Concurring Opinion of Judge Sicilianos, Joined by Judge Raimondi, para. 14). However, it is relatively easy for the Court to justify the application of an evolutive interpretation in accordance with the generally proclaimed object and purpose of the Convention, since the preamble explicitly states that the goal of the Convention is

not only the maintenance, but also "further realization of human rights and fundamental freedoms" (European Convention of Human Rights and Fundamental Freedoms, Preamble). Despite this, as Sonnleitner (2022, p. 50) states, the Court has never used this purpose to legitimize the use of evolutive interpretation in its case law. The Court did not even establish a direct connection between this part of the preamble and evolutive interpretation. The only judges that did so were Sicilianos and Raimondi when in their concurring opinion in *Magyar Helsinki Bizottság* case they claimed that the general purpose can also have that function (Sonnleitner, 2022, p. 51). In addition, the Court itself stated in the case law that the subsequent practice of the parties may exceed the object and purpose of the Convention (*Soering v The United Kingdom*, Application no. 14038/88, Judgment ECHR, 7 July 1989, para. 103). Bureš (2017, p. 25) believes that the object and purpose of the Convention cannot be the limit of evolutive interpretation at all, as they apply to any type of interpretation. Moreover, it is precisely the purpose of the Convention that has been seen as constituting the basis for the application of evolutive interpretation.

Present-day conditions, as the third limit of evolutive interpretation, were already determined in the case of *X and others against Austria*. In a joint dissenting opinion, seven judges emphasized that the point of the evolutive interpretation is to accompany and even channel the change, and not to anticipate it, or even less so to try to impose it *(X and Others v Austria*, Application no. 19010/07, Judgment ECHR, 19 February 2013, Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, para. 23). Interpretation in light of present-day conditions is the most fluid limitation to evolutive interpretation. Its fluidity stems from the different methodology used by the Court to determine the present-day conditions. While the approach of the Court was based initially on the legislation and practice of the member states, later is was based on the methodology evolved toward including the international practice, and finally, on the trends observed at the international level. It is precisely from this methodology that the significance of this limit emerges. There is no doubt that an international trend is a weaker form of consensus compared to the practice and legislation of the member states. However, this form of consensus enables the Court to move more easily from the preservation of human rights to their further elaboration in order to keep the pace with the changes in the circumstances in which they are to be realized. That is why the new methodology of writing the Court's decisions, where the relevant legal framework is analysed in a separate section of the decision, comes very useful (Sicilianos, 2020, p. 5). An insight into the legal framework that the Court considers when determining present-day conditions enables control of judicial reasoning and prevents rulings

based on conditions that could possibly arise in the future but do not exist at the moment of the Court's ruling. Bureš (2017, p. 25) believes that interpretation in light of present-day conditions is not the limit of evolutive interpretation but "rather a consequential description of adjudicator activity of the court."

Determining the limits of evolutive interpretation is also important for one more reason. The Convention is an international agreement concluded by the contracting states. Excessive use of the living instrument doctrine can lead to a situation where the contracting states and the Court could have different views on the degree of evolution of the Convention. Although we do not think that the Court should refrain from evolutive interpretation just because its reasoning might not please the respondent state, the Court must take into account the degree of legitimacy of its rulings. The legitimacy of the Court appears to be a kind of extra-legal limit of evolutive interpretation. Dzehtsiarou (2011, p. 1730) believes that the European consensus can provide a sufficient response to the objections to the Court's legitimacy. The existence of the European consensus can mitigate objection about the foreseeability of changes, which appears as another limit of evolutive interpretation (Djeffal, 2016, p. 308). Foreseeability and legal certainty, according to Sonnleitner (2022, p. 79), can even be improved by an evolutive interpretation if priority is given to the protection of individual rights and human dignity over the formal concept of the rule of law.

Certainly, one of the indicators of the degree of the state parties' support for the Court is the percentage of implemented decisions in the area of responsibility of the contracting states. Helgesen (2011, p. 25) warns that the effect of the expansive evolution of the Convention is reflected in the decreased lack of trust between states and international supervisory bodies.

4. Evolutive Interpretation - Recent Climate Cases

On April 9, 2024, the Court announced the rulings in three cases related to climate change. In one case, the Court found a violation of the Convention, while the complaints in the remaining two cases were declared inadmissible. In each of these cases, the Court used or refrained from using the evolutive interpretation.

In *Verein KlimaSeniorinnen Schweiz and Others applicants*, four women and an association claimed that their rights had been violated because the responsible state had not taken sufficient action to mitigate the effects of climate change. In the analysis of the relevant legal framework, the Court took into account numerous legal acts and related practice within the framework of the UN, the Council of Europe, EU, and the American and African human rights systems. The Court

analysed comparative law and found that in the vast majority of the member states (38 states), non-governmental associations can initiate cases for environmental protection and/or in the interest of their members. However, the Court also found that in most countries there was no definitive case law or no case law at all in this field. The Court presented the practice of domestic courts in climate cases in a total of 8 member states.

This case is also notable for a large number of intervenors. Other governments (8) have argued that the principles of harmonious and evolutive interpretation should not be used to interpret the Convention as a mechanism for protection against climate change. On the other hand, the other intervenors pointed out different arguments: the narrow margin of appreciation of the state in climate cases due to a broad scientific and international consensus, the importance of an evolutive interpretation and flexible interpretation of the victim status, the urgency of reducing harmful emissions, and the principle of harmonious interpretation of the Convention with other international instruments.

