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Gergő ÁRVAI*

The liquidation of undivided common land ownership in Hungary

Abstract

The issue of undivided common land ownership is a special anomaly in Hungarian land law that has been waiting for a solution for decades. As a result of the reorganization of land tenure relations after the change in regime and the legal successions that have taken place since then, almost one-third of Hungarian farmland is in common ownership. The legal institution of undivided common land ownership creates a bureaucratic obstacle to the circulation of farmland; the land register is unorganized due to the lack of knowledge of the co-owners, which exists only on the surface because of the small ownership they have, all of which lead to administrative burdens for land users and public administration and, in sum, reduce the competitiveness of Hungarian agriculture. As a result of the legislator's action in 2021, new rules allowed the liquidation of joint ownership, and from 2023, special land inheritance rules were introduced into the Hungarian legal system. This study focuses on the introduction of undivided common land ownership, relevant legal problems, and particularities of liquidation.

Keywords: undivided common land ownership, liquidation, land transactions, land tenure policy

1. On undivided common land ownership

This study examines the current situation of undivided common land ownership, which has been an unresolved problem in Hungarian agriculture for almost 30 years. In the 1990s, following the change in regime, the land ownership and land use structure in Hungary underwent major changes, one of the unintended consequences of which was a significant fragmentation of the Hungarian land tenure structure, which has been a source of unresolved legal and economic problems. The emergence of undivided common land ownership may have been related to this period. After the breakup of the Eastern bloc, all Central and Eastern European states settled the issue of land reparceling in their own way,[1] and the Hungarian solution was unique in several respects. The experience of the past shows that it was a mistake for Hungarian legislators to fragment the land tenure structure to such an extent, and to separate land ownership and land use in such a way and to such an extent. This idea is confirmed by the lines from Tamás Andréka, written almost two decades after the change of regime, that *"in Hungary, for historical and economic reasons, the land tenure structure is significantly different from the European structure, given that nearly 3.3 million landowners have an average agricultural area of less than 2 hectares."*[2] According to Zvi Lerman, another speciality of Hungarian land tenure policy

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[1] Burgerné Gimes 2003, 819–832.

[2] Andréka 2010, 11.

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is that *"Hungary is the only country where the restitution process is finished for all practical purposes."*[3] In the 1990s, the Hungarian legislator transferred 2.3 million hectares of the 9.3 million hectares of state land to the ownership of about 700,000 people (on average 0.46 hectares per person), and 3.4 million hectares to the ownership of about 2 million people on a pro-rata basis (on average 1.7 hectares per person).[4] Bobvos defined the economic significance of land tenure redistribution as follows: *"Two consequences of land tenure redistribution should be highlighted. First, as the number of landowners has increased, landholdings have become excessively fragmented, making it very difficult to manage a large part of the land in a modern way and compete in European markets. The second is that much of the land has been taken over by people who are not engaged in agriculture as a profession, who currently rent out their land, and later, by selling it, they will withdraw capital from agriculture, thereby increasing its production costs."*[5]

In Hungary, undivided common land ownership was created to the greatest extent possible because of sharecropping and legal inheritance. Sharecropping was a special form of property acquisition after the change of regime, which was entitled to those people who had not lost their private property between 1945 and 1989, but who had merely 'transferred' their land to the agricultural cooperative, typically not of their own free will, and on which the cooperative had 'a land use right of a proprietary nature.'[6] Members of the agricultural cooperative or their heirs were entitled to lease land if the cooperative did not buy their land. Due to the ambiguous legislative provisions that *"sharecroppers were not granted by law a subjective right to recover the land they had previously occupied from the cooperative"*,[7] sharecropping resulted in the creation of common ownership under civil law rules[8] on many parcels of land. The characteristic feature of common ownership is that the whole thing is owned in undivided shares, *"i.e. each partner owns the whole thing to the extent of his share of ownership (pro parte, pro indivisio). The thing is not divided between partners, but only the right. The right, as an abstract concept, can only be shared in an ideological sense (pro-intellectuals)."*[9] Sharing the ideas of Tamás Andréka, forced ownership communities have been formed, which are characterized by the fact that the co-owners *"members who are not acquainted with each other in any way are entitled to use their share of the property without infringing the rights and legitimate interests of the others in their property."*[10] Because there were no special agrarian inheritance rules, the creation of undivided common land ownership was a legal inheritance. Under the general rules of legal inheritance, the number of landowners has steadily increased, and their share of ownership has fragmented over the past decades. According to figures from the Ministry of Agriculture, the number of undivided common ownerships under the title of sharecropping is around 300,000, affecting nearly 1.5 million owners. As a result of legal succession, common ownership was established on 700,000 land parcels, affecting around 2.5 million owners.[11]

[3] Lerman 2000, 1140–1148.
[4] Bobvos & Hegyes 2019, 26.
[5] Bobvos 1998, 8.
[6] Bobvos & Hegyes 2019, 20.
[7] Bobvos & Hegyes 2019, 25.
[8] Act V of 2013.
[9] Molnár & Jakab 2015, 179.
[10] Andréka 2021.
[11] Andréka 2021.

According to the National Chamber of Agriculture, Hungary currently has approximately 2.5 million hectares of undivided common land ownership.[12] Comparing these figures with Endre Tanka's thoughts that *"...today, 83 percent of the 9.3 million hectares of state land is farmland, while 63 percent of the land is under agricultural cultivation…"*[13] It can be concluded that almost one-third of the Hungarian farmland base is in undivided common ownership. Another major problem is that the land register for jointly owned parcels of land is not ordered, so only the total number of co-owners can be estimated. According to statistics from the National Chamber of Agriculture, 4.6 million partners may be involved, whereas other sources estimate that only 3.5 million may be involved.[14] This may be due to errors in the inheritance procedures. Beyond the disorder in the land register, several legal issues and problems make farming difficult. Under the current Hungarian legislation, a community of ownership may be created by other legal titles (e.g., sale, gift, etc.), but this does not pose a problem from the point of view of the land tenure structure.

One of the main reasons for the fragmented nature of the Hungarian land tenure structure and the distorted land use structure is undivided common land ownership. The Hungarian legislator has tried to abolish undivided common land ownership several times,[15] without success so far, and in 2020 it enacted Act LXXI of 2020 on the liquidation of undivided common land ownership and the settlement of data on the land register of the holders of real estate constituting land (hereinafter: Foktftv.), and Government Decree 647/2020 (XII.23.) on detailed rules for the liquidation of undivided common land ownership. These legal sources offer new possibilities for the dissolution of ownership communities, withdrawal from the ownership community, change in ownership of other co-owners, and the resolution of problems arising from undivided common land ownership.

2. Legal problems arising from undivided common land ownership

The problems of undivided common land ownership affect the Hungarian agricultural sector. As already pointed out by László Fodor in 2010, *"even according to conservative estimates, farmland accounted for about 20% of national wealth,"*[16] which has increased in recent years, making the issue of strategic importance. The source of economic problems is typically legal, with the main anomaly being the lack of knowledge about the exact number of owners involved and the lack of order in the land register. The title deeds of these properties often list deceased, non-identifiable, or unidentifiable persons. This is due to the incomplete/incorrect inventories of inherited land assets, typically in the period before the digitalization of the land register. In many cases, the heirs themselves and often the testators were unaware of these properties, as the fragmented land tenure structure meant that their market value was negligible. Hungarian succession

[12] National Chamber of Agricultural 2020.
[13] Tanka & Molnár 2011, 13.
[14] Hungarian Agriculture 2020.
[15] Act II of 1993, Government Decree 63/2005 (IV.8.), Goverment Decree 405/2012 (XII.28.), Government Decree 374/2014 (XII.31.).
[16] Fodor 2010, 115.

law follows the principle of ipso iure inheritance, so even if the inventory of the testator's property did not include the notional share of the testator's property, by force of law it was inherited by legal heirs (or necessarily passed to the Hungarian State) who became owners outside the property register (including the Hungarian State). When these heirs later became testators themselves, without their ownership having ever been recorded in the land register, their shares in the estate were further divided among several legal heirs that were never recorded in the land register. As a result, tracing the current owners is impossible.

These ownership communities are also characterized by the fact that the partners are mostly not professionally engaged in farming and that the ownership of a partner is so low that it does not allow independent agricultural production. Endre Tanka's reflection: *"In the case of land ownership, private property does not mean possesion and use of the land as a means of production for a population of nearly two million owners, and therefore cannot ensure a living from farming. According to economic and sociological standards, from the perspective of the rights holder, it is only a nominal, pseudo-property, temporary legal form."*[17]

The unknown ownership environment and the small shares that owners are entitled to are obstacles to land-use regularization. Generally, in the case of undivided common property, a use-sharing agreement must be concluded between owners to divide the land in kind. The right to use land is an independent right in the Hungarian legal system, and the Hungarian land-use structure is characterized by the fact that the identity of the landowner and land user is often separated from each other. This is confirmed by the fact that, according to the Hungarian Central Statistical Office, 53% of the farmland in Hungary will be used by farmers in 2021 based on leasehold tenancy, that is, not on their own ownership.[18] In Hungarian public administration, the administration of land-use rights is ensured by an electronic database, the Land Use Register, which is a separate, publicly accessible register, and changes to the data contained therein are made upon request.[19] The content of the Land Use Register is often different from that of the entitlements recorded in the Land Register. According to the general rules of civil law, the right to use the land primaily belongs to the owner of the property, but others may also acquire the right by other legal titles (e.g., usufruct, lease, courtesy land use, etc.). In the case of the undivided common ownership of agricultural land, land use registers, such as land registers, are often disorganized. Thus, the following question arises: How can land tenure be settled when one or more owners are unknown? The *"case of consent given,"* which is a legal fiction, was adopted in order to settle the rules on the use of undivided common land ownership.[20] If the owner is unknown, consent to the sharing of use between the owners must be deemed to have been given if the statutory conditions are met, which has raised questions of constitutionality that have been examined by the Constitutional Court.[21] Another problem is that in addition to the administrative burden of settling the use of land, the fact that a fixed-term ownership agreement can easily be amended by a majority vote, which could lead to changes in the land parcels or parcel

[17] Tanka 2010, 283.
[18] Hungarian Central Statistical Office 2021.
[19] Goverment Decree 356/2007 (XII.23.).
[20] Act CCXII of 2013.
[21] Constitutional Court Decision No. 3255/2018. (VII.17.).

boundaries used by co-owners, is a major obstacle to management. By modifying use-sharing, land users will be entitled to use different parts of the land, which will result in a lack of an ownership approach, and the owner will certainly not carry out a high-value investment (e.g., installation of an agricultural irrigation system).

The disorder of land registration, small ownership shares, and difficulties in land use contribute to the fragmented Hungarian land tenure structure, which greatly reduces the competitiveness of agriculture. These disadvantages regarding competitiveness can be summarized in the words of Pál Bobvos, who says that *"farming on unincorporated land is disadvantageous; the disadvantage can be summed up most simply as the fact that it costs a lot of time and money."*[22] It is important to point out that the competitiveness of Hungarian agriculture could also be improved by the establishment of an agricultural holding regime, which could also speed up the process of land consolidation, as Mihály Kurucz points out: *"The individual parcels of land, as an amorphous set of independent properties as a land unit, become a unit of destination when the individual things form a structured set of things assigned to a common (agricultural) management purpose, or subordinate to it. A merger of holdings may achieve such a goal because it serves an agricultural purpose under common management."*[23]

Another problem with undivided common land ownership is the lack of uniformity in the application of the law by courts. Since the change of regime, *"... the state has taken on an increasing role in influencing the land market and has increasingly intervened in private autonomy,"*[24] which has led the legislator to impose a privileged pre-emption right on the property rights of the partners in undivided common ownership in order to eliminate common ownership as soon as possible. Regarding the constitutionality of the statutory pre-emption rights, Csilla Csák's statement should be highlighted that *"the first right of pre-emption of a co-owner is not a constitutional evidential right, but is based on positive discrimination supported by constitutional grounds."*[25] The controversies in interpreting laws that have arisen in connection with the exercise of privileged preemption rights by co-owners are presented in detail in a study by István Olajos.[26]

In addition to all these factors, a number of administrative problems related to the legal institution of undivided common land ownership can be mentioned, which affect the administration of land registry authorities. As a consequence of land use problems, not only day-to-day management but also the application for certain income support is becoming more complicated, which, as explained, contributes to disadvantages regarding the competitiveness of agriculture.

3. Options for the liquidation of undivided common ownership

On January 1st, 2021, the Foktftv. entered into force, making the liquidation of undivided common land ownership completely new. According to the new provisions, the legislator primarily intends to facilitate an amicable termination between the parties, primarily by dividing the property in kind or by incorporating the property, but also

[22] Bobvos 1998, 18.
[23] Kurucz 2010, 162.
[24] Bobvos 2021, 56.
[25] Csák 2010, 73.
[26] Olajos 2017, 109–116.

provides for the possibility of state intervention to ensure transparency in land ownership relations and prevent the fragmentation of property. The Hungarian State may acquire ownership of certain types of land through expropriation. It is a long-awaited development that, from January 1st, 2023, special rules will apply in cases where legal succession results in undivided common land ownership between heirs.

The legal possibility of opting out of undivided common land ownership exists even before 2020.[27] In addition to the relevant rules of civil law for the judicial dissolution of common ownership, the rules of land law allow individual owners to withdraw from the forced ownership community by obtaining as exclusive property a separate parcel of land of size and value corresponding to their own ownership, thereby reducing the size and value of the original undivided common land. Overall, it can be concluded that these procedures have not brought about a significant change in the Hungarian land tenure structure because relatively few procedures have been initiated and they have been significantly delayed. *"Since 2012, administrative procedures (...) have also been lengthy and difficult (...) costly for the state, and put a huge burden on government agencies. Despite this, by June 1st, 2012, including the previously submitted applications, approximately 250,000 applications for the termination of undivided common ownership had been submitted to the land authorities. These concerned 53.5 thousand parcels of land, and approximately 35 thousand procedures have already been completed, resulting in the granting of separate ownership to approximately 170 thousand owners."*[28]

The primary legislative objectives of the Foktftv. represents the liquidation of undivided common land ownership to improve land tenure and transparency. *"The question arises as to how the legislature intends to interpret this liquidation. The aim was to ensure undivided common land ownership: (1) may be reduced to less than about 1 million individual parcels of land, or (2) may be decreased per hectare, so to have fewer than about 2.5 million hectares in total at a national level, or (3) affect fewer owners, so that the number of forced common ownerships is reduced, which currently totals around 3.5-4.6 million?*

It would seem logical to answer all three options together as this would have the most positive impact on tenure structure."[29] However, there is a very fine line between public interest in eliminating the fragmented land structure to achieve more reasonable land sizes and the sanctity of the right to property. This is clear from the provisions of Foktftv. that the legislator offers the possibility of an amicable settlement between the co-owners, such as the division of the property in kind, and in the absence of this the legal instrument of incorporation is applicable (although incorporation may also be the joint will of the parties), but in certain cases it provides for a settlement by expropriation as the ultima ratio.

The system of termination methods in Foktftv. adopts the provisions relating to the termination of common ownership under general Hungarian civil law rules in detail. The right to terminate common ownership is not only established by Act V of 2013 on the Civil Code (hereinafter, the Civil Code), but is also established by the Foktftv. for the agricultural and forested lands, respectively. The lex specialis derogat legi generali principle applies to the relationship between the Foktftv. and the Civil Code.

[27] Nagy 2022, 110.
[28] National Land Centre 2021.
[29] Árvai 2022, 18.