In assessing the merits of the case, the Court simply departed from the previous case law and applied evolutive interpretation by stating that this case represented an unprecedented issue before the Court. The Court determined that there was a scientific, social, political and legal evolution in the field of environmental protection and directly referred to the living instrument doctrine (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20, Judgment ECHR, 9 April 2024, para. 434). The Court also noted that its failure to "maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement" (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 455). The Court used the consensus arising from the international law mechanisms to which the member states voluntary acceded as a basis for such approach. In addition, the Court used evolutive interpretation when assessing the victim status and warned that any "excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory" (*Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, para. 461). The Court found that, as a result of this development, the existing consensus, and the nature and severity of the threats arising from climate change, the state's margin of appreciation has narrowed. After that, the Court easily concluded that the state had exceeded the margin and failed to fulfil the positive obligations under Article 8 of the Convention.

Judge Eicke criticized the application of evolutive interpretation in this case. According to him, the majority exceeded the permissible limits of evolutive interpretation, especially in relation to the victim status, and by creating a new convention right and/or a new primary obligation (*Verein KlimaSeniorinnen Schweiz*

and Others v Switzerland, Partly Concurring Partly Dissenting Opinion of Judge Eicke, para. 4).[4] A particularly strong argument from the dissenting opinion refers to the fact that the contracting states refused to respond positively to the adoption of an additional protocol to the Convention that would guarantee the right to a healthy and clean environment. In addition, Judge Eicke warned that the Court did not act cautiously enough considering that the proposed law to reduce harmful emissions was rejected in the referendum. In this way, the Court annulled the democratic will of the Swiss citizens.

Unlike this case, the Court did not apply an evolutive interpretation in the other two recent climate cases. In the *Carême case*, a former mayor and former resident of a municipality in France argued that the state had not taken sufficient measures to prevent climate change. Although the intervenor in this case indicated the possibility of recognizing the victim status of the applicant, the Court declared the complaint inadmissible based on its previous case law (*Carême v France*, Application no. 7189/21, Decision ECHR, 9 April 2024).

In *Duarte Agostinho and Others v Portugal and 32 others*, the applicants, nationals and residents of Portugal, claimed that there was an infringement of the Convention due to the existing and serious future effects of climate change. The responsible states in the joint submission argued that the Court should not develop the concept of jurisdiction without the consent of the states, and in an inconsistent, unpredictable, and unprincipled way, because that would be incompatible with the principle of legal certainty. In this context, the governments pointed out that the Court has never extended the living instrument doctrine to Article 1, nor should it do so (*Duarte Agostinho and Others v Portugal and 32 Others*, Application no. 39371/20, Decision ECHR, 9 April 2024, para. 83). The intervenors, implicitly, called for an evolutive interpretation of Article 1 of the Convention considering that climate change impact is a transnational problem and that the special characteristics of climate change could justify the extension of jurisdiction. The Court refused to apply an evolutive interpretation and change its existing case law regarding the extraterritorial jurisdiction. In relation to Portugal, which had territorial jurisdiction, the Court declared the complaint inadmissible due to the applicants' failure to exhaust all domestic remedies. It can be concluded that in this case, which has been described as revolutionary (Tintor, 2021, p. 258), the Court applied the logic of judicial restraint instead of judicial activism.

[4] According to Judge Eicke, it is the right to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change" and/or new primary duty "to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change."

5. Conclusion

Evolutive interpretation is a method of interpretation developed in the Court case law that enables the interpretation of the Convention in the light of present-day conditions. By applying this principle of interpretation, the Court has made it possible for the Convention to be a living instrument that has the capacity to establish, but also to develop, an effective human rights protection system.

The living instrument doctrine was established by the Court almost a half a century ago and has been continuously developed. However, its development was not always linear, and often it was even incoherent. The Court failed to determine the conditions for the application of evolutive interpretation, and consequently, the limits of the Convention's evolutive potential remain unclear. Implicitly, from the earlier case law it can be concluded that the condition for the application of this principle is the existence of the European consensus, established on the basis of the legislation and practice of the member states. However, the Court reformulated this standard so that in certain cases an international consensus was sufficient – in some cases that was an international trend, and in others not even that – and referred to abstract formulations about the need to ensure human rights and human dignity. On the other hand, there are also cases in which the Court did not apply an evolutive interpretation despite the existence of a clear European consensus. Such inconsistency of the Court leads to legal uncertainty, weakening the legitimacy of the Court and strengthening the distrust of the contracting states, which can result in retrogression in this area.

The vagueness of the limits of evolutive interpretation is particularly visible in the recent climate cases. In the case of *Verein KlimaSeniorinnen Schweiz and Others*, the Court essentially established a new Convention right. A large number of contracting states have intervened, warning about the limits of evolutive interpretation, which clearly signals their intention. Although it would be illusory to expect that the states will accept new obligations without hesitation, determining clear conditions for the application of evolutive interpretation is necessary, not only to neutralize criticism, but also for the sake of the Court's legitimacy and the further development of human rights.

References

Bureš, P. 2017. Human dignity: an illusory limit for the evolutive interpretation of the ECHR?. *Amicus Curiae*, 110, pp. 20-28. Available at: https://doi.org/10.14296/ac.v2017i110.5035 (6. 7. 2024)

Djeffal, C. 2016. *Static and Evolutive Treaty Interpretation: A Functional Reconstruction*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9781316339558

Dothan, S. 2019. The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights. *Fordham International Law Journal,* 42(3), pp. 765-794. Available at: https://ssrn.com/abstract=3241331 (3. 5. 2024).

Dzehtsiarou, K. 2011. European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, *German Law Journal*, 12(10), pp. 1730-1745. Available at: https://ssrn.com/abstract=1951371 (2. 5. 2024). https://doi.org/10.1017/S2071832200017533

Đajić, S. V. 2019. Mehanizmi defragmentacije međunarodnog prava: sistemsko tumačenje, evolutivno tumačenje i sudski aktivizam Evropskog suda za ljudska prava. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 53(2), pp. 363-375. Available at: https://scindeks.ceon.rs/article.aspx?artid=0550-21791902363Q (3. 5. 2024). https://doi.org/10.5937/zrpfns53-23515

Etinski, R. 2022. Evolutive Interpretation of Treaties and Risk of Judicial Legislation. *Studia Iuridica Montenegrina*, 4(2), pp. 7-31. Available at: https://www.ceeol.com/search/journal-detail?id=2718 (5. 5. 2024).

Greer, S. 2006. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511494963

Greer, S. 2010. *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*. Available at: https://www.ucl.ac.uk/human-rights/sites/human-rights/files/greer.pdf (2. 5. 2024).

Hadži Stević, B. 2021. Opravdanost ustavnosudskog aktivizma zarad zaštite ljudskih prava: Evropski sud za ljudska prava i Ustavni sud Bosne i Hercegovine*, Eudaimonia: revija za pravnu, političku i socijalnu teoriju i filozofiju*, 5(1), pp. 63-86. Available at: http://epub.ius.bg.ac.rs/index.php/eudaimonia/issue/view/8 (3. 5. 2024). https://doi.org/10.51204/IVRS_21103A

Hariri, R. 2022. *Zaštita ljudskih prava u okviru Vijeća Europe*. Diplomski rad. Zagreb: Pravni fakultet Sveučilišta u Zagrebu.

Helgesen, J. E. 2011. *Dialogue between judges 2011*. Strasbourg: European Court of Human Rights, Council of Europe. Available at: https://www.echr.coe.int/documents/d/echr/Dialogue_between_judges_2011 (5. 5. 2024).

Letsas, G. 2012. *The ECHR as a Living Instrument: Its Meaning and its Legitimacy*. Available at: https://ssrn.com/abstract=2021836 (3. 5. 2024).

Lubura, M. 2021. Pravo na abortus u savremenom pravu i praksi Evropskog suda za ljudska prava. *Strani pravni život*, 65(1), pp. 159-170. Available at: https://doi.org.10.5937/spz65-28264 (9. 5. 2024).

Marochini, M. 2014. The interpretation of the European Convention Human Rights, *Zbornik radova Pravnog fakulteta u Splitu*, 51(1), pp. 63-84. Available at: https://hrcak.srce.hr/116319 (4. 5. 2024).

Marochini Zrinski, M. 2018. Izazovi u primjeni i tumačenju Konvencije u Republici Hrvatskoj. *Zbornik radova Pravnog fakulteta u Splitu*, 55(2), pp. 423-446. Available at: https://hrcak.srce.hr/clanak/293135 (1. 5. 2024). https://doi.org/10.31141/zrpfs.2018.55.128.423

Mihelčić, G. & Marochini Zrinski, M. 2018. Utjecaj konvencijskih načela tumačenja na pojedine građanskopravne institute (odabrana pitanja), *Zbornik radova Pravnog fakulteta u Nišu*, 57(78), pp. 127-147. Available at: https://scindeks.ceon.rs/article.aspx?artid=0350-85011878127M (2. 5. 2024). https://doi.org/10.5937/zrpfni1878127M

Omejec, J. 2014. *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava: Strasbourški acquis*. 2. dopunjeno izdanje. Zagreb: Novi informator.

Schabas, W. A. 2015. *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press. https://doi.org/10.1093/law/9780199594061.001.0001

Sicilianos, L. A. 2020. *Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach*. Available at: https://www.coe.int/en/web/cahdi/the-contribution-of-the-european-court-of-human-rights-to-the-development-of-public-international-law (3. 5. 2024).

Sonnleitner, L. 2022. *A Constitutionalist Approach to the European Convention on Human Rights: The Legitimacy of Evolutive and Static Interpretation*. Oxford: Hart Publishing. https://doi.org/10.5040/9781509946907

Tintor, Lj. 2021. Značaj sluačaja Urgenda za razvoj klimatskih parnica na području Evrope. *Strani pravni život*, 65(2), pp. 249-265. Available at: https://doi.org10.5937/spz65-31054 (9. 5. 2024).

Tulkens, F. 2011. *Dialogue between judges 2011*. Strasbourg: European Court of Human Rights, Council of Europe. Available at: https://www.echr.coe.int/documents/d/echr/Dialogue_between_judges_2011 (5. 5. 2024).

Legal Sources

Konvencija za zaštitu ljudskih prava i temeljnih sloboda, 1950, Vijeće Europe. Available at: https://www.echr.coe.int/documents/d/echr/Convention_hrv (3. 5. 2024).

Vienna Convention on the Law of Treaties, 1969, United Nations, Treaty Series, Vol. 1155, p. 331. Available at*:* https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (3. 5. 2024).