The essential difference is that the Civil Code precludes the court from ordering the termination of common ownership if it falls within an inappropriate time. However, the special rules of the Foktftv. do not contain such restrictive provisions, regardless of the cyclical nature of agricultural production. The termination system under the Foktftv. is similar to the termination options that can be ordered by the court under the Civil Code: there is sharing in kind in the first place, which requires the joint agreement of the partners. In this case, the new property created as a result of the division must meet three main requirements: no new undivided common ownership may be created unless the owners expressly agree to it, and the separate property created as a result of the division must be suitable for agricultural and forestry purposes, finally, no owner may receive, on the basis of his or her share of ownership in the property on which the division is based, a property with a value less than the cadastral net income of the land, expressed in Golden Crowns, unless he or she expressly agrees to this as part of the settlement. To prevent further land fragmentation, minimum area values (10.000-3.000-500 square metres) were divided by the type of farming, below which no land parcels with a smaller surface area could be created. The in-kind division is followed by sale under the Civil Code, whereby the co-owner has the right of preemption against third parties, so that if the co-owner takes the whole thing for himself, it is equivalent to the possibility of termination under Foktftv. According to the provisions of the Foktftv, the termination of undivided common ownership may be affected by the acquisition of the property by a single owner, that is, by incorporation, if the property cannot be divided into at least two separate parcels of land, each of which meets the specified minimum territorial requirements, and if there is no room for division. The Foktftv. also provides for cases in which several owners wish to use incorporation, as well as for the determination of the consideration to be paid to other owners and the method of payment. Serious questions of legal theory are raised because the legislature also allows for the incorporation of the ownership of unidentified co-owners, for whom consideration must be paid by a court deposit. Given that a unilateral declaration is used to redeem the notional shares of uncertain partners, the legislature effectively gives partners the opportunity to initiate the incorporation of power (quasi-purchase right). Any co-owner has the right to initiate incorporation and division. The disadvantage of these procedures is that legislators do not set a final deadline for their implementation.

Finally, a distant parallel can be drawn between forced sales for the benefit of a third party under the Civil Code and state expropriation under Foktftv. The termination of undivided common ownership by expropriation may only be carried out exceptionally under the conjunctive conditions laid down by law, at the earliest, from January 1st, 2023. In view of the ultima ratio nature of expropriation, the legislator intends to resort to this method of termination only in specific cases where in-kind division or incorporation would not be effective. The fundamental rights to property and the public interest in restructuring the national land tenure structure necessarily conflict with each other. As expropriation involves the deprivation of property rights, the provisions of the Fundamental Law must also be taken into account, according to which *"Property may be expropriated only exceptionally and in the public interest, in cases and in the manner provided by law, and with full, unconditional and immediate compensation."*[30]

[30] XIII Article of Fundamental Law.

A significant development in the liquidation of undivided common land ownership was the beginning of the process of sorting the data of the beneficiaries of the land register. From 2021 onwards, the land registry authority has started to search ex officio for persons born more than 120 years ago and listed as owners in the land register.[31] The law requires the land registry authority to ex officio trace unidentifiable persons listed as owners in the land register in respect of property that is classified as land. If a search yields a result, data adjustment is required. If the land registry authority becomes aware that the beneficiary has been deceased, it shall contact the notary regarding the location of the property under investigation to initiate probate or alternative probate proceedings. The figures suggest that this could be a major task for local administrations and municipal notaries.

On January 1st, 2023, special rules were enforced for the legal succession of agricultural and forestry lands.[32] The legislature wanted to reverse the past trend by ensuring that legal succession does not lead to further fragmentation of Hungarian land tenure. Under the new rules, if the testator's land used for agricultural or forestry purposes is to be inherited by more than one heir under the rules of legal succession (whether inheritance includes a share of the land in sole ownership or undivided common ownership), special rules of succession will apply. The aim is to maintain the testator's land in one type of ownership; that is, to prevent the creation of new undivided common ownership and an increase in the number of existing common ownership types. This largely serves the general objectives of agricultural and land tenure policies. However, the legislature introduced restrictions on inheritance rights, which are originally private in nature. As a result of the new rules, legal heirs may be forced to make a choice, since in order to inherit the land or its ownership, they will either have to enter into a class settlement, transfer it to another person, sell it, or offer it free of charge to the state, or, in extreme cases, the legislator foresees a forced sale. If the testator wishes to make his land the common ownership of several heirs through testamentary disposition, the new legal provisions do not apply.

4. Expected consequences of regulating the land ownership relations

The development of Hungarian agriculture can be greatly facilitated by the settlement of undivided common land ownership if the procedures result in land consolidation. This could improve the competitive position of small and medium-sized farms and their production efficiency. The economic benefits of land consolidation can be found in an organized land-use structure, which removes unnecessary administrative burdens for farmers and public administration, and in the development of more rational land sizes, which can lead to lower unit production costs, more efficient use of equipment and labor, and reduced other expenditures. In terms of the administrative burden, a positive change is expected in the simplified verification of legal land use for the application of certain subsidies. Clear and transparent land ownership relations could create opportunities for increased agricultural lending, secured by mortgageable land ownership and certified by a public land register that has already been regularized.

[31] Act LXXI of 2020.
[32] Act LXVII of 2022.

The availability of easily accessible credit and land ownership can improve the willingness to invest, which is a prerequisite for the implementation of many new modern technologies (e.g., irrigation and[33] precision equipment,[34] etc.). Furthermore, well-ordered land ownership and land-use structures have the advantage of greatly facilitating the creation of irrigation communities.[35] Another advantage of land consolidation is the more favorable location for individual parcels of land on a farm, which can also be facilitated by the liquidation of undivided common land ownership. *"The concept of economic cultivation based on geographic distance (i.e., distance of access) is not necessarily based on the distance between parcels of land, but on the distance from the location of the means of cultivation."*[36] In the context of these projected competitive advantages, it can be noted that on land parcels with current unresolved ownership or land-use backgrounds, certain technical innovations may not be feasible at all or at considerable economic risk. The timeliness and continuity of farming may be problematic. In light of the above, it can be concluded that *"the advantages of land consolidation for economic production are indisputable."*[37]

Agreeing with Endre Tanka, the current distorted land tenure structure has a number of negative consequences, which are problems for the whole agriculture, since *"the environmentally destructive large-scale industrial monoculture based on wage labour that displaces living labour, completely denies the ecosocial value system (the combined requirement of economic, social and environmental efficiency), thus making the autocracy of agriculture unsustainable."*[38] The liquidation of undivided common land ownership could lead to a more competitive and equitable land use structure in Hungary. By resolving the issue of undivided common land ownership, small and medium-sized farms could gain access to additional land, which would go some way to counteract the dominance of large farms.

5. Summary

In conclusion, I believe that settling the issue of undivided common land ownership is a matter of high importance for Hungarian agriculture. With the legislation adopted in 2020, the legislature has created the possibility, in principle, to liquidate undivided common land ownership, but in the absence of a deadline for the liquidation procedures, a delay in the process is expected. In my view, settling the issue of undivided common land ownership could lead to significant land consolidation in our country, the primary beneficiaries of which, if the legislature intends, would be small- and medium-sized farms, as opposed to large-scale land acquisitions. With the consolidation of land ownership and land tenure relationships, the strengthening of smaller farms and improvements in the competitiveness of the agricultural sector are predicted.

[33] Act CXIII of 2019.
[34] Fodor 2020, 18–38.
[35] Szilágyi, Dobos & Szűcs 2020, 44–45.
[36] Kurucz 2010, 160.
[37] Bobvos 1998, 4.
[38] Tanka & Molnár 2011, 20–24.

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Kaja HOPEJ * – Katarzyna MALINOWSKA**
Environmental law principles as guidelines for protecting the outer space

Abstract

Sustainable development practices in the terrestrial environment have been implemented for a long time and, despite their lack of uniformity, have so far proven to be successful. Sustainability in the space environment is a concept that has been under development for over a decade and its implementation is much more difficult, given how challenging, from various perspectives, space domain is. Hence, sustainability in outer space depends on many factors, not only technological development, responsible approaches, and measures taken by all space stakeholders, but also on properly constructed legal foundations. The peculiarities of the space sector, especially from a legal perspective, are characterized by limited experience in regulating such a challenging area. There are a number of normalization activities in addition to Corpus Iuris Spatialis that contribute to a process of unification of space activities (at least at the technical level), even though they remain outside the strictly regulatory aspect. Therefore, lawyers dealing with the space domain frequently use analogies from various legal branches. In the study of space law, particular attention has been paid to aspects of the law of the sea (regulations of high seas) or mining law in the context of space resources. Nevertheless, owing to the increasing problem of the condition of the outer space environment (mainly due to the dangerous amount of space debris in orbit) references to environmental law are increasingly visible in legal research aimed at ensuring sustainable development in outer space. National Space Legislations (NSL) often refer to 'soft law' instruments in the form of internationally recognized and recommended guidelines and standards[1]. Nevertheless, the question arises regarding the extent to which such recommendations will be implemented and enforced, particularly given their diversity. To propose a potential solution, it is important to refer to the principles based on environmental protection law, which, according to the authors, could be analogously applied in the formulation of regulations protecting the outer space environment or at least act as an inspiration for searching for the best solution in the area of space law. Starting from the foundations of the concept of sustainability, in the following study, the authors focus on the Precautionary Principle as well as the Polluter Pays Principle through appropriate risk allocation between the state and non-governmental entities. Regulations at the global, European and national level are reviewed in order to introduce the evolution of the concept of sustainable development and its potential impact on the shaping of space law. This analysis aims to examine the functioning of environmental regulation at national,

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[1] The various standards and guidelines commonly used or recommended, includes in particular: Space Debris Mitigation Guidelines (COPUOS, 2010); The Long-Term Sustainability Guidelines (LTS Guidelines, 2019); European Code of Conduct for Space Debris Mitigation; Recommendation of International Telecommunication Union, Inter-Agency Space Debris Coordination Committee Space Debris Mitigation Guidelines (IADC); International Organization for Standardization Standards and Technical Reports (ISO).

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supranational and international level, thereby creating potential guidance for the regulation of the protection of space environment.
Keywords: sustainable development, space law, environmental law, precautionary principle, polluters pay principle, space debris

1. The Current State of Affairs

Minimum binding regulations and, in certain aspects, the total absence of rules imply an increasing number of doubts and difficulties in determining the appropriate direction for the sustainable development of space activities. The consequence of this state of affairs is a high risk and legal uncertainty for both states and private entities, which must comply with the requirements imposed by legislators to properly conduct space activities. In 2022, the space industry recorded 161 launches, once again setting a record number.[2] This trend will be increasing in the following years. Therefore, permanent access to space is threatened by the frequent launches of space objects into outer space. This consequently leads to an increased risk of collisions, explosions, or break-ups of space objects in the Earth's orbit. According to NASA's latest estimates, the current state of affairs is critical in terms of the mass of space debris (10,800 tonnes). The latest data related to space debris, provided by the ESA Space Debris Office at the European Space Operations Centre (ESOC), show the following figures (based on statistical models) regarding the estimated number of debris objects in orbit: more than 36,000 space debris objects greater than 10 cm, 1 million space debris objects greater than 1 cm to 10 cm, and 130 million space debris objects greater than 1 mm to 1 cm.[3] Even millimeter-sized fragments can pose a huge threat because space debris travels at speeds of up to 29 000 km/h. Since 1999, the International Space Station (ISS) has conducted approximately 30 debris-avoidance maneuvers to avoid potential collisions with pieces of debris.[4] Recent international activities have focused on the use of anti-satellite weapons, which have become a visible threat to the future of space activities and the entire space environment. Because of the importance of certain satellites, various countries have developed anti-satellite (ASAT) weapons, especially those connected to national security. This tool is used to destroy or incapacitate satellites in orbit. Consequently, fragments from destroyed satellites are added to the large existing mass of space debris.[5] In response to the ASAT test conducted by Russia in 2021 (which aimed at destroying the non-functioning satellite Kosmos 1408),[6] United Nations General Assembly introduced a draft Resolution calling on member states *"to not conduct destructive direct-ascent anti-satellite missile tests"* thereby stating that *"such a commitment to be a urgent, initial*

[2] SIA, Record Setting Growth Highlights Commercial Satellite Industry as it Continues to Dominate Expanding Global Space Business – SIA Releases 26th Annual State of the Satellite Industry Report.
[3] ESA 2023.
[4] Bhutada 2022.
[5] Ibid.
[6] As a result of this test, additional precautionary measures were taken against the crew on the International Space Station.

measure aimed at preventing damage to the outer space environment, while also contributing to the development of further measures for the prevention of an arms race in outer space."[7]

The above facts explicitly show that the problem is important and should be addressed by lawmakers or at least by legal doctrine. Thus, the goal of this study is to assess the current state of law and propose adequate solutions de lege ferenda. The research methods proposed by the authors include the dogmatic method, by analysis of legislation and legal texts, as well as comparative methods, both at the level of NSL of various countries and between various branches of law, such as environmental law and mining law.

2. 'Permeation' of Sustainable Development Into Space Law

Sustainable development was enshrined as one of the fundamental objectives of European integration, based on Article 2 of the Treaty Establishing the European Community in 1957 as modified by Maastricht Treaty in 1992. [8] Since then, the concept of sustainability has evolved gradually.[9] The 1972 United Nations Conference on the Human Environment (Stockholm Conference) outlined the beginning of sustainable development principles in the Stockholm Declaration and Action Plan for the Human Environment by prioritizing environmental issues in an international forum.[10] The clear concept has emerged in the 1980s when the United Nations Brundtland Commission[11] in 1987 released the 'Our Common Future' Report (so-called Brundtland Report) in which the definition of sustainable development appeared. The term was explained as the *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."* This was a significant milestone in directing subsequent efforts toward achieving environmental sustainability. The Rio Declaration on Environment and Development of 1992, (which reaffirmed the Stockholm Conference Declaration) included many provisions related to sustainability.[12] In accordance with Principle 4 *"in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."* The important milestones in the development of sustainable development law were constituted in the Agenda 21

[7] The new draft resolution, entitled Destructive direct-ascent anti-satellite missile testing approved by The Committee on the Peaceful Uses of Outer Space (Document A/C.1/77/L.62).

[8] *"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."*

[9] Pallemaers & Azmanova 2006.

[10] Bándi 2022, 17–73.

[11] Formerly the World Commission on Environment and Development. Sub-organization of the United Nations, whose goal was to unite countries in terms of sustainable development. Founded in 1983 when Gro Harlem Brundtland, former Prime Minister of Norway was appointed by the Secretary-General of the United Nations as chairperson of the commission, hence its name.

[12] Bándi 2022, 18–19.

implemented by the United Nations during the Conference on Environment & Development in Rio de Janerio (June 1992) as well as in Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 2002) in which the collective responsibility to strengthen the *"pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels"* were expressed.[13]

Confirmation of the significance of the concept of sustainable development can be found in the unratified Treaty establishing a Constitution for Europe,[14] which indicated that *"in its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, and the sustainable development of the Earth (…)."*[15] In its resolution adopted on 16 September 2005, the United Nations General Assembly distinguished three components of sustainable development, which are based on social development, economic development and environmental protection.[16] Among the many milestones towards sustainable development[17], it is important to point out the most current aspects concerning the document entitled 'Transforming our world: the 2030 Agenda for Sustainable Development' which finally concluded 17 Sustainable Development Goals (SDGs) and related 169 actions.[18] One of the objectives of the SDGs is to present an appropriate approach that demonstrates how environmental improvements will bring both economic and social benefits by seeking to reduce environmental risks and increase the resilience of societies and the environment as a whole.[19] In general, for the purposes of this article, environmental sustainability can be understood as preserving the integrity of the environment, keeping all the Earth's environmental systems in balance, while maintaining the rate at which humans consume the natural resources so that they are able to replenish themselves.[20] This raises the question of whether this understanding can also be applied to the outer space environment, particularly considering its complexity.

The various steps taken internationally in the field of sustainable terrestrial development have laid the foundation for space stakeholders to follow similar paths. The Working Group on Long-Term Sustainability in Outer Space Activities was established in 2010 by the United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS). Since then, the committee has developed a set of measures and internationally recognized standards relating to the safety of space activities. Nine years later, in 2019, the Committee on the Peaceful Uses of Outer Space adopted the Guidelines for Long-Term Sustainability of Outer Space Activities (LTS Guidelines),

[13] Annex of Johannesburg Declaration on Sustainable Development.
[14] Draft Treaty Establishing A Constitution For Europe Adopted by consensus by the European Convention on 13 June and 10 July 2003.
[15] Pallemaerts & Azmanova 2006.
[16] Resolution adopted by the United Nations General Assembly on 16 September 2005. A/RES/60/1. 2005.
[17] Such as the establishment of the expert group by UN General Assembly in 1992: the Commission on Sustainable Development.
[18] The leaders of UN member states signed the document at the summit in New York between 25 and 27 September 2015.
[19] UN Environment Programme 2023.
[20] McGill University 2023.

thereby presenting a definition of long-term sustainability in outer space. In the UN guidelines the term is determined as *"the ability to maintain the conduct of space activities indefinitely into the future in a manner that realizes the objectives of equitable access to the benefits of the exploration and use of outer space for peaceful purposes, in order to meet the needs of the present generations while preserving the outer space environment for future generations."*

As previously mentioned, at the time of the creation of international space treaties, the concept of sustainability did not have much relevance as the number of players in this sector was limited to the two major powers. However, it should be noticed that the subject of sustainability appears, in a fragmented manner, in the already existing Space Treaties. Provisions regarding sustainable development can be found in most international space law treaties. Outer Space Treaty in Article IX provides that *"[…] States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose […]."* Directly included protection of the environment and celestial bodies can only be found in the Moon Agreement in which, in accordance with Article 7 *"In exploring and using the Moon, States Parties shall take measures to prevent the disruption of the existing balance of its environment, whether by introducing adverse changes in that environment, by its harmful contamination through the introduction of extra-environmental matter or otherwise. State Parties shall also take measures to avoid harmfully affecting the environment of the Earth through the introduction of extraterrestrial matter or otherwise."* The concept of sustainability also emerged in the Registration Convention through the Registration of Space Objects as well as in the Liability Convention. Because environmental protection appears only in the Moon Agreement, these regulations at the international level are negligible (through the number of parties), particularly because of the limited relevance of this treaty to the international space ecosystem. Therefore, the current New Space era, which consists of various non-governmental entities, inevitably requires proper activities, especially more decisive legal actions, to reduce risks to the outer space environment.

3. Environment – Dual Perspective

In this section, the authors draw attention to legislative gaps in the context of the definition of the environment, from both a space and terrestrial perspective. The purpose of this chapter is to describe national legislation that attempts to partially define this matter.

3.1. Outer Space Environment

The term 'outer space', which is frequently used in documents and treaties concerning space activities, has never been defined.[21] There is no legal definition of the outer space environment in international law. Consequently, the approaches to their protection vary in many respects, leading to a lack of universal standards governing environmental issues. This matter is unresolved at the international level, but some states

[21] Max Plan Encyclopedia of International Law 2006.

have attempted to regulate at least the delimitation of outer space in their national space legislation, which may facilitate legal interpretation and simplify possible disputes on this matter. The relevance of such a demarcation is questioned because of the nuisance of certain activities, for example, in the airspace. Nevertheless, although consensus has not yet been reached at the international level to avoid legal ambiguity, some opinions favor designating a precise line.[22] A commonly accepted measure of space 'demarcation' is the so-called Kármán Line which lies at an altitude of 100 km above sea level. An example of a country that has introduced clear space delimitation line is Denmark on the basis of the Danish Outer Space Act from 2016 in which Outer Space is defined as *"Space above the altitude of 100 km above sea level."*[23] Indonesia has adopted a definition of space outside the Air Space and surrounding it, along with what is in it.[24] Likewise, Kazakhstan defined outer space as a space extending beyond airspace at an altitude of more than one hundred kilometers above the sea level .[25] In South Africa's Space Affairs Act,[26] 'outer space' refers to space above the Earth's surface from the height at which it is possible to operate an object in an orbit around the Earth.[27] From the above examples, it can be seen that many countries decided to draw a precise demarcation line based on the Kármán Line, and the vast majority tended towards a broad and rather general definition that provided a wide scope for interpretation. Therefore, space demarcation becomes problematic in the context of being subject to the relevant legal regime, which may lead to concerns about the interpretation and qualifications of space-related activities in the future.[28]

In addition to the line of demarcation, the question arises as to what exactly is the space environment and what can we include in it? As mentioned before, despite the commonly accepted 'border' of 100 km, a clear distinction between airspace and outer space can cause different problems as the development of space technology grows rapidly. However, from a legal perspective, this is particularly relevant because of international treaties as there is a fundamental difference between their content concerning airspace and outer space. According to Article I of the Convention Relating to the Regulation of Aerial Navigation from 1919, *"The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory"*[29] whereas in the Article II of the Outer Space Treaty *"Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."*[30] In this case, the demarcation of space and airspace seems necessary from a legal perspective. However, it has not yielded satisfactory results with respect to outlining the elements of the outer space environment, which is the starting point for the introduction of legal protection instruments.

[22] European Space Policy Institute 2017.
[23] The Danish Outer Space Act (act no.409 of 11 May 2016).
[24] Law No. 21 of 2013 on Space Activities (Undang-undang tentang keantariksaan).
[25] Law of the Republic of Kazakhstan on Space Activities No.528-IV of 6 January 2012 (О космической деятельности).
[26] Space Affairs Act 1993.
[27] Malinowska et al. 2022.
[28] For example sub-orbital flights.
[29] This principle was confirmed in Article I of the Convention on International Civil Aviation.
[30] Harris & Harris 2006.

3.2. Terrestrial Environment

Although, looking from an 'Earth perspective' there also seems to be no universal definition of the environment itself. International law does not explicitly define the environment itself. Nevertheless, from the perspective of non-binding international instruments, an important starting point is the identification of documents such as previous mentioned Stockholm Declaration or the World Charter for Nature[31] which proclaims five general principles *"of conservation by which all human conduct affecting nature is to be guided and judged."*[32,33] For the purposes of this article, the authors refer to the definition of natural resources as well as environmental damage contained in the EU Environmental Liability Directive (ELD),[34] as well as to the selected legislation of CEE countries.[35] The Directive indicates 'natural resource' as protected species and natural habitats, water and land. Furthermore, the Directive also defines environmental damage, which refers to damage to protected species and natural habitats (any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species), and includes water damage[36] as well as land damage.[37] As in the case of 'outer space', detailed definitions can also be observed in some national legislation, more often than at the international level. For example, in the Polish Environmental Protection Act of 2008 the environment is understood as *"the totality of natural elements, including those transformed by human activity, and in particular the surface of the earth, minerals, water, air, landscape, climate and other elements of biodiversity, as well as the interaction between these elements."*

[31] Adopted on October 28, 1982 by United Nations member nation-states.

[32] Preamble of the World Charter for Nature

[33] Resulting from the World Charter of Nature, these general provisions are as follows: (1) Nature shall be respected and its essential processes shall not be impaired. (2) The genetic viability on the earth shall not be compromised. The population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded. (3) All areas of the earth, both land and sea, shall be subject to these principles of conservation. Special protection shall be given to unique areas, to representative samples of all the different types of ecosystems, and to the habitats of rare or endangered species. (4) Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but in a way that does not endanger the integrity of those other ecosystems or species with which they coexist. (5) Nature shall be secured against degradation caused by warfare or other hostile activities.

[34] On the 21st April 2004 the European Parliament and the Council adopted Directive 2004/35/CEi on environmental liability with regard to the prevention and remedying of environmental damage.

[35] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD, 2004/35/WE).

[36] *"water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;"*

[37] *"land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;"*

In the Hungarian Act LIII of 1995 on the General Rules of Environmental Protection environment is defined as *"the environmental components and the systems, processes and structure thereof."* Environmental components, according to the Act means *"land, air, water, the biosphere as well as the built (artificial) environment created by humans as well as the constituents."* Hungarian law, also defines natural resources as *"environmental components or certain constituents thereof (with the exception of the artificial environment) that may be used for satisfying the needs of society."* In the Czech Environmental Liability Act[38], natural resources are defined as *"land and rocks, including peloid natural medicinal sources, protected species of wild fauna and flora, and natural habitats, surface waters, and groundwater, including natural medicinal sources and sources of natural mineral waters."*

From this perspective the legal situation of the 'terrestrial' environment is far clearer than that of outer space, due to the possibility to predict the types and effects of damage that may occur on Earth. When it comes to outer space, most of the technology involved, for example, in the extraction of space resources, is still under development. Therefore, so in terms of regulating future activities that have not yet been tested in practice poses some difficulties regarding the identification of damages in the outer space environment.

4. Legal Mechanisms ensuring Sustainable Development

Current legal instruments ensuring the implementation of the concept of sustainable development mainly take the form of guidelines and standards in the shape of the so-called 'soft law'. In the context of environmental protection, this is particularly relevant because of the emphasis on a broad spectrum of legal and sociological concepts that are compatible with the idea of soft law.[39] These are often resolutions and recommendations of international organizations, conclusions drawn by expert groups, declarations, and summaries edited at the end of international projects and conferences.[40] For example, in the context of environmental protection, an organization dealing with environmental issues that formulates soft law instruments in the form of various recommendations is the Commission on Transnational Corporations (ECOSOC), operating under the UN. The situation is similar to the recommended international standards for activities in outer spaces. Over the years, common and recommended guidelines have been developed to prevent the formation of space debris. This catalog includes the Committee on the Peaceful Uses of Outer Space (UN COPUOS) Space Debris Mitigation Guidelines, the Inter-Agency Space Debris Coordination Committee (IADAC) Space Debris Mitigation Guidelines, and the International Organization for Standardization (ISO Standards).

[38] Act No. 167/2008 Coll., on prevention and remedying environmental damage and amendment on some laws.
[39] Peterson 2012.
[40] Dupuy 1990.

5. Environmental Law Principles

Most environmental and pollution control legislations were formulated in the early 1970s to protect public welfare and health.[41] International environmental law is fragmented and consists of many global, regional and sub-regional as well as unilateral and multilateral treaties. Examples of such treaties includes the previously mentioned United Nations Framework Convention on Climate Change (UNFCCC),[42] the Vienna Convention,[43] and the Basel Convention.[44] The Union's environmental policy, developed over the years, is based on the main pillars related to the principles of prevention and removal of pollution at the source, the precautionary principle, and the so-called polluters pay principle.[45] For the purposes of this article, the authors developed the concepts of the precautionary principle and polluters pay principle to analyze them in terms of space law.

5.1. Precautionary Principle

One of the most influential declarations concerning the precautionary approach is Principle 15 of the Rio Declaration, which states that "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, a lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*[46] The precautionary principle was similarly replicated in the preamble of the Convention on Biological Diversity (CBD)[47] and Article 3 of the UN Framework Convention on Climate Change[48] from 1992. At the European Union level, this principle was endorsed in the Maastricht Treaty and is enshrined in Article 191 of the Treaty on the Functioning of the European Union: *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should be rectified at source as a priority, and that the polluter should pay."* The precautionary principle, which is widely implemented internationally and at the national level, has extended from the

[41] Peirce et al. 1998, 15–30.
[42] Ginzky H Soil governance at the international, regional and national level 2022.
[43] Vienna Convention for the Protection of the Ozone Layer from 1985.
[44] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes from 1989.
[45] European Parliament 2023.
[46] Gollier & Treich 2013, 332–338.
[47] *"Where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."*
[48] *"The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties."*

regulation of industry or health risks to the broader management of science, trade, and innovation.[49] Because of the frequency with which this approach is invoked in both international environmental law and internal national regulations, the precautionary rule has reached the level of a customary rule of international law.[50] However, again, there is no universal definition of precautionary principle and its scope (as European Commission indicates) *"depends on trends in the case law, which to some degree are influenced by prevailing social and political values."*[51] According to the European Court of Justice (ECJ) judgment in the case of Artegodan v. Commission[52] *"the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests […]."* The precautionary principle also appeared in the case concerning Gabcikovo- Nagymaros Dispute, where owing to the extreme importance of natural resources, the precautionary principle is justified in environmental law, even if danger is not fully realized.[53] Owing to the accepted uncertainty in scientific evidence[54], the reference of the precautionary principle to the outer space environment seems to be justified. The Outer Space Environment and space activities are often at a developmental stage; therefore, predicting the effects of human activity in outer space seems difficult at this stage. Nevertheless, current estimates indicate, for example, the possibility of the so-called Kessler Syndrome, that is, a situation in which, despite no further objects being launched into outer space, the amount of debris in orbit may increase owing to collisions between them. Another argument in favor of this analogy is the notion of outer space as a fragile environment.[55] This rationale is also relevant to Article IX of the Outer Space Treaty in the context of avoiding harmful contamination of outer space, including the Moon and other celestial bodies.

Thus, the precautionary principle prevailed. Its application to the space environment and its resources, which are extremely fragile, has its justification, especially based on a lack of full knowledge of the hazards and, thus, the enormous consequences as a result of possible damage. According to the latest executive summary published by the Organization for Economic Cooperation and Development (OECD), an experimental model was developed to assess the economic effects of a collision event through value chains. It estimates worldwide monetary losses in the case of Kessler Syndrome to USD 191.3 billion. This is a large sum of the resources currently committed to global debris mitigation and remediation.[56]

[49] Renn 2015.
[50] Bittencourt Neto 2013.
[51] European Parliament 2023.
[52] Judgment of the Court of First Instance (Second Chamber, extended composition) of 26 November 2002. Artegodan GmbH and Others v Commission of the European Communities.
[53] Bittencourt Neto 2013.
[54] European Parliament 2023.
[55] Larsen 2006.
[56] OECD Library 2023.

5.2. Polluters Pay Principle

In 1972 for the first time OECD introduced the so-called 'polluter pays principle' for allocating the costs of pollution control in the form of economic principle.[57] This principle means that the polluter should bear the expenses of the pollution prevention and control measures *"decided upon by the public authorities in order to ensure that the environment is in an acceptable condition."*[58] Initially, the focus was on the cost of pollution control and prevention. Later, it included the costs of the anti-pollution measures taken by the authorities. Environmental responsibility is an extension of this principle.[59] Environmental Liability Directive indicates that *"the prevention and remedying of environmental damage should be implemented through the furtherance of the 'polluter pays' principle, as indicated in the Treaty and in line with the principle of sustainable development."*[60] Based on this principle the ELD indicates the responsibility of the operator to take all necessary remediation measures at his own expense.[61] Besides the OECD document, this principle is expressed in the Rio Declaration. According to Principle 16 *"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investments."*

Applying the polluters pay principle to legal instruments dedicated to the space sector, the launching state would have to guarantee a certain amount of debris generation during a space mission. One reason for this is that, at the current stage of technological development, it is practically impossible to avoid creating debris during these activities.[62]

Among the many principles of international environmental law (such as principle of prevention, prohibition of discrimination, principle of intergenerational justice and equity, etc.) the authors have chosen the principles described above due to their potential applicability to space law as well as the rare reference in space-related legal research to the principles mentioned. The principle of prevention is the principle that should be applied first in the context of the formation legal instruments concerning space activities, no less, its complexity as well as the way of implementation require extensive research, which is why the authors have chosen not to expand on this principle in this article. Nevertheless, what such a proposed application of the precautionary and polluter pays principle would look like if there is no unified system for protecting the space environment as there is absence of homogeneous regulations for protecting the terrestrial environment. As mentioned earlier the precautionary principle is justified in an extremely risky and unexplored environment such as the space environment, and the polluter pays principle forces the authorities to introduce specific economic rules in the form of pollution prevention measures. Space activities often involve a number of international actors, and this rule could contribute to economic efficiency in *"the event of an incident*

[57] OECD 2023a.
[58] OECD 2023b.
[59] European Court of Auditors 223.
[60] Directive 2004/35/CE.
[61] Ibid.
[62] Chowdhury 2023.

causing transboundary harm, assessing the actions of polluters according to a strict liability standard."[63] The concept of both prevention and polluter pays does not have the status of a principle of general international law and currently only operates as a general guideline of public international law.[64] Is it then possible to develop such an international principle for the space environment. In the context of harmonizing regulations protecting the space environment, achieving consensus in the form of an international treaty seems difficult, and soft law mechanisms are not sufficiently effective in the event of a potential dispute. However, to avoid fault-based liability as much as possible and to minimize the risk of collisions, which lead to a deterioration of the space environment, the interest of all space stakeholders should be the adoption of coherent measures. Prevention and remediation of environmental damage should be in the so-called 'good practices' of each stakeholder involved in space activities. Such instruments should be introduced most effectively by means of soft law mechanisms that can be easily adapted and to such a dynamic environment as outer space and rapidly evolving space technology. The dynamic nature of the space industry is a key indicator that international rules may appear too time-consuming to develop and, consequently, may not be very effective.