Case law

A, B and C v Ireland, Application no. 25579/05, Judgment ECHR, 16 December 2010.
Bayatyan v Armenia, Application no. 23459/03, Judgment ECHR, 7 July 2011.
Carême v France, Application no. 7189/21, Decision ECHR, 9 April 2024.
Christine Goodwin v The United Kingdom, Application no. 28957/95, Judgment ECHR, 11 July 2002.
Duarte Agostinho and Others v Portugal and 32 Others, Application no. 39371/20, Decision ECHR, 9 April 2024.
Dudgeon v The United Kingdom, Application no. 7525/76, Judgment ECHR, 22 October 1981.
I v The United Kingdom, Application no. 25680/94, Judgment ECHR, 11 July 2002.
Johnston and Others v Ireland, Application no. 9697/82, Judgment 18 December 1986.
Magyar Helsinki Bizottság v Hungary, Application no. 18030/11, Judgment ECHR, 8 November 2016.
Marckx v Belgium, Application no. 6833/74, Judgment ECHR, 13 June 1979.
Muñoz Díaz v. Spain, Application no. 49151/07, Judgment ECHR, 8 December 2009.
Pretty v The United Kingdom, Application no. 2346/02, Judgment ECHR, 29 April 2002.
Sheffield and Horsham v The United Kingdom, Application nos. 22985/93 23390/94, Judgment ECHR, 30 July 1998.
Soering v The United Kingdom, Application no. 14038/88, Judgment ECHR, 7 July 1989.
Tyrer v The United Kingdom, Application no. 5856/72, Judgment ECHR, 25 April 1978.
Verein KlimaSeniorinnen Schweiz and Others v Switzerland, Application no. 53600/20, Judgment ECHR, 9 April 2024.
X and Others v Austria, Application no. 19010/07, Judgment ECHR, 19 February 2013.

IN MEMORIAM: DR VIDA ČOK
(Beograd, 1931 – Maribor, 2023)

* * *

VIDA ČOK – ŽIVOT POSVEĆEN STRUCI I POZIVU

Vida Čok je rođena u Beogradu, 15. juna 1931. godine. Njen otac je bio Slovenac koji je po pozivu došao na rad u Beograd i zaposlio se kao stručnjak u preduzeću Jugoslovenske železnice. Stanovali su u železničkom naselju na Voždovcu. Vida je osnovnu školu i gimnaziju završila u Beogradu. Studirala je na Pravnom fakultetu Univerziteta u Beogradu i diplomirala je 1953. godine kao jedna od najboljih studenata u generaciji.

Na istom fakultetu je završila poslediplomske i doktorske studije. Doktorirala je 1961. godine i stekla stepen doktora pravnih nauka odbranivši disertaciju na temu *Pravni položaj žena i Ujedinjene nacije*. Kao stipendista francuske vlade bila je na specijalizaciji u Evropskom univerzitetskom centru u Nansiju (Centre Universitaire Europeen, Nancy 1958). Na Haškoj akademiji za međunarodno pravo (Academie de droit international de la Haye, 1964) bila je polaznik kursa iz oblasti međunarodnog prava.

Od januara 1956. do novembra 1992. godine radila je u Institutu za uporedno pravo u Beogradu, prošavši sve stepene naučnih zvanja, zaključno sa

zvanjem naučnog savetnika (1973). Godine 1983, izabrana je za redovnog profesora međunarodnog javnog prava na Pravnom fakultetu Univerziteta u Ljubljani. Po pozivu, predavala je na postdiplomskim studijama pravnih fakulteta u Beogradu, Zagrebu, Ljubljani, Sarajevu, Novom Sadu i Prištini. Na Alternativnoj akademskoj obrazovnoj mreži (AAOM, Beograd, 1999–2004), bila je voditelj i predavač u okviru programa Životna sredina – izazov za nauku, tehnologiju i društvo, na Katedri za evropsko pravo i pravo životne sredine. Kao predavač, učestvovala je i u radu Beogradske otvorene škole. Bila je član Upravnog odbora Instituta Ujedinjenih nacija za istraživanje socijalnog razvoja (Board of United Nations Research Institute for Social Development – UNRISD Geneva, 1985–1991). Kao član jugoslovenske delegacije, učestvovala je na zasedanju Generalne skupštine UN (1979).

U svojstvu organizatora, učesnika-autora, izvestioca, delegata, učestvovala je na mnogim skupovima domaćih i međunarodnih vladinih i nevladinih organizacija (zasedanjima, kongresima, savetovanjima, seminarima, kolokvijumima – u Njujorku, Otavi, Parizu, Antibu Huan-le-Pinu, Minhenu, Berlinu, Beču, Upsali, Budimpešti, Varšavi, Bukureštu, Jašiju, Moskvi, Kijevu, Hagu, Ženevi, Trstu, Rimu, Bagdadu, Bejrutu, Kairu, Teheranu, Damasku, Beogradu, Novom Sadu, Ljubljani, Zagrebu, Titogradu, Sarajevu, Herceg Novom, Bečićima, Opatiji, Brionima, Kranju, Kopaoniku i dr.), kao i na sastancima čiji je cilj bio povezivanje Instituta za uporedno pravo sa srodnim stranim naučnim institucijama.