6. Conclusion

The principles of environmental law can be determinants and guidelines for the development of future widely used and internationally established principles for protecting the space environment. The widespread use of environmental principles, that is, the precautionary or pollution pay principle, proves their effectiveness and general acceptance by society. Nevertheless, with the possible implementation of these principles in the space law regime, attention should be paid to the nature of the space sector, which is undoubtedly a more complicated area requiring an interdisciplinary approach. It is an emerging domain that is very costly and carries a high risk; therefore, the responsible actions of both state and private entities should contribute to sustainable development. Therefore, the appropriate regulation of aspects related to the protection of the space environment is necessary to guarantee equal access to outer space for future generations.

[63] Separate opinion of udge Bhandari (regarding two separate but related disputes that have arisen between Costa Rica and Nicaragua pertaining to the San Juan River, which serves as the international boundary between these two nation-States).
[64] Ibid.

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Liability rules protecting waste management in the light of the right to a healthy environment[***]

Abstract

Some European countries use a complex system of liability to protect the environment through civil, criminal, and administrative law. The purpose of this work is to present and evaluate the constitutional background of the complex liability system protecting the order of waste management in Hungary, in addition to examining the constitutional provisions of three Western European countries – namely France, Spain and Germany – in relation to the topic. Paying particular attention to how the Constitution of the given country regulates the right to a healthy environment.
Keywords: environmental protection, right to a healthy environment, waste management, environmental liability, constitutional review

1. Introductory thoughts

In addition to classical security policy problems, at the end of the 20th century, a new, globally significant subject appeared, which attracted the attention of an increasingly large part of the profession: the issue of 'environmental safety'. The aim of this area is to identify threats that pose a threat to human civilization, either directly from the environment or indirectly through their impact on the environment.[1] Szálkai identifies three main groups of environmental hazards.[2] (1) Natural environmental threats to human civilization that are independent of human activity, such as volcanic eruptions and earthquakes. (2) Human activities that are dangerous to the environment, but apparently not to civilization, such as the depletion of some of Earth's mineral resources, the use of which can be abandoned as technological development progresses. (3) Threats to the environment from human activities, including environmental pollution and greenhouse gas emissions, which also pose a risk to civilization.

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[1] For different conceptual approaches of environmental security and its interface with environmental protection, see: Bándi 2021, 343–344.
[2] Szálkai 2021, 208.

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The topic of the present work focuses on the latter, since activities belonging to this category can ideally be the subject of legal regulation, and the so-called 'waste problem', which has become perhaps the most significant environmental risk factor in recent years, can be interpreted in this context.[3] However, the regulatory regime of causal environmental law is very different from that of other laws. Kecskés points out that while in other regulated areas (e.g., nuclear law) the aim is prevention, waste generation must be accepted as a natural consequence of human civilization,[4] and therefore, a different approach must be taken.

The importance of waste law was demonstrated by Eurostat's report, according to which nearly 2,145,000,000 tons of waste were generated in the European Union (hereinafter: EU) states in 2008, while in 2018, this number exceeded 2,337,000,000 tons,[5] which means that in the ten-year period under review, there was an increase of almost 9%.

Notably, Hungary is not one of the largest waste producers in Europe. Looking at the ratio of the country's land area and population compared to other member states, it can be concluded that an 'average' amount of waste is generated in our country. With this in mind, it is worth paying attention to the data of the Hungarian Central Statistical Office (HCSO): the amount of waste collected under public service, which is, of course, only a fraction of the total amount, was more than 3,310,000 tons in 2020, which is slightly higher than ten years earlier.[6] Although there was a decrease in some years during the examined period, it is clear that the amount of waste produced by the population was stagnant, which indicates an increase in the amount of waste per capita, in addition to a moderate decrease in the population.[7]

Based on this data, waste-related provisions are often formulated in international documents. Without going into an exhaustive list of 'soft law' documents, we would like to highlight the European Charter on Environment and Health (1989) (hereinafter referred to as the ECEH), which was adopted at the 'First European Conference on Environment and Health', organized by the WHO. Among the basic principles, we found the following provision: "*The entire flow of chemicals, materials, products and waste should be managed in such a way as to achieve optimal use of natural resources and to cause minimal contamination.*"[8] The ultimate goal of proper waste management (hereinafter referred to as wm.) is the optimal use of the environment and minimization of environmental pollution.

[3] See more: Kőhalmi 2010, 48–51.
[4] Kecskés 2012, 101–102.
[5] Eurostat 2022.
[6] HCSO 2022.
[7] At this point, it should be noted that the restrictions imposed as a result of the pandemic could potentially have contributed to the increase experienced over the past two years, as the consumption of certain goods logically increases, thus the generation of waste, if the range of services available to the population narrows.
[8] ECEH, Principles for public policy 8.

Waste is also referred to in the provision for so called 'low-impact technologies',[9] and waste disposal in connection of drinking water supply and agriculture, as well as the management, transport, and disposal of hazardous waste are identified as 'priorities' and deserve particular attention at national, regional and international levels.[10]

Due to its global importance, we cannot forget the United Nations 2030 Agenda for Sustainable Development, 2015 (hereinafter: Agenda 2030), which is an 'action plan for people, planet, and well-being.'[11] In order to achieve the 17 'Sustainable Development Goals', 169 sub-goals have been identified, of which three explicitly include waste-related objectives.[12]

In accordance with these goals, the 4th National Environmental Protection Program of Hungary for the period 2015-2020 also emphasizes waste management priorities, mainly prevention of generation, reduction of quantity, development of separate collection, and increase of utilization; in the last case, if the waste cannot be utilized, professional disposal.[13] This order of objectives reflects the waste 'hierarchy'.[14] In addition, the 2020 Climate and Nature Protection Action Plan includes eight measures, four of which help improve the domestic waste situation:[15] (1) liquidation of illegal landfills; (2) banning the distribution of single-use plastics; (3) protection of our rivers from waste coming from abroad; (4) expectation for multinational companies to use environmentally friendly technology.

The various programs and action plans – although common in the field of environmental law development – are not sufficient instruments for the enforcement of environmental interests, as they lack enforceability, and their non-compliance is free of consequences. Although there are a small number of *lex imperfecta* rules in the field of 'hard law', the violation of the vast majority of legal rules implies some kind of legal disadvantage or sanction.

The complex liability system that ensures the protection of terrain from environmental regulations is practically indefinable. The complexity was observed both horizontally and vertically. It is horizontally complex as the legislator invokes the sanctioning rules of several branches of law to protect the environment; thus, Act LIII of 1995 on the General Rules of Environmental Protection (hereinafter: EPA) refers to the civil, criminal, and administrative liabilities of the user of the environment.[16] It is also vertically complex because environmental liability goes beyond national law, and we must consider both EU and international law.

The purpose of this study is to present and evaluate the constitutional background of a liability system protecting the order of waste management in Hungary, France, Spain,

[9] ECEH, Strategic elements d).
[10] ECEH, Priorities 1.
[11] Agenda 2030, Preamble
[12] Agenda 2030, 11.6; 12.3; 12.4; 12.5; 14.1. On the importance of the Sustainable Development Goals, see: Bándi 2022, 23–25.
[13] 27/2015 (17.VI.) Parliamentary decision Annex I, 51–53.; separate objectives have been established for some special waste streams, practically all of them envisage the use of other alternatives instead of disposal.
[14] Act CLXXXV of 2012 on the Waste (hereinafter: WA) 7. § (1)
[15] Climate and Nature Protection Action Plan 2020.
[16] EPA 101. § (1).

and Germany. In this study, we do not describe the entire complex liability system, the rules of international law with environmental implications, or the provisions of EU legislation concerning waste management.

In addition to this Western European perspective, it may be interesting to examine the regulations in some Central European countries. We will not attempt to do so in this study, but we would like to draw attention to the research conducted within the framework of the Central European Academy, which examines, among others, the constitutional protection of the right to a healthy environment in Poland,[17] the Czech Republic,[18] Slovakia,[19] Hungary,[20] Slovenia,[21] Croatia,[22] Serbia[23] and Romania[24].[25]

2. Constitutional review[26]

Today's perception of environmental protection is strongly anthropocentric, which is why it is related to the human right to health. Thus, the Fundamental Law of Hungary (April 25th, 2011) (hereinafter: the Fundamental Law) states that Hungary promotes the right to physical and mental health by, among other things, "*ensuring the protection of the environment.*"[27] This wording contradicts the detailed justification of the Fundamental Law, which, in the context of the text still appearing in the proposal as Article XIX, states that "*the Proposal aims to achieve health protection through regulatory and... material means.*"[28] The quoted line of justification suggests that the legislator's intention was to formulate a state objective, even though it is certain that the provisions of the relevant section appear as a state task in the Fundamental Law. In addition, we share the position that even if the Fundamental Law does not explicitly include the right to a healthy environment, it can still be derived from the right to life.[29;30]

In addition to the declaration of the right to a healthy environment, two provisions of the Fundamental Law that present substantive legal rules on environmental liability and waste management are worthy of analysis.

[17] Majchrzak 2022, 249–308.
[18] Radvan 2022, 161–202.
[19] Maslen 2022, 399–438.
[20] Krajnyák 2022, 203–248.
[21] Juhart & Sancin 2022, 439–478.
[22] Staničić 2022, 127–160.
[23] Savčić 2022, 359–397.
[24] Benke 2022, 309–358.
[25] For a comparative study on this, see: Szilágyi 2022, 497–499.
[26] This chapter does not deal with the less relevant statutory provisions of the Fundamental Law. For all the provisions of Fundamental Law relating to environmental law, see: Téglásiné Kovács 2021, 395–396.
[27] Fundamental Law Article XX (2); Several state commitments formulated in this legislation are almost unique in Europe. See about this: Hojnyák 2018, 156–157.
[28] Detailed justification of the Fundamental Law.
[29] Fundamental Law Article II.
[30] Csák 2012, 162.

Subsequently, it is important to briefly note the nuanced differences between the liability principles contained in the Fundamental Law and those in other relevant legislation.

2.1. Interpretation questions arising in connection with the right to a healthy environment

In major human rights conventions, the rights under discussion are typically not explicitly enshrined. The reason for this is that it was drafted relatively late, even among third-generation rights, so its first draft can be found primarily in soft law documents. However, the Banjul Charter of 1981 (African Charter of Human and Peoples' Rights), which does not create an obligation for our country, should be mentioned as the first significant (regional) human rights convention that contains a provision for the right to the environment. According to this theory, every person has the right to a development-promoting and satisfactory environment.[31] Thus, the environment can be considered to be of sufficient quality if it is suitable for sustainable development. On the one hand, this interpretation is forward-looking, as it refers to the need for integrated environmental protection; on the other hand, it can be considered insufficient, since it does not state whose obligation is to ensure this environmental quality, so it can be interpreted more as a declaration than as an enforceable subject right.

Most national constitutions have addressed this deficiency. According to Majtényi, it is useful to group constitutions based on this aspect so that states recognize the right to the environment as a right to all (e.g. Spain, Portugal), as an obligation for themselves (e.g. Germany, Austria), or in both aspects (e.g. Latvia).[32] Hungary belongs to this category.

The article declaring the right to the environment in the Fundamental Law is very general: "*Hungary recognises and enforces everyone's right to a healthy environment.*"[33] Apart from the fact that human rights-type wording prevails and the idea of state involvement also appears, the detailed content of the fundamental right is not defined, so its interpretation is the task of the Constitutional Court (hereinafter: CC).

On this issue, since the Constitutional Court established continuity between the Fundamental Law and the Constitution in relation to the right to the environment[34], it is necessary to return to the legal interpretation of the 1990s. On this basis, we can say that the right to the environment cannot be interpreted as a subjective right; that is, its direct enforcement by an individual who has suffered a violation of the right is not possible. With regard to this right, the state's objective institutional protection obligation comes to the fore: "*The right to the environment raises the guarantees of the state's fulfillment of its obligations regarding environmental protection to the level of fundamental rights, including the conditions for limiting the protection of the environment achieved."* The relevant decision also lays down the *prohibition of retrogression*, that is, the prohibition of lowering the level of protection

[31] *"All peoples shall have the right to general satisfactory environment favourable to their develompent."* Banjul Charta Article 24.
[32] Majtényi 2018, 85.
[33] Fundamental Law Article XXI (1).
[34] 3068/2013. (14.III.) Constitutional Court Decision (CCD) Justification [46].

achieved in terms of nature conservation, and allows exceptions to this only to pursue other fundamental rights or values, to an extent proportionate to the aim pursued.[35]

The immaturity of the subject is undoubtedly a serious shortcoming. However, there is an approach in which certain sublegal rights can be interpreted as procedural rights that constitute a substantive right. This is the right to participate in environmental decision making, access to environmental information, and appeal to environmental decisions.[36] From this point of view, the lack is not as serious as it seems at first sight, but it is indisputable that the protection of the right to the environment is, to this day, primarily implemented in connection with other – mainly first generation – rights at the individual level. This statement is somewhat contradictory, and the situation is overshadowed by the fact that there is a precedent in a civil case in which the court ordered a defendant to pay restitution because of a violation of the fundamental right to the environment as a personal right.[37]

The declaration of the State's objective institutional protection obligation can be linked to the so-called *first abortion decision*. "*The State may, from a general and objective point of view, determine the objective, institutional scope of protection of the same fundamental right beyond the scope of protection of the subjective fundamental right. This is the case, for example, if the individual exercise of a right of freedom does not appear to be endangered, but in the totality of the cases, the institution of freedom or life relationship generated by the fundamental right is endangered.*"[38] Based on this definition, it can be concluded that the CC emphasized the institutional protection side of the fundamental right in question in 1994, since the purpose of the right is to ensure an appropriate quality of the environment for everyone, and this can only be done with regulations that protect the environment. According to *Sári*'s definition based on the cited decision, "*the State's obligation to enforce fundamental rights is not limited to refraining from violating rights, but must ensure the conditions necessary for their enforcement.*"[39] This interpretation also illustrates that the State must act actively to ensure the enforcement of fundamental rights.

Regarding the prohibition of retrogression, we must also note that although there may be an exception in theory, the CC did not use this option in practice. At the same time, it can be observed that, in its decisions, it tries to refrain from the direct application of the principle and prefers to cite formal reasons for destroying harmful legal provisions.[40] In its recent interpretation, the CC clarified the content of the prohibition, which extends to the substantive, procedural, and organizational rules that ensure environmental protection. According to this, a violation of the principle means, in addition to unchanged substantive legal rules, the weakening of the procedural or organizational rules that enforce it, but also when the object of the regulation changes

[35] 28/1994. (20.V.) CCD V.
[36] Majtényi 2018, 87.
[37] Court of Appeal of Debrecen Pf.II.20.749/2009/4.; Court of Appeal of the Capital 6.Pf.21.995/2009/3.
[38] 64/1991. (17.XII.) CCD Justification C).
[39] Sári 2004, 34.
[40] Fodor 2014, 110.

unfavorably from the point of view of environmental protection, and substantive legal regulation does not respond to this.[41]

According to Article XXI Section (2) of the Fundamental Law, *"Anyone who causes damage to the environment must - as defined by law - restore it or bear the cost of the restoration."* The CC considers this provision to be a codification of the 'polluter pays' principle and states that, on the one hand, it creates an absolute substantive limit for the law enforcer and, on the other hand, that the principle must be respected at all times in the application of the law.[42]

Finally, a specific waste management provision, which is considered curious in Europe, is included in the examined article. According to this, "*it is prohibited to import polluting waste into the territory of Hungary for the purpose of disposal.*"[43] This sentence, which is highly controversial in terms of its placement, is also worrying because its concepts are incompatible with existing waste management legislation. The 'disposal of waste' is an unknown concept in the EU Framework Directive.[44] According to Fodor, the scope of interpretation may include disposal on the ground surface (landfills), long-term storage, deep injection, or surface filling.[45] These are elimination methods according to the Annex of the Framework Directive.

Another problem is the indicator polluter, which does not correspond to waste management terminology. T. Kovács's opinion was that the cited legal provision can also be a directly applicable prohibition; however, in practice, it must be coordinated with the derogation of the free movement of goods.[46] However, we agree with Fodor that the indicator in question refers to certain waste treatment processes. With these procedures, pollution can only be judged on an individual basis; therefore, the material scope of the provisions is not specific. Based on this, he concluded that it was a declarative rule rather than a normative provision.[47] The difficulty of interpretation is greatly aided by the 2013 amendment to the Waste Act, which states that "*hazardous waste for elimination, household waste for elimination and residues from the incineration of household waste may not be imported into the territory of Hungary.*"[48]

2.2. Subject of the right to a healthy environment

We have already made it clear that the right to a healthy environment is a human right, a right that everyone has and a right linked to so-called 'biological existence'.[49] As protection must be provided to everyone, the right tool, according to *Sári*, is to create the possibility of popular action.[50] The EPA provides two ways to do this: anyone can

[41] 16/2015 (5.VI.) CCD Justification [110]; 3223/2017. (25.IX.) CCD Justification [28]; cf. Krajnyák 2022, 216.
[42] 3162/2019. (10.VII.) CC Order, Justification [18]; 5/2022. (14.IV.) CCD Justification [87].
[43] Fundamental Law Article XXI (3).
[44] Directive 2008/98/EC.
[45] Fodor 2012, 643.
[46] Téglásiné Kovács 2021, 399.
[47] Fodor 2012, 649.
[48] WA 19. § (2).
[49] Téglásiné Kovács 2021, 391.
[50] Sári 2004, 293.

draw the attention of the user of the environment and authorities to environmental hazards and civil organizations representing environmental interests are given the right to act as clients in such cases.[51]

In connection with third-generation rights, the question of the legal personality of humanity arises, which refers to the unity of the present and future generations.[52] Kovács states that the legal personality of humanity is relevant in the categories of 'crimes against humanity' and the 'common heritage of humanity', and is enforced through the activities of states and certain international organizations.[53] There are dogmatic difficulties in accepting the legal personality of future generations, as it is not possible to attribute legal interests to a set of persons who do not yet exist within the framework of national law, and there is still no broad consensus on the definition.[54] In relation to this dilemma, two prevailing theoretical legal concepts must be mentioned.[55] (1) According to the theory of will, only people capable of asserting their interests have rights, thereby rejecting the idea of rights of future generations. (2) According to the theory of interest, the alternative can be objectively recognized, which may coincide with the likely value choice, which can be considered the interest of a given person or group; therefore, talking about the rights of future generations is not an oxymoron.

In Weiss's pioneering work, to avoid legal uncertainty, he placed responsibility for future generations on a moral basis. He believes that it is not a direct legal obligation but rather a certain level of development of public consciousness.[56] In light of this, Weiss defined three so-called 'conservation principles':[57] (1) conservation of options: preserving the diversity of our natural and cultural heritage, (2) conversation of quality: maintaining the 'quality' of the planet, (3) conservation of access: Future generations must be given a fair right to access the heritage of their past generations.

Despite the category that is difficult to accept legally, some constitutions refer to the interests of future generations, including several provisions of the Fundamental Law.[58] Among others, the constitutions of Bolivia and Norway mention the protection of future generations in connection with the use of natural resources. A unique solution was recognized by the ruling of the Supreme Court of the Philippines in 1993, which states that, based on the right to a healthy environment, children have the right to sue for their own sake and for future generations.[59] Taking this into account, we can conclude that the rights of future generations exist.

[51] EPA 97. § (2); 98. § (1).
[52] Majtényi 2012, 32.
[53] Kovács 2016, 442–443.
[54] For issues causing scientific dissent, see: Bándi (2022) 46–47.
[55] Szabó 2018, 423.
[56] Weiss 1988, 103.
[57] Weiss 1988, 38.
[58] Fundamental Law Preamble, Article P) (1), Article 30 (3), Article 38 (1).
[59] Szabó 2018, 421–422.

2.3. The relationship between the right to a healthy environment and other human rights

Most human rights conventions do not declare the right in question; however, courts that apply them deal with the violation in their judgments, and more than once, a violation of the given convention is found. Human rights forums apply an 'anthropocentric approach', that is, the issue of environmental harm is relevant to them if an explicit human rights violation can be established in its context.[60]

For an analysis of the regional court relevant to us, let's stick to the case law based on the European Convention on Human Rights (hereinafter: ECHR).

The European Court of Human Rights derives the right to the environment primarily from the right to private and family life.[61] In the case of Powell and Reyner c. the United Kingdom[62] merely raised, but did not lead to, a judgment – the rights of nearby residents to have their rights affected by noise pollution from Heathrow Airport The breakthrough case of López Ostra c. Spain[63] was a case in which the complainants applied to this forum because the Spanish authorities and courts did not take action to eliminate an illegal landfill near their homes.[64] There was also a conviction based on Article 8 in the case of Fadeyeva c. Russia.[65]

Less often, environmental violations are also established based on the right to a fair trial[66] and the right to life.[67] An example of the former is the case of Okyay et al. c. Turkey,[68] and the latter is the case of Öneryildiz c. Turkey.[69] The latter is also an interesting legal case, as the complainant requested the determination of the liability of the Turkish State based on all three mentioned articles of the ECHR due to a fatal methane explosion at an illegal tire dump; however, the case was ultimately only investigated in relation to the right to life, as its violation was sufficient to the detriment of Turkey.

Therefore, in the current European human rights system, violations of the right to the environment can be established only indirectly through other fundamental rights. However, we can be optimistic about the 'independence' of the right under discussion in view of the universally significant 2022 resolution of the General Assembly of the United Nations, which declares the human right to a clean, healthy and sustainable environment.[70]

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[60] Kecskés 2012, 211.
[61] ECHR Article 8.
[62] no. 9310/81.
[63] no. 16798/90 cited from Bándi 2014, 103.
[64] According to Raisz and Krajnyák, the reason behind the different decisions is that while the English authorities have taken a number of measures to reduce the harm caused by noise pollution, the Spanish authorities have remained passive regarding the residents' complaints. Raisz & Krajnyák 2022, 78.
[65] no. 55723/00 cited from Csák 2008, 13.
[66] ECHR Article 6.
[67] ECHR Article 2.
[68] no. 36220/97 cited from Raisz 2010, 23–24.
[69] no. 48939/99 cited from Kecskés 2012, 213.
[70] A/RES/76/300. See more: Raisz & Krajnyák 2022, 75.

3. Principles of environmental liability in the Hungarian legal system

"*The phenomena of environmental liability permeating all areas of life appear in the rules of law, the ethical standards of society, or the teachings of religion.*"[71] The principles protecting the environment had a non-legal origin; they appeared much earlier in the moral and religious rules of early societies. In the absence of State enforceability, it was justified to give these norms, which have existed since time immemorial, the binding force of the law. This is how environmental liability systems were established, the tools of which can be found in several branches of law, the application of which is also possible in parallel. For these systems, liability principles have been formulated. Principles are typically indirectly related to the application of law by performing an interpretative function, but in addition to this, we can also talk about integrative, law-enhancing, etc. functions too.[72]

There is no uniform principle of environmental liability. Different names and contents are found in the Fundamental Law, Civil Code, EPA and sectoral legislation. Therefore, it is worthwhile to analyze and compare them.

The above-mentioned section of the Fundamental Law was interpreted by the CC as the polluter-pays principle, but in our opinion, this is incorrect because only liability for damage to the environment is required. Damage means that "*damage is done, the ecological system is affected, which includes both damage to public property and private property.*"[73] Consequently, in the private law approach, property is a necessary precondition for damage because, in its absence, we cannot speak of a victim. Pollution can occur without harming a specific person.[74] Therefore, we agree with the view that only part of the polluter pay principle is covered by the Fundamental Law.[75]

In EPA, the 'principle of liability'[76] appears explicitly, establishing the liability of the user of the environment in connection with the effects of his/her activity on the environment. According to the provisions of the Fundamental Law, the subject already covers a much broader scope than the tortfeasor. At the same time, this rule covers a broad spectrum of liability: it is not limited to the obligation of reparation (or restitution) but also includes the application of criminal sanctions. However, its shortcoming is that there is no provision for compensation for omissions, even though it can be suitable for changing the environment in a negative direction.[77]

The polluter pays principle has already been included in the Waste Act[78] by its original name, but as it is a sectoral rule, the scope of the persons concerned is well

[71] Csapó 2015, 111.
[72] Csák 2014, 19.
[73] Csák 2012, 74.
[74] We are therefore talking about cases in which environmental damage within the meaning of the EPA (4. § 13.) is not accompanied by damage in the civil law sense. Spanish jurisprudence faced the same dogmatic difficulty in the early 2000s, which was solved by the category of 'pure environmental damage' (daño ecológico puro). See more: Leyva Morote 2016, 114–115.
[75] See for example: Csák 2014, 23.; Bándi 2020, 16.; Krajnyák 2022, 222–223.
[76] EPA 9. §; According to Csák – although it was not included in the wording – the polluter pays principle can be considered one of the implicit principles of the EPA. See: Csák 2014, 21.
[77] Csapó 2015, 180.
[78] On the circumstances of the creation of the Waste Act, see: Mélypataki 2012, 51–58.

defined: "*the waste producer, the waste holder or the manufacturer of the product that has become waste is responsible for the treatment of the waste and the payment of the costs of waste management.*"[79] The interpretative provisions of the Act define all the three subjects.[80] This principle of liability limits obligations and only lays down financial liability. *Marton* pointed out, as a shortcoming of the old Waste Act, that this principle does not imply an effort to reduce emissions, that is, prevention, nor does it clarify whether liability is based on objective or subjective grounds.[81] These two comments are still relevant today, with the addition that, from 2021, the 'principle of preventing waste generation'[82] is separately included in the Waste Act; that is, the legislator fulfills his previous debt.

In addition, the 'principle of extended producer liability'[83] is defined, which imposes a double obligation on producers. On the one hand, as a specific manifestation of the principle of prevention, it requires life-cycle planning when choosing the product and technology; on the other hand, it requires the return of the product or the acceptance and collection of the waste left over, as well as the performance of prescribed waste management activities.[84] The two parts of this special liability principle reinforce each other; it encourages the manufacturer to maintain the requirement of conscious design because it has fewer obligations at the end of the product's life cycle. The effective March 2021 amendment created an 'extended producer liability system', which is a set of measures aimed at making the producer financially or organisationally responsible for the management of waste after it becomes waste.[85]

According to *Bándi*, the polluter-pays principle and the principle of liability can be used as synonymous concepts, as they both serve the same purpose in the sense of complexity.[86] On the other hand, we share Fodor's point of view that individual liability principles cannot be treated as synonymous simply because not all presuppose actual infringement or damage. Accordingly, the possibility of subjective criminal (and misdemeanor) liability appears in most cases, alongside objective liability.[87]

4. Constitutional bases of liability systems protecting the order of waste management in some countries

States use complex liability systems to protect their environment through civil, criminal and administrative law. This study examines the constitutional provisions of three Western European countries, France, Spain, and Germany, in relation to this topic. Particular attention has been paid to how the constitution of a country regulates its right to a healthy environment.

[79] WA 3. § (1) e).
[80] WA 2. § (1) 16., 24., 32.
[81] Marton (2001) 36.
[82] WA 3. § (1) a).
[83] WA 3. § (1) b).
[84] For the manufacturer, the requirement is made more difficult by the Hungarian licensing system, which is strict regarding the use of recycled materials. See about the problem: Olajos 2016.
[85] WA 30/A–C. §§; This is essentially a manifestation of the 'cradle to grave' principle from Anglo-Saxon law in our domestic law. See more: Kubasek & Silverman 2014, 281–282.
[86] Bándi 2014, 87.
[87] Fodor 2014, 90–91.

4.1. France

The Constitution of France (1958) (Constitution française) does not contain fundamental rights, but only a constitutional foundation and state organization rules. A special institutional structure, the 'Economic, Social and Environmental Council' (Conseil économique, social et environnemental),[88] a consultative body with maximum of 233 members, which gives its opinion on draft legislation in matters within its competence, but can also be consulted by Parliament and the Government on various programmes and budget planning, should be highlighted.[89]

At the same time, the preamble to the Constitution refers to the 'Charter of the Environment' (Charte de l'environnement), adopted in 2004, as a kind of 'attachment' (attachement), the creation of which, although mainly due to the strengthening of environmental criminal law, does not contain any repressive provisions.[90] The ten-article document contains the following provisions: (1) declares everyone's right to a 'balanced and healthy' (equilibré et respectueux de la santé) environment,[91] (2) simultaneously, it makes everyone responsible for preserving and improving their environments,[92] (3) raises the principles of damage prevention and mitigation to a constitutional level, (4) establishes the principle of compensation for damages caused to the environment, (5) raises the precautionary principle to constitutional level,[93] (6) takes a stand in favor of the policy for sustainable development (considering all three pillars), (7) declares environmental procedural rights (right to information and participation), (8) emphasizes the importance of education, (9) and research and innovation in preserving the environment, (10) and foresees European and international cooperation.

Although the Charter can be evaluated as a gap-filling document, considering that these rights and obligations have not been recognized in a constitutional legal source in France, the wording is vague in several cases and does not contain specifics – not to mention Articles 8-10, which can only be interpreted as a political declaration – and understandably was the subject of criticism in French professional circles.[94] On the other hand, it is a welcome result that, regarding the procedural rights contained in Article 7, it has become a constitutional obligation of the legislator to develop detailed rules.

[88] For the history and functioning of the body, see: Delevoye 2013, 737–739.
[89] Constitution of France Articles 69–71; In addition, the text of the Constitution does not contain any provisions related to agriculture or environment, just like the constitutions of most Western European states. Hojnyák 2018, 158.
[90] Jaworski 2009, 891–892.
[91] On the interpretation of the wording of the right to a healthy environment in the Charter, see: Capitani 2005, 497–499.
[92] Capitani points out that while the term chacun specifically refers only to natural persons in terms of the right discussed, the phrase toute personne means that both natural and legal persons must be considered the subject of the obligation. Capitani 2005, 503.
[93] The judgments of the French Supreme Court (Cour de cassation) recognized the applicability of this principle in private law disputes. See about this: Camproux-Duffrene & Muller-Curzydlo 2011, 373–381.
[94] See: Prieur 2008, 58–59.