Aktivno je učestvovala u delatnostima mnogih državnih i društvenih organizacija, u neposrednoj vezi sa svojom profesijom. Između ostalog, bila je povremeni sudija Suda udruženog rada Srbije (od njegovog osnivanja do ukidanja); u svojstvu članice učestvovala je u radu Komisije za međunarodno humanitarno pravo Predsedništva Crvenog krsta Jugoslavije; Radne grupe za međunarodno pravo životne sredine Saveznog sekretarijata za inostrane poslove; koordinacionog tela za Dekadu žena, Saveznog izvršnog veća; Saveta za zaštitu čovekove sredine pri Ministarstvu za nauku, razvoj i životnu sredinu; Saveta Međunarodnog univerzitetskog centra za društvene nauke, Univerziteta u Beogradu; Svetskog udruženja za međunarodno pravo (International Law Association, ILA, London); Jugoslovenskog udruženja za međunarodno pravo (Beograd); Jugoslovenskog udruženja za uporedno pravo (Beograd); Centra za antiratnu akciju (Beograd) i njegovog Veća za ljudska prava; Međunarodnog saveta za pravo životne sredine (International Council of Environmental Law, Bonn); Udruženja pravnika Srbije (Beograd); Udruženja za međunarodno pravo (Beograd) i Foruma za međunarodne odnose Evropskog pokreta u Srbiji (Beograd). Sarađivala je na projektima Helsinškog odbora za ljudska prava Srbije (Beograd); Jugoslovenskog centra za prava deteta (Beograd); Beogradskog centra za ljudska prava

(BCLJP, Beograd) i Centra za unapređivanje pravnih studija (CUPS, Beograd). Bila je članica uredništava više stručnih i naučnih pravnih časopisa, između ostalih, to su: *Strani pravni život* (*Yugoslav Law)*; *Jugoslovenska revija za međunarodno pravo*; *Novinarstvo*.

Istraživački i naučni rad Vide Čok je u velikoj meri bio opredeljen delatnošću tada veoma uglednog i u svetu cenjenog Instituta za uporedno pravo. Pored projekata vezanih za teorijska pitanja međunarodnog prava i ljudskih prava, istraživala je i niz tekućih pitanja koja su se ticala države u kojoj je živela. Baveći se, pretežno, pitanjima iz oblasti javnog prava, u opusu njenih radova naročito je došlo do izražaja bavljenje pravnim problemima savremenog sveta. U tome se izdvaja oblast prava ljudskih prava. Istraživanja su vršena sa stanovišta unutrašnjeg, uporednog i međunarodnog prava. Mnoga od njih su objavljena u jugoslovenskim i stranim naučnim časopisima ili kao monografske studije. Autorka je u njima uspela da postavi solidne pretpostavke za naučnu analizu i da zadrži visok nivo objektivnog i kritičkog pristupa. Po mišljenju stručnjaka ovi radovi, posebno o pravu na državljanstvo, slobodi informisanja i manjinskim pravima, predstavljaju najviši domet naše pravne nauke u ovoj teškoj i složenoj oblasti.

Kao predavač i nastavnik, oduševljavala je studente svojim širokim znanjem i prijateljskim pristupom. Zahvaljujući njoj mnogi od njih su se posvetili naučnoistraživačkom radu, dobili stipendije za stručno usavršavanje na poznatim univerzitetima i institutima u SFR Jugoslaviji i svetu. Bila je član komisija za pripremu i odbranu magistarskih i doktorskih radova mladih pravnika širom Jugoslavije. Značajno je doprinela saradnji između naučnoistraživačkih institucija i univerziteta u bivšoj Jugoslaviji i poslednjih decenija između Srbije i Slovenije.

Za svoj pregalački rad i rezultate koje je ostvarila u oblasti međunarodnog i uporednog prava Vida je dobila značajna priznanja. Dobitnik je Ordena rada sa zlatnim vencem i priznanja Instituta za uporedno pravo, gde je izabrana za počasnog člana. Od njenih naučnih publikacija posebno su značajne i citirane sledeće: *Pravni položaj žene i Ujedinjene nacije, razmatranje sa stanovišta međunarodnog i uporednog prava* (1960), *Pravno regulisanje miroljubivog iskorišćavanja nuklearne energije* (1966), *Vrste i dejstvo odluka ustavnih sudova* (1972), *Javno informisanje: pravni vid stvaranja i kreiranja informacije* (1977), *Transfer nuklearne tehnologije: sa stanovišta javnog prava, međunarodnog i unutrašnjeg* (1982), *Pravo na državljanstvo* (1999), *Državljanstvo u savremenoj Evropi* (2002) i dr.

Vida Čok je živela u vremenu nenaklonjenom nauci i serioznom istraživačkom radu. Uprkos tome, ona se više od pola veka s ljubavlju, izuzetnom posvećenošću i akribijom bavila svojom strukom i ključnim pitanjima zaštite ljudskih prava. Zahvaljujući tome, njeni stručni radovi nisu samo svedočenje o

ranijim vremenima i stručnim temama. Naprotiv, oni su u velikoj meri izdržali probu vremena i sud nauke. Danas, nekoliko decenija kasnije, oni na kompetentan način svedoče i govore o važnim pitanjima koja su na dnevnom redu savremenog međunarodnog prava i pravne struke.

Imao sam čast da kao urednik pripremim i objavim većinu tih radova u knjizi Vida Čok, *Spone međunarodnog i uporednog prava, Primeri iz oblasti ljudskih prava*, izd. Službeni glasnik, Beogradski centar za ljudska prava, Centar za unapređivanje pravnih studija, Beograd, 2010, 557 str. U toj knjizi objavljena je i Bibliografija radova Vide Čok koja broji oko 300 jedinica (monografija, studija, članaka, priloga u zbornicima, osvrta, prikaza). Ona na najbolji način govori o autorkinoj odgovornosti i posvećenosti svojoj struci i pozivu.