4.2. Spain

The Constitution of Spain (1978) (Constitución Española) declares everyone's right to an 'environment suitable for the development of the individual' (medio ambiente adecuado para el desarollo de la persona), as well as the obligation to preserve this environment. The holders of public power, relying on 'indispensable community solidarity' (indispensable solidaridad colectiva), guard the use of natural resources in order to protect and improve living standards and to protect and restore the environment. For those who violate the provisions of the previous paragraph, criminal[95] or, in certain cases, administrative sanctions as well as the obligation to restore the damage caused will be imposed within the framework of the law.[96]

The Spanish Constitution essentially discusses the right to a quality environment, the preservation of which is the duty of both state bodies and the people. This refers uniquely to the consequences of environmental violations in different branches of law. Strictly speaking, the triad of civil criminal administrative law is also separate, and the principle of liability appears implicitly.[97] It is important to emphasize the systematic placement of the article, which is in the chapter 'Main principles of social and economic policy' (De los principios rectores de la política social y económica), not in 'Rights and freedoms' (Derechos y libertades),[98] thereby referring to, that the active activity of the State has a decisive role in terms of the fundamental right. The literature also confirms that this is not a programmatic norm, but a principle that imposes obligations not only on the legislator but also on the depositories of executive and judicial power, but does not directly provide citizens with a legal basis for taking action.[99]

It can therefore be seen that the objective institutional protection side of the right to the environment is more dominant in Spain, although some authors find that the subjective side is also emphasized because of its formulation as a human right.[100]

4.3. Germany

The Constitution of Germany (Grundgesezt für die Bundesrepublik Deutschland – GG) was adopted in May 1949; thus, it is the text that has been in force for the longest time among the examined constitutions. Some areas of environmental protection that appear in the chapter dealing with legislative issues, such as waste management, air

[95] A relatively recent development in this field is the introduction of the new offense called 'crime against the environment' (delito ecológico) into the Criminal Code of Spain (Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal art. 326 bis.). Gómez Puerto 2020, 230.
[96] Constitution of Spain Article 45; translation by the authors; The Constitution only protects natural resources, but does not affect the issue of land ownership, which is a glaring omission among southern European constitutions. See: Hornyák 2017, 193.
[97] The literature underlines that the scope of the principle of liability extends not only to citizens but also to public authorities, both in the case of their illegal activities and omissions. Real Ferrer 1994, 323.
[98] Domínguez 2004, 136.; Gómez Puerto criticizes this solution, since according to him the protection of environmental interests is left to the current political leadership. Puerto 2020, 254.
[99] Real Ferrer 1994, 325.; Morote 2016, 113.
[100] For an overview of these, see: Puerto 2020, 233–234.

protection, noise protection, nature protection, landscape protection, and water resources management, are classified as shared competences between the federal legislature and the provinces,[101] i.e. the provinces can decide on these issues as long as and to the extent that no regulations are made at the federal level.[102]

As the right to the environment became significant in human rights thinking only in the second half of the 20th century, the text did not originally contain, and still does not contain, a provision in the chapter on fundamental rights (Grundrechte). On the other hand, at the beginning of the 2000s, the idea of state liability for future generations was introduced into the chapter entitled 'The Confederation and the provinces' (Der Bund und die Länder), in which they emphasize 'natural subsistence and animals' (die natürliche Lebensgrundlagen und die Tiere) by the coordinated application of the branches of power.[103]

5. Final thoughts

As a summary, we can say that of the four examined countries, at the constitutional level, the 'right to a healthy environment' has been regulated in Hungary, France and Spain. There are also differences in the content of the provisions and in the way they are regulated: while the constitutions of Hungary ('right to a healthy environment') and Spain ('right to an environment suitable to the development of the individual') explicitly mention these rights, in France the 'right to a balanced and healthy environment' is not declared in the Constitution but in the Charter of the Environment, which has constitutional value. Common to all three regulations is that they not only recognize everyone is right to a healthy environment but also make its preservation an obligation for everyone.

In contrast, in the Constitution of Germany, there is no such provision among the fundamental rights, only in the chapter 'The Confederation and the provinces' is the idea of state liability for future generations, in the context of which the protection of 'natural subsistence and animals' is mentioned, with the coordinated application of the branches of power.

[101] Constitution of Germany Article 74 (1) 24., 29., 32.
[102] Constitution of Germany Article 72 (1) (section (3) of the same article defines exceptions to this rule, but waste management is not mentioned there)
[103] Constitution of Germany Article 20a.; See about this: Bernsdorff 1997, 328–334.; Henneke 1995, 325–335.; Kloepfer 1996, 73–80.

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Radomír JAKAB*

Prohibition of cross-border water transport in the conditions of the Slovak Republic and its legal consequences**

Abstract

The Slovak Republic decided to protect its water resources by prohibiting cross-border water transport. The ban was incorporated into the Constitution of the Slovak Republic. As an administrative regulation, this constitutional norm was subsequently detailed in ordinary legislation, namely the Water Act. The adoption of this ban has raised doubts about its compatibility with the European Union (EU) law, in particular, regarding the quantitative restrictions on exports and imports of goods between the member states. This constitutional prohibition and the subsequent administrative regulation have caused interpretative and applicative confusion. Therefore, in this paper, the author assesses the limits of possible restrictions on water transport across the Slovak Republic borders, taking into account the limits resulting from the EU law. This study aims to analyze and assess the manner and consequences of the constitutional ban on water transport across the Slovak Republic's national borders.

Keywords: Prohibition of transport of water across national borders, protection of water, quantitative restrictions landfill

1. Introduction

On December 1, 2014, the Constitutional Act No. 306/2014 Coll., supplementing the Constitution of the Slovak Republic Act No. 460/1992 Coll., as amended, entered into force in the Slovak Republic; this constitutional act supplemented Art. 4(2) of the Constitution of the Slovak Republic (hereinafter, referred to as the 'Constitution'). According to this provision, *"the transport of water taken from water entity located in the territory of the Slovak Republic across the borders of the Slovak Republic, utilizing transport or pipelines, is prohibited; the ban does not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic, and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic and to the provision of humanitarian aid and assistance in emergencies. Details of the conditions for transporting water for personal consumption and water for the provision of humanitarian aid and emergency aid shall be laid down by law."*[1]

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[1] See also Drgonec 2019, 1792; Orosz et al. 2021, 892.

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The above-mentioned provision of the Constitution clarifies the general prohibition on cross-border water transport out of the Slovak Republic through different means of transport, such as pipelines. According to the explanatory memorandum regarding the draft of the amendment of the Constitution, water entities in the Slovak Republic include all the water sources, namely groundwater, natural mineral resources, natural healing resources, geothermal waters, and surface waters (i.e., water flows, reservoirs, canals, and lakes). In other words, the constitutional provision applies to all the relevant categories of water entities in the Slovak Republic.

Art. 4(2) lays down the detailed conditions regarding relevant details on water for personal consumption, humanitarian aid, and emergency assistance in the form of executive legislation. These conditions are detailed in Art. 17a of Act no. 364/2004 Coll. on waters and in the amendment of the Act of the Slovak National Council no. '372/1990 Coll.' on offenses, as amended (hereinafter referred to as the 'Water Act').

Concerning commercial drinking water packaging and natural mineral water packaging in the Slovak Republic, a total exemption from the prohibition of cross-border transport is provided. This exception is provided in Art. 34 and 35 of the Treaty on the Functioning of the European Union (TFEU). It applies to private and commercial water transport.[2]

It must be noted that the adoption of the aforementioned ban was a political decision of the government. It was a way to prevent mineral water processors from the neighboring states from extracting and transporting water out of the Slovak Republic's territories through pipelines or tanks. Taking into consideration the speed and rigor of the measures taken by the Slovak government, reasonable doubts about the legality of the implemented measures arose. Specifically, questions were raised about the extent to which a member state of the European Union (EU) can autonomously impose restrictions on the free movement of goods, which, in certain circumstances, includes water. In fact, proceedings were initiated against the Slovak Republic for violation of the EU[3] law, and an international arbitration procedure for investment protection was initiated by a mineral water processor from Poland.[4]

This study aims to examine the meaning of Art. 4(2) of the Constitution and related legislation and assess the possible limits of such regulation, taking the EU law into account. In addition, it will analyze and assess the manner and the consequences of the constitutional ban as an administrative legislation. This research hypothesizes that the political context of the adopted amendment to the Constitution may have had an impact on its compliance with the EU law. It also hypothesizes that the conditions of this constitutional regulation may have inconsistencies with the conditions of subsequent administrative regulations.

[2] In this regard, I refer to the paper: Kral 2016, 137–147.

[3] Decision No. 20154225 of 10.12.2015 (Rules concerning export of water). The European Commission (EC) has sent a letter of formal notice to the Slovak Republic pursuant to Article 258 of the TFEU concerning infringements of the rules on the export of water. However, the EC has not brought the matter before the Court of Justice of the European Union.

[4] Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08/AA629

Fundamental research methods, a standard for the legal sciences, have been applied. More specifically, analytical and synthetic methods were used to examine the legislation, the related literature, and the results of the decision-making activity of judicial authorities. Explanations, interpretations, and analogies concerning institutes were used.

In conclusion, it must be noted that the issue appears to be a matter of national Slovakian law. However, its implications go beyond the republic's borders. In the context of the climate crisis, more states would try to protect their water resources. Therefore, the Slovak Republic's manner of solving the problem could be a basis for other states. Furthermore, it is worth emphasizing that water entities rarely belong in just one state borders. Therefore, the aforementioned regulation has a cross-border effect.

2. Constitutional protection of waters and its limits in the context of the EU law

The enactment of a cross-border water transport ban must be examined against the EU law since the Slovak Republic is a member state of the EU.[5] This involves two considerations, namely (i) whether and to what extent a member state can protect its interests to ensure water resources protection for its population within its territory; and (ii) whether the prohibition of cross-border water transport undermines the member states' principles of free movement of goods. In examining this issue, it is necessary to consider the principles and exceptions regarding the respect for the EU member states' national identity[6] and free movement of goods[7].

2.1. National identity of the member states

In light of the foregoing, it is necessary to consider whether the prohibition of cross-border water transport is a matter of national identity for the Slovak Republic, which the EU must respect. The concept of national identity is derived from Art. 4(2) of the Treaty on European Union (TEU). According to the provision, *"the Union shall respect the equality of the Member States before the Treaties, as well as their national identity, inherent in their fundamental political and constitutional systems, including regional and local self-government. It respects their essential state functions, in particular, ensuring the state's territorial integrity, maintaining public order, and ensuring national security. In particular, national security remains the sole responsibility of each Member State."*

The principle of respect for national identity has existed since the Treaty of Maastricht in the conditions of the EU's primary law. However, it gained popularity after the Treaty of Lisbon was adopted. In this regard, Elko Cloots states that *"it was the Treaty of Lisbon that highlighted the visibility and clarity of this provision."* The pre-Lisbon version of the Treaty stated that *"the Union shall respect the national identities of the Member States."* However, the Treaty of Lisbon supplemented the provision by saying that *"the Union shall respect the equality of the Member States before the Treaties, as well as their national identity, embodied in their*

[5] The Hungarian water law regulation. See more: Marinkás 2019, 96–129; Szilágyi 2019, 255–298.
[6] See also Bonelli 2021, 537-557; Cloots 2015, 5; Kovacs 2022, 170–190; Matusescu 2014, 447–452.
[7] See also Woods 2012, 340–367.

fundamental political and constitutional systems, including regional and local self-government."[8] In addition, certain constitutional courts of the member states have begun to use the concept of the so-called constitutional identity, which defines the so-called core material of the Constitution, which must not be affected by EU law.[9] The German and Polish constitutional courts, in particular, unambiguously link their identity doctrine to the Union's obligation to respect the national identities of the member states, as enshrined in Art. 4(2) of the TEU.[10] The same shall apply in Hungary.[11]

Even if the prohibition on cross-border water transport out of the Slovak Republic is considered a matter of national identity, it is questionable whether it is necessary in terms of national security. In this context, B. Balog states, *"The constitutional value which is protected by Art. 4(2) of the Constitution of the Slovak Republic is the security of its inhabitants. From that point of view, I consider the modification in Art. 4(2) of the Constitution of the Slovak Republic as original and yet, but perhaps not forever, as unique and, therefore, perhaps groundbreaking from the point of view of the traditional definition and understanding of the subject matter of constitutional regulation... In its constitution, the Slovak Republic has declared itself to protect water as a constitutional value. It is a regulation that is unprecedented, but at the same time I believe that it is a regulation that is right and necessary because [of] the challenges facing the world; I am thinking of the challenges of climate change, which will force the state to respond to it sooner or later... I, therefore, consider Art. 4(2) of the Constitution of the Slovak Republic and [the] constitutional protection of water as part of the material core of the Constitution. It protects a value that is essential to human life, namely water... I consider this [modification] to be one [on which] the national constitutionalist has the status [to authorize] to regulate its sovereignly [and] precisely what [it] considers most important for [it] and the community whose life [it] regulates by the constitution given by [it]. I consider this right to be stronger than the obligations arising from [its] current membership in different international organizations."*[12]

Thus, in the opinion of Balog, the constitutional protection of water under Art. 4(2) of the Constitution is part of its core material. If we accept this conclusion, this form of water protection could be considered a matter of the national identity of the Slovak Republic, which the EU should respect. However, it is questionable whether the core material of the Constitution should not be defined through the fundamental principles of constitutionalism, typical to the democratic states, based on the rule of law. I. Palúš considers the principle of democracy, pluralism, guarantee and protection of human and civil rights, the rule of law, republican parliamentarianism, separation of powers, unitary state, compliance of international and national law, and self-government as the essential principles of Slovakian constitutionalism.[13] The protection of waters in the form of a constitutional ban is not derived from the stated principles of Slovakian constitutionalism. To ensure such protection, such adoption did not seem necessary. The same objective could have been achieved through ordinary legislation. It seems to be driven by political interests rather than legal necessity.

[8] Cloots 2015.
[9] Avbejl 2011, 818.
[10] Cloots 2015, 5.
[11] Hungarian regimes Szilágyi 2019, 255–298 and Szilágyi 2019(a), 188–214; Marinkás 2019, 96–112.
[12] Balog 2016, 100–118.
[13] Palúš 1999, 11.

Therefore, I do not agree that the constitutional protection of water must be a fundamental principle of Slovakian constitutionalism or that it is a core material of the Constitution or its constitutional identity. Hence, I do not see this regulation as a matter of the national identity of the Slovak Republic.

2.2. Exceptions to the free movement of goods

The free movement of goods, capital, and persons is among the essential freedoms fundamental to the functioning of the EU. Art. 34 and 35 of the TFEU explicitly provide for the quantitative restrictions on imports and exports between the member states and any measures having an equivalent effect. An exception to this rule is provided in Art. 36 of the TFEU.

According to the provision, *"The provisions of Art. 34 and 35 shall not preclude prohibitions or restrictions on imports, exports, or goods in transit justified on the grounds of public morality, public policy, or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic, or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

In the explanatory memorandum on the amendment to the Constitution, the Slovak Republic justifies the conformity of the prohibition on water transport to the cited Art. 36 of the TFEU, namely the need to protect public security and the health and life of humans and animals. These arguments are contained in the explanatory memorandum to the Constitutional Act No. 306/2014 Coll. It can be inferred from the explanatory memorandum that water, as a vital environmental component, is an irreplaceable raw material and natural asset, which is of strategic importance for the state's security, and the scarcity of which may cause a threat to the life and health of the population or jeopardize the state's fulfillment of its basic functions. It emphasizes the state's crucial role: ensuring water sustainability through measures to protect water resources located in the Slovak Republic, including their effective use to meet the needs of society. Taking into account other arguments in the explanatory memorandum, the Slovak Republic seeks to justify the prohibition on cross-border water transport for these reasons. Thus, such regulation will not be covered by Art. 34 and 35 of the TFEU.

The Slovak Republic justified the adoption of this constitutional prohibition as an exception to the free movement of goods, according to Art. 36 of the TFEU, based on public policy, public security, and the need to protect human and animal health. It is, therefore, necessary to assess the content of the exceptions, taking into account the previous decision-making activity of the Court of Justice of the EU.

Public policy is one of the so-called legal concepts, which does not and cannot have an unambiguous definition since its meaning varies depending on the situation, place, and time. At the same time, it is a concept of the EU law and a part of the national legal orders and international law.[14] As Valdhans points out, despite the public policy

[14] For example: Convention on the Recognition and Enforcement of Maintenance Decisions (Decree of the Minister of Foreign Affairs No. 132/1976 Coll.) or the Convention on the Recognition and Enforcement of Foreign Arbitration Decisions (Decree of the Minister of Foreign Affairs No. 74/1959 Coll.).

being a traditional institute, the definition of its content cannot be easily determined.[15] Thus, even if it is stated as a standard (traditional) term, it does not have to mean the same thing in every country. If that were the case (i.e., the legal orders are the same), it would not be necessary to use it as a type of safety measure. This is, currently, a safety valve that protects the domestic legal order from the penetration of fundamentally unacceptable effects of foreign law or activity.[16] It is difficult to define it; its description or its classification is terminologically inconsistent due to its historical development and, in particular, due to its diverse [meanings] from the point of view of different legal orders.[17]

The Court of Justice of the EU has held[18] that it is not for it to define the content of states' public policy. Rather it is for it to control the limits within which the court may use that term.[19] To identify the public policy in a particular case, it requires a genuine and sufficiently serious threat to the fundamental interest of the society. Notably, the Community/EU law does not provide for a uniform range of values for the member states when assessing their behaviors, which may be detrimental to public policy. [20]

Therefore, public policy is interpreted strictly by the Court of Justice and has rarely been a successful ground for an exception under Art. 36 of the TFEU. For example, it will not succeed if it is intended as a general protection clause or serves only for protectionist economic purposes. Where an alternative exception is applied under Art. 36 of the TFEU, the Court shall, as a general rule, use the alternative reasoning or the reasoning on the grounds of public policy in conjunction with other possible justifications.[21] The justification on the grounds of public policy was recognized only in such cases where a member state restricted the import and export of collectible gold coins. The Court held that this was justified based on public policy because it resulted from the need to protect the right to mint coins, which is normally presumed to include the state's essential interests.[22]

The concept of public security is a legal concept. However, it is not the task of the Court of Justice of the EU to define this. Rather, it is their task to define the boundaries and limits of its use as an exception to the free movement of goods. For example, it has accepted the application of the exception for protecting public security in cases involving

[15] Valdhans et al. 2015, 155.
[16] Bystrický 1955, 63.
[17] Štefanková & Sumková 2017, 132.
[18] Judgment of the Court of Justice of the EU in Krombach v. André Bamberski, C-7/98, m.m.; ECLI:EU:C:2000:164;
[19] Poništ 2019, 37–56.
[20] The judgment of the Court of Justice of the EU in the joined cases of Rezguia Adoui v Belgiska and the City of Liège; respectively Dominique Cornuaille v Belgium, 115 and 116/81, ECLI:EU:C:1982:183.
[21] E.g., the judgment of the Court of Justice of the EU Finland against Jan-Erik Anders Ahokainen and Mati Leppik. C-434/04, ECLI:EU:C:2006:609, p. I-9171, paragraph 28.
[22] Judgment of the Court of Justice of the EU in Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwis. C-7/78 ECLI:EU:C:1978:209 [1978] ECR 1978, 2247.

strategically sensitive and dual-use goods[23] since *"... the risk of serious disruption of foreign relations or the peaceful coexistence of peoples may affect the security of a Member State."* In these cases, the Court found that the scope of Art. 36 of the TFEU covers both internal (e.g., the detection and prevention of crime and traffic regulation) and external security.[24]

The need to protect public health may justify the application of an exception to the free movement of goods. In this context, the Court of Justice of the EU has ruled that *"the health and life of people come first, and it is up to the Member States, in light of the limits imposed by the Treaty, to decide what level of protection they wish to ensure and, in particular, how stringent the controls to be carried out should be."*[25] However, it further stated that the *"national rules or practices do not fall under the exceptions..., if the health and life of human beings can be effectively protected by measures, which do not [restrict] intra-EU trade in such a way."*

Several conditions can be inferred from the case law of the judicial authority, which must be fulfilled to apply the exception for the protection of public health. However, health protection cannot be invoked if the real reason for the measure is the protection of the domestic market. In addition, this shall apply in the absence of harmonization when the member states to decide the level of protection. Furthermore, the measures taken must be proportionate and limited to what is necessary to achieve the legitimate objective of protecting public health. The contested measures must be well justified—the member state must provide relevant evidence, data (technical, scientific, statistical, and nutritional), and all other relevant information to demonstrate the justification for applying the exception.[26]

It must be mentioned that the free movement of goods may be restricted for reasons other than those referred to in Art. 36, namely, based on so-called categorical requirements.[27] The categorical requirements have been developed by the case law of the Court of Justice of the EU as an overriding social interest leading to further restrictions on the free movement of goods beyond the provision of Art. 36.[28] The Court has included environmental protection among the scope of categorical requirements (e.g., C-302/86 Commission v. Denmark).[29]

[23] Judgment of the Court of Justice of the EU in Grand Duchy of Luxembourg v Aimé Richardt and Les Accessoires Scientifiques SNC. C-367/89, ECLI:EU:C:1991:376 [1991] ECR 1991, s. I-4621.
[24] Judgment of the Court of Justice of the EU in Grand Duchy of Luxembourg v Aimé Richardt and Les Accessoires Scientifiques SNC. C-367/89, ECLI:EU:C:1991:376 [1991] ECR 1991, s. I-4621.
[25] Judgment of the Court of Justice of the EU in Adriaan de Peijper, directeur de la société Centrafarm BV. C-104/75, ECLI:EU:C:1976:67, Zb. 1976, 613.
[26] Judgment of the Court of Justice of the EU in Commission of the European Communities v Italian Republic. C-270/02, ECLI:EU:C:2004:78, [2004] ECR 1559; judgment of the Court of Justice of the EU in Commission of the European Communities v Federal Republic of Germany. C-319/05, ECLI:EU:C:2007:678 [2007] ECR 2007, s. I-9811.
[27] Poncelet 2013, 171–201.
[28] Tomášek et al. 2013, 218.
[29] Kral 2016, 144.

The International Court of Arbitration ruled on the aforementioned case, Spółdzielnia Pracy Muszynianka v. the Slovak Republic. Its conclusions were similar to those of the Slovak Republic,[30] justifying the need to adopt such a cross-border prohibition on water transport. The Court of Arbitration found that *"Environmental preservation, public health, and seeking to regulate the use of natural resources in an informed and optimal fashion all represent core State functions and, thus, legitimate policy objectives. Environmental protection is not the only public interest invoked. The regulation of the use of natural resources is a self-standing sovereign prerogative that is not necessarily correlated with the level of availability of the natural resource at issue. The same can be said of the protection of public health, which constitutes an independent State function. The Tribunal notes in this regard the Government's objective in seeking to situate the competence over water resource decisions within the central government, thereby, taking it away from the local and regional levels of government."*

A similar conclusion was presented by M. Maslen, who stated that *"A constitutional prohibition on the export of water by pipeline or tanker does not have the character of a trade rule laid down by a Member State, which would directly or indirectly, actually or potentially, hinder trade between [the] Member States. Union rules laying down requirements for water treatment, water care, water packaging, and distribution to the consumer have been transposed by the Slovak Republic. The Slovak constitutional law does not prohibit the export of water packaged in prepackages, as required by the Food Law Regulation and related Union directives. Moreover, from a systematic point of view, the Union treatment itself implicitly indicates that water should be treated as close as possible to the source of its occurrence. This fact is also confirmed by the World Health Organization and UN bodies in the framework of the promotion of the concept of the right to water and safe sanitary conditions of the environment. When exploiting water, it is necessary to take into account the quality and quantity of the water source and the stability of water conditions in the environment from which the water is taken. Therefore, water is a raw material and a natural resource, which becomes food and, therefore, a commodity only after exploitation and processing. The ban on water export must be justified, it must pursue a justified interest, and it cannot be merely general. Judicial case-law permits the enshrinement of instruments, such as restrictions and authorizations for the protection of public health and public policy, which pursue a legitimate aim and are not contrary to the [TFEU]. Even in the context of the interpretation of the freedoms of the internal market, the case-law of the Court of Justice of the [EU] itself emphasizes the requirement to take care of natural resources and natural values."*[31]

As mentioned above, from the point of view of ensuring the free movement of goods, the question is whether water is a commodity, from the point of view of EU law, or a raw material – a natural treasure that only becomes a commodity through its processing (packaging). In the latter case, raw – unprocessed water – would not fall under the free movement of goods regime.

The Court of Justice of the EU has long stated that, under EU law and EU Treaties[32], any item with an 'intrinsic commercial value' constitutes a 'good'. However, the intrinsic commercial value of an item is contingent on it being able to be

[30] Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08/AA629 (rec. 550 and 551).
[31] Maslen 2017, 104–105.
[32] The judgment of the Court of Justice of the European Union in Commission of the European Communities v. Belgium, C-2/90, ECLI: ECLI:EU:C:1992:310.

"valued in money" and "capable, as such, of becoming a subject of commercial transactions."[33] As for mineral water, Slovakian law precludes private parties from purchasing or selling mineral water before bottling. Under the Act on Mineral Waters, the Slovak Republic transfers the ownership of water to an enterprise upon extraction according to an exploitation permit and payment.[34] To the extent that this transfer may be regarded as a commercial transaction, it would follow that Slovakian natural mineral water acquires the status of 'goods' under the EU law, at the earliest, upon being extracted further to an exploitation permit and payment, and latest, upon being bottled.

In this context, it is noted that the relevance of the national law in the determination of water commerciality is not disputed. Although the EU Water Framework Directive defines water as a 'commercial product', it adds that water is not a product *"like any other, but rather, a heritage, which must be protected, defended, and treated as such."*[35] The EU Commissioner for the Environment confirmed that while the EU Water Framework Directive *"cannot be interpreted as a limitation to the perception of water as a commodity,"* it *"falls within the powers of a member state to decide whether to treat water as a commercial product,[36] [under] non-discriminatory terms for third parties and following the rules of the internal market."*

Taking into account the ongoing climate change and the drinking water scarcity, which will intensify[37] over time, it can be concluded that the protection of public security requires or will require the protection of water resources on the territory of individual states. In any case, the need to protect the health and life of humans and animals is linked to this. Bearing in mind that the prohibition on cross-border water transport has exceptions, in particular, the prohibition does not apply to prepackaged drinking water and mineral water, that is, water which is under the 'goods' regime and not qualified as 'raw materials'. The application of the exception to the free movement of goods is proportionate to the objective pursued. Thus, it refers to water having the character of a raw material, not the character of a commodity.

3. Constitutional protection of waters and its administrative consequences

As mentioned above, the adoption of the constitutional amendment on the cross-border water transport ban was influenced by a political decision not preceded by a thorough legal analysis of the need for such legislation within the framework of the

[33] The judgment of the European Court of Justice in Commission of the European Communities v. Italy, C-7/68, ECLI: ECLI:EU:C:1968:51.

[34] According to Article 3 of the Act No. 538/2005 Coll. on Mineral Waters as amended *"Natural healing water and natural mineral water shall become the ownership of the natural person – entrepreneur or legal person that has extracted it from a natural healing source or natural mineral source based on mineral water exploitation permit issued, hereunder, and has made a payment for it."*

[35] Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for the Community action in the field of water policy, Recital 1 *("Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such"*).

[36] Report from the bilateral meeting of the State Secretary of the Ministry of the Environment with the Cabinet of the Commissioner for the Environment, July 8, 2014.

[37] See also in detail Čechmánek 2015, 156–169.

Constitution. The absence of a prior rigorous legal assessment caused doubts about the conformity of this regulation with the EU law. However, implementing the legislation in the administrative legislation – the Water Act – suffered similar consequences. To implement the constitutional prohibition, Section 17a was incorporated into the Water Act, which was intended to detail the constitutional regulation. However, the result of this legal regulation is more restrictive than the one in the Constitution and suffers from several ambiguities that allow different interpretations.

Given that this contribution is intended for a wider international professional audience, we quote the provision of Section 17a of the Water Act. Art. 17a of the Water Act is as follows: (1) The use of water taken from water entities located on the territory of the Slovak Republic for transport, utilizing transport or pipelines, across the borders of the Slovak Republic is prohibited, except in the cases specified in Paragraphs 2–5. (2) The transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic is possible only for personal consumption and the provision of humanitarian aid and emergency assistance. (3) The transport of water taken from water entities located in the territory of the Slovak Republic across the borders of the Slovak Republic for personal consumption is possible for drinking purposes in the volume of no more than 20 liters per person. (4) The transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic for the provision of humanitarian aid and emergency assistance is possible only if the following conditions are met: (a) The choice of water entity for extraction must be made in the light of its condition, which must not be impaired by extraction. (b) Water extraction from the water entity for the residents' drinking water demands must be ensured and prioritized. (c) Water extraction from the water entity must not jeopardize the provision of the residents' current and future drinking water demand and others. (5) The provision of humanitarian aid and emergency assistance, as referred to in paragraph 4, shall be limited to the time necessary to provide them.

3.1. The ordinary legal regulation is more restrictive than the regulation in the Constitution

As mentioned above, the prohibition of cross-border water transport is regulated by Art. 4(2) of the Constitution. In addition, this provision provides for an exception to this prohibition, namely that *"[it] does not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic, and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic, and to the provision of humanitarian aid and [emergency assistance]. Details of the conditions for transporting water for personal consumption and water for the provision of humanitarian aid and emergency aid shall be laid down by law."*

In this regard, the Constitution refers to a legal regulation as a basis for the details of the conditions for transporting water for personal consumption and for the provision of humanitarian aid and emergency assistance. This provision is in Section 17a of the Water Act. According to Paragraph 1 of this provision, *"the use of water taken from water bodies located in the territory of the Slovak Republic for transport, utilizing transport or pipelines across the borders of the Slovak Republic shall be prohibited, except in the cases specified in Paragraphs 2–5."*

According to Paragraph 2, *"the transport of water taken from water entities located on the territory of the Slovak Republic across the borders of the Slovak Republic is possible only for personal consumption and for the provision of humanitarian aid and [emergency assistance]."*

The Water Act, in Section 17a, Paragraph 1, prohibits cross-border water transport, which is the same as Art. 4(2) of the Constitution. Paragraph 2 provides the exceptions to this prohibition, namely the use of water for personal consumption and the provision of humanitarian aid and emergency assistance. However, Section 17a does not provide an exception to the prohibition of transport, namely that the prohibition does not apply to drinking water and natural mineral water packaged in consumer packaging in the Slovak Republic. However, such an exception to the prohibition is provided for in Art. 4(2) of the Constitution. Hence, it can be concluded that the provision in Section 17a of the Water Act provides a smaller range of exceptions to the prohibition than the provision in Art. 4(2) of the Constitution. Thus, the provisions in Section 17a (Paragraphs 1 and 2) do not exactly coincide with Art. 4(2) of the Constitution and are more restrictive.

3.2. The legal regulation for the prohibition of water transport does not apply to all types of water

The question arises whether the legislation reflects constitutional regulation. In such a case, the prohibition must apply to all water entities and categories in the Slovak Republic. As mentioned, the implementing regulation is contained in Section 17a of the Water Act. To answer the question, Paragraph 3(5) of the Water Act must be taken into account. According to the provision, *"waters which are declared natural healing resources and natural resources of the mineral table under a special regulation and waters which are reserved minerals under a special regulation (hereinafter referred to as 'special waters'), shall be covered by this act only if it expressly provides for it."*

If Section 17a of the Water Act applies to the so-called special waters, it must be explicitly stated. However, it must be noted that the Water Act does not expressly provide (neither in Section 17a nor in any other provision) that the prohibition on water transport under Article 17a applies to special waters.

Hence, it can be inferred that the legislation is not identical to the constitutional regulation, even within the scope of the water categories to which the prohibition on cross-border transport is intended to apply. The legal regulation is narrower in this respect, not taking into account all water types. That is, it does not apply to so-called special waters. It is possible to eliminate this inconsistency by applying a constitutional-conforming interpretation under Art. 152(4) of the Constitution. Therefore, the principle of legal certainty would require that the legal norms are sufficiently clear and certain.