Vida Čok je bila aktivna i posle odlaska u penziju. Učestvovala je u radu brojnih stručnih skupova, tribina i promocija knjiga u Institutu za uporedno pravo, na Pravnom fakultetu Univerziteta u Beogradu i Pravnom fakultetu Univerziteta Union. Živela je u Beogradu od rođenja, stanovala je sa suprugom Milivojem Despotom na Novom Beogradu. Posle 85 godina provedenih u Beogradu, maja 2016. godine preselila se u Maribor da bi negovala bolesnu sestru. Od tada nije dolazila u Beograd, ali je održavala veze sa brojnim koleginicama i kolegama kojima je ostala u najlepšoj uspomeni kao stručnjak, čovek i iskreni prijatelj. Preminula je 1. novembra 2023. godine u Mariboru.

Jovica D. Trkulja

UPUTSTVO AUTORIMA

PRIJAVLJIVANJE RUKOPISA ZA OBJAVLJIVANJE

Autori mogu da dostave radove napisane latiničkim pismom na srpskom ili na engleskom jeziku u elektronskom formatu, kao *Word* dokument. Rokovi za predaju radova su: za prvi broj – 15. februar, za drugi broj – 15. maj, za treći broj – 15. avgust i za četvrti broj – 15. novembar. Rukopisi se dostavljaju putem linka: http://aseestant.ceon.rs/index.php/spz/, izuzetno elektronskom poštom na adresu uredništva: **redakcijaspz@gmail.com**, koje će ih uputiti kako da se prijave na sistem *Assestant (CEON)*. Autori tom prilikom daju i autorsku izjavu. U slučaju dostavljanja koautorskih radova, korespondencija se u ime svih autora odvija sa autorom koji je rad poslao i koji će biti odgovoran za komunikaciju sa ostalim autorima (tzv. autor za korespondenciju). Autorskom izjavom autori garantuju da su prihvatili uređivačku politiku časopisa i da su prilikom izrade rada i njegovog prijavljivanja za objavljivanje poštovali etičke standarde publicistike i naučnog rada.

Očekuje se da autori u radu, kako bi ostvarili naučni doprinos, pođu od rezultata već sprovedenih istraživanja na datu temu, konsultujući relevantnu domaću naučnu i stručnu literaturu na sistematičan način, moguće korišćenjem digitalnih repozitorijuma domaćih naučnoistraživačkih organizacija i drugih zbirki naučnih i stručnih publikacija u otvorenom pristupu.

Sve aktivnosti vezane za uređivanje časopisa (od prijema rukopisa do objavljivanja elektronskog izdanja časopisa) obavljaju se posredstvom elektronskog sistema *Assestant* (CEON) koji omogućava pripremu i objavljivanje časopisa u elektronskom obliku (*Open Journal Systems* – OJS). U slučaju da autor nema nalog, potrebno je da se registruje preko linka: *http://aseestant.ceon.rs/index.php/spz/user/register*. Detaljno uputstvo za registraciju autora i prijavu rukopisa može se preuzeti sa sajta časopisa *Strani pravni život* (www.stranipravnizivot.rs). Navedene aktivnosti se obavljaju unutar samog sistema, pod nadzorom glavnog i odgovornog urednika i tehničkog urednika, a ključna obaveštenja koja su namenjena autorima, recenzentima ili drugim korisnicima automatski se prosleđuju elektronskom poštom. Zahvaljujući sistemu *Assestant* (CEON) obezbeđeno je čuvanje svih verzija objavljenih radova i odbijenih radova u elektronskoj bazi podataka. Autori, takođe, mogu da se upoznaju u svakom trenutku sa tokom i ishodom postupka recenziranja.

NAPOMENE VAŽNE ZA PRIPREMU RUKOPISA

Način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života* uređen je ovim uputstvom. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako prilozi ne bi bili eliminisani nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Oni moraju sadržati podatke o autoru, naslov, sažetak, ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, rezimea i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku sadrže prevod naslova, sažetka i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman, veličina 12pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvatiće se duži rukopis i to obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, sažetak (do 800 karaktera sa razmacima), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka. Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (koji sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocitata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i **naučnu kritiku ili polemiku**, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 znakova sa razmacima. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 znakova sa razmacima), ključne reči (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne uračunavaju se u obim rada.

Ostali prilozi. Komentari sudskih odluka mogu da imaju najviše do 15.000 znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta

Svi prilozi moraju biti sačinjeni u Microsoft Word-u, latiničkim pismom, fontom Times New Roman, veličine 12 pt, sa proredom 1,5, na strani formata A4, sa uvlačenjem pasusa za 1 tabulator, bez deljenja reči na slogove (hifenacije). Posle svakog znaka interpunkcije staviti samo jedan razmak. Za posebna slova iz srpskog i stranog latiničkog pisma koriste se raspoloživi simboli – dijakritički znaci. Ćirilički znaci iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: *https://www.loc.gov/catdir/cpso/roman.html*. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu (na primer imena iz ruskog jezika). Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Strani pojmovi pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa preciznošću prevesti na sprski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema stilu citiranja i referenciranja – Harvard britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Ime, srednje slovo i prezime autora (jednog ili više njih) navode se na prvoj strani rukopisa u gornjem levom uglu. Pišu se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijakritičkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose na autore: naučna i stručna zvanja, akademske titule, ORCID broj autora, naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove (grad i država) u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

Istraživački podatak / istraživački projekat. Autor može nakon naslova uneti posebnu fusnotu u kojoj će navesti tačne, potpune i aktuelne podatke o okolnostima pod kojima je rad nastao (u okviru međunarodne saradnje, međunarodnog programa, kao deo naučnog ili istraživačkog projekta, u okviru postdiplomskih studija ili postdoktorskih studija, kao saopštenje sa održanog naučnog skupa, gostujuće predavanje i slično) i/ili naznaku o instituciji, državnom organu ili međunarodnoj organizaciji koja je finansijer ili korisnik projekta.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imala učešća u istraživanju ili su pomagala u priređivanju rada, sa objašnjenjem njihove uloge. U fusnoti se može navesti i obaveštenje da je rad urađen u okviru određenog naučnoistraživačkog projekta, da je ranije usmeno izlagan na naučnom skupu i slično.

Naslov rada piše se malim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10 do 12 reči.

Sažetak se navodi ispod naslova članka. Sažetak ne sme da bude duži od 800 znakova sa razmacima. Veličina fonta je 11 pt (složeno kurzivom). U sažetku autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretraživanje članaka.

Ključne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati pet ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt, kurzivom).

Naslov rada, Sažetak i ključne reči na engleskom jeziku (ako je članak na srpskom jeziku), **odnosno, na srpskom jeziku** (ako je članak na engleskom jeziku) navode se dva reda ispod.

Podnaslovi u tekstu se pišu na sredini, malim slovima i podebljanim (boldiranim) slovima, veličine 12 pt i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima. Podnaslovi drugog reda se pišu podebljanim (boldiranim) slovima, složeno kurzivom. Podnaslovi trećeg reda se pišu kurzivom.

Tabele, grafikoni i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

Navođenje izvora unutar teksta

Od autora se očekuje da navedu korišćene izvore, i to potpuno i tačno, i da precizno prenesu tuđe navode, te se prilikom citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene strane sa kojih se preuzima tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa „p.", a više strana sa „pp." (skraćeno lat. *paper – pluta paper).* Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literature uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i strana). Na primer:

> Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.
>
> Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora. Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

> U svom radu Ćirić (2008) konstatuje da je…

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Primeri:

> U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.
>
> Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

> Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje". Na primer:

> Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)…

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćenica „fn.":

> Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)…

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efektan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

> Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe".

Ili:

> Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe" (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili strana na kojima se nalazi citat. Tekst se može preuzeti direktno:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika".

Indirektno se isti tekst može preuzeti na sledeći način:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u

> oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika" (Stanković, 1972, p. 307).

Dugačke citate bi najpravilnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice. Izostavljeni deo reči iz citata označava se trima tačkama u ugaonim zagradama, na primer:

> Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi […] ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)" (*Alternative zatvorskim kaznama*, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

> I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.
>
> Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (vid. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

> Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).
>
> U svom radu Nikolić & Čović (2018) ukazali su na…
>
> Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je…
>
> Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju…

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšteprihvaćena skraćenica „*et al*." (*et alia*). Na primer:

> Ćeranić *et al.* (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

> Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70)… Pored „tvrde", ne bismo smeli da zaboravimo „meku moć"… (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćenica međunarodnih organizacija ili njihovih tela, na primer:

> Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, pp. 32-35).
>
> Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)…

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

> U *Teoriji države i prava* (1995, p. 204) jasno se kaže…

Rad nepoznate godine izdanja. U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

> Zirojević (n.d.) ukazuje na obeležja terorizma…

Ili indirektno:

> Obeležja savremenog terorizma su… (Zirojević, n.d.).

Sekundarne reference. Ako primarni izvor nije bilo moguće pronaći, nego ga autor preuzima iz rada drugog autora, mora se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

> Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

> U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se u tekstu punim nazivom (složeno običnim slovima), uz broj godine kada je usvojen, sem kada se analizira određena izmena ili dopuna propisa, kada se navodi kao izvor službeno

glasilo u kome je objavljena takva izmena. Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćenica pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik.

U krivičnom zakonodavstvu Srbije (Krivični zakonik RS, 2005 – KZ).

Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, 2016).

Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (*Gesetz* über *die Entschädigung für von Gewalttaten* – OEG) s tim što je 1985. godine donet novi zakon koji je i sada na sanzi (OEG, 1985).

U francuskom Građanskom zakoniku (*Code civil* – CC), prema poslednjoj verziji od 1. oktobra 2018. Godine predviđeno je… (CC, 1804).

Akti međunarodnih organizacija citiraju se tako što se u tekstu navodi donosilac akta i pun naziv akta, koji se, po potrebi skraćeno, navodi u zagradi uz naznaku godine u kojoj je donet.

U Istanbulskoj konvenciji Saveta Evrope (CETS No. 210) od 11. 5. 2011. godine (CoE CETS, 2011) predlaže se…

Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, 1990)…

U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (Concil Regulation (EC), 2000)…

Na isti način kako je citiran propis naveden u tekstu, mora biti označen u popisu literature.

Autor može da koristi tekst propisa preuzet sa interneta sa službene stranice nadležnog organa ili javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. U tom slučaju u popisu literature moraju biti označeni osnovni podaci o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik (što mora biti naznačeno).

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer:

čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor u tekstu treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstavke. Iza teksta autor navodi u zagradi skraćeno oznaku odluke, koja će biti korišćena i u popisu literature. Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 utvrđena je nesaglasnost… (Odluka US, 2017).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

… kako se navodi u obrazloženju Presude Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrže što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke). Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćenica za nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćenica „*v*" za veznik *versus*, npr. *Fremkin v Russia*, *Goobald v Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstavke. Na primer:

Borodin v Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015. *Intrasoft International SA v European Commission* (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa interneta. Ukoliko se u radu koriste sadržaji sa interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih publikovale, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže pozivanjem na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora. U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi „n.d." (*non dated* – nepoznat datum), na primer:

> Njihov značaj za parlamentarne procese je nemerljiv (Ostrogorski, n.d).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

> Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

Sastavljanje spiska literature i popisa pravnih izvora

Spisak literature je obavezan na kraju rada. U spisak literature se unose sve bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

1. Knjige (elektronske), druge monografije i udžbenici, poglavlja u monografijama

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov.* Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćenica „*et al.*". Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu „ur." (ako je knjiga izdata na srpskom jeziku), a „ed." (za knjige na engleskom jeziku sa jednim urednikom) ili „eds." (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu*. Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd: Institut za uporedno pravo; Banja Luka: Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI. 1997. *Promoting Probation Internationally*. Publ. no 58. Rome/ London: UNICRI.
- Tappan, P. W. (ed.). 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije. Opšti deo*. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford: OUP Oxford. Database: eBook Academic Collection. Dostupno na: http://eds.a.ebscohost.com/ (18. 1. 2019).

2. Doktorske disertacije, magistarski ili završni master radovi

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. Poglavlja u knjigama i naučni/stručni radovi objavljeni u zbornicima i zbirkama radova sa naučnih skupova

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdava-

nja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov.* Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu „ur." (ako je zbornik na srpskom jeziku), a „ed." (za zbornike na engleskom jeziku sa jednim urednikom) ili „eds." (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony?. In: Parry, R. & Omar, P. (eds.), *International Insolvency Law: Future Perspectives.* Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. & Čolović, V. (ur.), *Uvod u pravo Nemačke.* Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. Članci

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa,* oznaka sveske/godišta/volumena (broj), str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: https://doi.org/DOIbroj.

Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. & Čolović, V. (ur.), *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd/Valjevo: Institut za uporedno pravo, pp. 463-476.
- Gasmi, G., Prlja, D. & Jerotić, A. 2017. European leading legal principles of combating gender based violence: "Istanbul Convention". U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. *et al*. 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida,* 20(1), pp. 45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://doi.org/10.5937/spz1803065V (18. 1. 2019).

5. Članci objavljeni u elektronskom časopisu ili online bazi podataka

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv *online* baze podataka (datum posete stranici). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686 (18. 1. 2019).

Ili:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (18. 1. 2019).

6. Članci, izveštaji, radovi iz zbornika dostupnog na internetu, koji imaju autora

Članci koji su dostupni na internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa, i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vlasnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. Dostupno na: https://www.paragraf.rs/ (18. 1. 2019).
- Lietonen, A. & Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87.* Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa

nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf (18. 1. 2019).

7. Članak dostupan na internetu koji nema naznačenog autora

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- *National Action Plan to combating corruption – Mongolia*. 2016. Dostupno na: https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption (18. 1. 2019).

8. Spisak korišćenih pravnih izvora i izvora sudske prakse

Popisuju se nazivi zakona i drugih propisa korišćenih u radu, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red. Kada se navode akti Evropske unije, obavezno se navodi broj službenog glasnika u kome je propis objavljen i strana na kojoj se nalazi:

- Krivični zakonik RS 2005. *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.
- Izmene KZ RS 2016. *Službeni glasnik RS*, br. 94/2016.
- OEG, 1985. Gesetz über die Entschädigung für Opfer von Gewalttaten, od 7. januara 1985 (*BGBl*. I S. 1), sa poslednjom izmenom od 17. jula 2017 (*BGBl*. I S. 2541). Dostupno na: https://www.gesetze-im-internet.de/oeg/ (18. 1. 2019).
- CC, 1804. Code civil, poslednja verzija od 25. decembra 2018. Dostupno na: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (18. 1. 2019).
- CETS, 2011. Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS No.210) od 11. 5. 2011. godine. Dostupno na: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210 (18. 1. 2011).

- EU Decision 2010. EU Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under document C(2010) 593 (Text with EEA relevance). *OJ* L 39, 12. 2. 2010, pp. 5-18.
- Rec 2011. Council of Europe, Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care. Adopted by the Committee of Ministers on 16 November 2011.
- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćenica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke. Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI).

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje, 1999. Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999, dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Odluka US, 2017. Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama, *Službeni glasnik RS*, br. 68/2018.
- Cass. crim., 19 December 1991, RCA 1992.170. *Ius Commune Casebook for the Common Law of Europe*, 2018.
- Presuda Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012. *Arhiv Apelacionog suda u Beogradu*, 2012.
- *Goobald v Mahmood*, 2005 All ER (D) 251 (Apr). Dostupno na: https://Lexisweb.co.uk/cases/2005/april/godbold-v-mahmood (18. 1. 2019).

- *Intrasoft International SA v European Commission*, 2015. EGC, Judgment of the General Court (Second Chamber) of 13 October 2015 (Case 403/12, ECLI:EU:T:2015:774). Dostupno na : https://eur-lex.europa.eu/l (18. 1. 2019).

Uredništvo stoji na raspolaganju autorima i za sva druga neophodna razjašnjenja (pitanja uputiti elektronskom poštom na adresu uredništva).

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34

STRANI pravni život = Foreign legal life / glavni i odgovorni urednik Katarina Jovičić. - 1956, br. 1- . - Beograd : Institut za uporedno pravo, 1956- (Beograd : Birograf Comp). - 24 cm

Tromesečno. - Drugo izdanje na drugom medijumu: Strani pravni život (Online) = ISSN 2620-1127
ISSN 0039-2138 = Strani pravni život
COBISS.SR-ID 86244103