3.3. Insufficiently clear definition of the exception for water transport for personal consumption

According to Section 17a(3) of the Water Act, *"the transport of water taken from water entities located in the territory of the Slovak Republic across the borders of the Slovak Republic for personal consumption is possible for [drinking purposes] in a volume of not more than 20 liters per person."* However, several questions arise regarding the interpretation of this provision:

(1) does the set limit apply to each or all crossings; (2) if these apply to all crossings, then for what period; (3) is it appropriate to limit this exception to drinking purposes only; (4) how is it possible to control compliance with this provision; and (5) how will the violation of this exception be sanctioned.

It is possible to agree with the opinion of R. Kral that *"although water transfers of 20 liters per person may not seem dramatic, the legislator could have clarified these limits for the sake of clarity and comprehensibility. It is unclear whether the limit of 20 liters per person for drinking purposes applies to each or all border crossings. On the other hand, however, such an interpretation causes difficulties on the end of the control authorities – ensuring compliance. This issue is also related to the fact that the level of regular or permanent border checks at border crossing points has been significantly reduced in the Slovak Republic after it entered the Schengen area. Moreover, the current legislation is vague and, in practice, essentially unusable, not intended to fulfill its purpose and requires re-evaluation."*[38] In addition, control should be carried out by the state water authorities within the framework of the state water surveillance[39]; they would not be able to staff such control along the entire length of the national border.

In addition to the quantitative limit, the application of the exception requires that water is used exclusively for drinking purposes. I agree with R. Kral's view that *"[based on] the term water for personal consumption, which, in addition to the Water Act, is also used by the Constitution, the use of water for personal hygiene should be included [or implied], in addition to [drinking purposes]. Such wider [interpretation] of water for personal consumption can also be found in documents of international organizations, for example, the [UN]."*[40]

4. Conclusion

Water is a strategic raw material, and its importance will increase over time in light of climate change and the increasing scarcity of drinking water. Given these circumstances, the Slovak Republic attempted to protect its territorial water through a constitutional ban on cross-border water transport. This prohibition has been incorporated into Art. 4(2) of the Constitution. However, a justified controversy has arisen about its compliance with the EU law, in particular, regarding the restrictive measures on the import and export of goods between the member states (Art. 34 and 35 of the TFEU).

The Euro-conformity of a given provision of the Constitution must be considered in the context of Art. 4(2) of the TEU, according to which the Union respects the national identity of the member states and national security. In addition, Art. 36 of the TFEU must be taken into account, which states that the restrictive measures shall not apply in cases where public policy, public security, or the need to protect human and animal life and health are required.

Water protection through constitutional change cannot be considered a part of the Slovak national identity, which the Union must respect. Such constitutional protection of the waters is not one of the basic principles of Slovakian constitutionalism. Hence, it cannot be considered as a part of the core material of the Constitution.

[38] Král 2016, 140.
[39] More details on bodies of the state water administration in: Tekeli et al. 2017, 162–163.
[40] E.g., the United Nations Human Rights Council Resolution 15/9 of 2010.

It must be considered through the basic principles of constitutionalism. Furthermore, the objective does not require a constitutional change. A regulation in ordinary legislation is sufficient. Hence, the prohibition of cross-border water transport cannot be justified by the need to respect the national identity of the Slovak Republic.

However, it is true that the urgency of increased water protection is due to the impending scarcity and climate change. Therefore, an exception is provided regarding the quantitative restrictions on exports and imports between the member states to protect public policy, public security, and the life and health of humans and animals.

On December 1, 2014, the amendment to the Constitution was adopted, which regulated cross-border water transport with exceptions. This constitutional rule was subsequently detailed in ordinary legislation, namely, in Section 17a of the Water Act. However, the legislator has not been sufficiently consistent in adopting this legislation.

Section 17a of the Water Act does not provide all the exceptions to the ban compared to the Constitution (e.g., the prohibition shall not apply to drinking water and natural mineral water packaged in consumer packaging in the Slovak Republic). Therefore, ordinary regulation is more restrictive compared to constitutional regulation.

In addition, according to the constitutional regulation, the prohibition must apply to all water categories. When adopting the amendment to the Water Act (Section 17a), the legislature did not take into account Section 3(5) of the Water Act, according to which the Act applies to so-called special waters only if it expressly provides for it. However, it is not stated in Section 17a of the Act nor any other provision. Thus, by formal interpretation, the ordinary legislation on the prohibition of water transport does not apply to special waters. This inconsistency can only be reconciled by constitutionally-conforming interpretation.

Finally, the applicative problems are caused by the application of the exemption, which the legislature has defined to be up to 20 liters per person and for drinking purposes only. It is, therefore, disputed whether the quantitative limit applies to each or all crossings of the border. If it applies to all crossings, then the time period is unclear. In addition, the limitation of personal consumption for drinking purposes only is not appropriate. The possibility of controllability of compliance with these conditions is problematic due to the absence of permanent border controls. This shall apply especially when the control is carried out by state water authorities.

Thus, it can be concluded that the implementing legislation in the Water Act is not fully consistent with the conditions of the constitutional prohibition of cross-border water transport in the Slovak Republic.

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Tatjana JOSIPOVIĆ*

Croatian land acquisition rules after the expiry of the EU moratorium**

Abstract

The aim of this article is to present the harmonization of the Republic of Croatia in connection with its land acquisition rules. This paper presents the gradual adjustment of Croatian land acquisition rules to EU laws and the final results of the process upon the expiry of the EU moratorium on the acquisition of agricultural land. The paper aims to analyse how the accession to the EU has impacted the development of Croatian land acquisition rules, the development of legal transactions of real property, and the entire economic development of the country.
Keywords: land acquisition, cross-border land acquisitions, moratorium, Croatia.

1. Introduction

In the legal and economic systems of any country, immovable property is of particular importance for social and economic development, physical planning, urbanism, environmental protection, national security, and defence, as well as for preserving the national identity. In many countries, there are specific regulations that lay down different positions for foreigners as opposed to domestic persons when acquiring immovables. Except for very general requirements for the acquisition of immovables, foreigners must often fulfil certain conditions such as reciprocity, prior authorisation given by a public authority, statements regarding the use of real property, and a specific length of their stay in the place where the immovable is acquired. Foreigners are often prohibited from buying specific types of real property (agricultural land, forestry land, etc.). Their specific position in the acquisition of immovables and the legal transactions of real property, in general, is explained by the protection of the market, economic, defensive, and cultural interests, or physical planning. However, accession to the European Union (EU) requires the alignment of national land acquisition rules with the laws of the EU and, in particular, with the principles of EU market freedom. The implementation of market freedom must be unlimited and non-discriminatory for both natural and legal persons from all Member States. The same rule applies when, to realise market freedoms and the freedom of movement, natural and legal persons acquire real property in other Member States.

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In the EU, in the cases of cross-border land acquisitions, discrimination based on nationality is prohibited.[1] EU Member States which, prior to their accession, had imposed such land acquisition rules on foreigners from other Member States, had to adjust their land acquisition rules to EU laws.[2] Indeed, some Member States had to significantly change their national rules on the position of natural and legal persons from other Member States when acquiring and using immovables in their territories.[3] Such reforms resulted in the existence of two parallel regimes of land acquisition rules: one (non-discriminatory) for domestic persons and those from other EU Member States and the other (discriminatory) for persons from non EU third countries.

[1] A basic rule exists in legal transactions between nationals and legal persons of Member States involving real property that they must also be aimed at accomplishing EU goals and the efficient functioning of the internal market. Accomplishing these goals requires that legal real property transactions in every Member State must be in principle unrestricted and non-discriminatory for the nationals and legal persons from other Member States. A non-discriminatory treatment of nationals and legal persons from other Member States, when acquiring land, is of importance for cross-border realisation of the freedom of establishment, freedom of the provision of services, the free movement of capital and, in general, the freedom of movement in the EU. Although this rule is not expressly prescribed in EU law for land acquisition, it ensues from the provisions of primary and secondary EU laws on the content and way of realisation of fundamental rights and market freedoms in the EU. These are, in the first place, the provisions of the Treaty of the Functioning of the European Union (TFEU) on the free movement of workers (Arts 45–48), the right of establishment (Arts 49–55), the freedom to provide services (Arts 56–62) and the free movement of capital (Arts 63–66). Important determinants of legal transactions of real property in EU are also general prohibition of discrimination on the grounds of nationality (Art.18) and the rules on the right to move and freely reside within the territory of the Member States (Art. 21). For more see in Kellerbauer, Klamert & Tomkin 2019, 661; Schulze, Janssen & Kadelbach 2020, 470–471; Glöckner 2000, 600; Pechstein, Nowak & Häde 2017, 750; Schwarze 2019, 839; Calliess & Ruffert 2016, 916; Schwarze 2019, 910; Calliess & Ruffert 2016, 998; Groeben, Schwarze & Hatje 2015, 2008; Kellerbauer, Klamert & Tomkin 2019, 749; Geiger, Khan & Kotzur 2015, 398.

[2] As a rule, it was possible to keep particular discriminatory restrictions on some immovables (agricultural land, forestry land, secondary residences) only temporarily, that is, for a period of time following the accession. An exception was Denmark where it could maintain the existing legislation on the acquisition of second homes (Protocol No. 32, TFEU on the Acquisition of Property in Denmark).

[3] For example, in the Republic of Austria, the competent regional states (Bundesländer) have amended their Laws on the Transfer of Land (Grundverkehrgesetze, Ausländergrunderwerbsgesetze) several times to harmonise them with EU laws, particularly following the moratorium to the application of the existing legislation regarding secondary residences for five years from the date of accession (Art. 70 of the Treaty concerning the accession of the Republic of Austria to the EU, OJ C 241, 1994, p. 9). In several cases, the Court of Justice of the European Union the alignment of such laws with EU law. See the judgments Konle, C-302/97, ECLI:EU:C:1999:271; Beck and Bergdor, C-355/97, ECLI:EU:C:1999:391; Reisch, joined cases, C-515/99, C-519/99-C-524/99, C-526/99- C-540/99, ECLI:EU:C:2002:135; Trummer and Mayer, C-222/97, ECLI:EU:C:1999 C-222/97; Stefan, C-464/98, ECLI:EU:C:2001:9; Ospelt, C-452/01, ECLI:EU:C:2003:493; Salzmann, C-300/01, ECLI:EU:C:2003:283. See: Ágoston 2022, 65–66

In the process of accession to the EU, the Republic of Croatia was obliged to harmonise its land acquisition rules. In the course of preparations for the accession, an extremely serious challenge for the Croatian legislators was the harmonisation of the country's national rules on legal transactions involving real property to EU laws. The adjustment was necessary because prior to the accession to the EU, Croatian land acquisition rules had been characterised by separate and discriminatory rules for foreign natural and legal persons. Croatia's obligation to liberalise and harmonise its land acquisition rules for nationals of EU Member States and EU companies was assumed by signing the Stabilisation and Association Agreement (SAA)[4] and its provisions on the freedom of establishment and the free movement of capital.[5] Specific obligations regarding agricultural land were subsequently agreed upon by signing the Treaty of Accession of Croatia.[6] The main obligation was to progressively adjust Croatian legislation to remove discriminatory restrictions or prohibitions against the acquisition and use of immovables by citizens and legal persons from other EU Member States. It was necessary to gradually establish the same legal regime when citizens and companies from other EU Member States acquired and used immovables, as was the case with domestic natural and legal persons. In addition, Croatia committed itself to no longer imposing any new discriminatory regulations or restrictions on the right of establishment and free movement of capital on natural and legal persons from other EU Member States. Maintaining temporary restrictions or prohibitions against land acquisition by citizens of other Member States was only possible under the conditions stipulated in the Treaty of Accession.

[4] The Republic of Croatia signed the SAA with the European Communities and their Member States on 29 October 2001 in Luxemburg. The Act on the Confirmation of the SAA between the Republic of Croatia and the European Communities and their Member States is published in the Official Gazette NN – International Agreements No. 14/01. The Act on the Implementation of the SAA between the Republic of Croatia and the European Communities and their Member States and the temporary Agreement on Trade-Related Aspects between the Republic of Croatia and the European Community is published in the Official Gazette NN- International Agreements No. 15/01. The Stabilisation and Association Agreement entered into force on 1 February 2005 (Official Gazette NN – International Agreements, No. 1/05).

[5] Art. 49/5 and Art. 60/2, SAA.

[6] The Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the EU), and the Republic of Croatia concerning the accession of the Republic of Croatia to the EU, OJ L 112, 24.4.2012, p. 10–110 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV; OJ L 300, 9.11.2013, p. 11–110 (HR).
The Treaty on Accession was signed on 9 December 2011. The Treaty on Accession entered into force on 1 July 2013.

By the time of its accession to the EU, Croatia had already met all its obligations to align its land acquisition rules to EU laws. Discriminatory rules were abolished several years before Croatia became a Member State of the EU. The only area where bans on land acquisition by citizens and legal persons from other Member States still applied was agricultural land. In the Treaty of Accession, a moratorium of seven years was imposed, during which the acquisition of agricultural land by citizens and legal persons from other Member States could still be prohibited. After the moratorium was extended for an additional three years, the transitional period ultimately expired on 30 June 2023 without any possibility of further extension.

After the transitional period concerning the prohibition on acquiring agricultural land by the nationals of other Member States had expired, the situation in the Republic of Croatia was similar to the situation in other Member States which decided, even after accession, to maintain discriminatory land acquisition rules with respect to persons from third countries. In Croatia, two regimes exist for land acquisition: one for its own nationals and persons from other EU Member States and the other for persons from third countries. The first, non-discriminatory regime, was the result of the reforms in Croatian property law following its independence as well as many years of progressive adjustment of the country's legislation to EU laws. The discriminatory regime is based on two pillars. On the one hand, to be able to acquire agricultural land, apart from general requirements, persons from other countries must fulfil specific requirements depending on the title of acquisition. On the other hand, for individual types of immovables, an absolute prohibition against the acquisition by persons from third countries is still prescribed.

This paper presents the gradual adjustment of Croatian land acquisition rules to EU laws and the final results of the process upon the expiry of the EU moratorium on the acquisition of agricultural land. Valid land acquisition rules are applied to foreign persons from third countries. The paper aims to analyse how the accession to the EU has impacted the development of Croatian land acquisition rules, the development of legal transactions of real property, and the entire economic development of the country.

2. Land acquisition rules in Croatian property law

2.1. General land acquisition rules

General rules on land acquisition in Croatian law have been outlined in the Act of Ownership and Other Real Rights (hereinafter, Property Act/PA, in force since 1 January 1997),[7] by which property law reform was carried out. In the Property Act, land acquisition rules are construed on the model of Austrian law and have not been amended. In principle, the land acquisition rules were retained in the PA from the period when the Austrian Civil Code was applied in Croatian territories[8] and were, thus, deeply rooted in

[7] Official Gazette NN Nos 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 90/10, 143/12, 152/14. The acquisition of ownership is provided for in Articles 114–160 of the PA.

[8] For more see Josipović 2011, 157–174.

the Croatian legal system.[9] The same concept of the acquisition of ownership applied to that of privately owned land in the socialist era.[10] During the property law reform, after abolishing social ownership, the Croatian legislators decided to respect the country's legal tradition and, with a certain level of modernisation, maintain the system of land acquisition, which had been developing in Croatia for more than a hundred years. Such an approach made a faster transition possible from the social to private ownership regime, as well as the tendency to keep the already-established instruments of significance for land acquisition and the publication of rights on immovables (land register and cadastre).[11] The same land acquisition principles apply to the new legal and economic environment based on private ownership and the market economy.

The Property Act specifies the general requirements to be fulfilled prior to any land acquisition. For example, an immovable must be involved, which may be an object of ownership,[12] allowing the acquirer to be the owner of such immovable[13], and a valid legal basis should exist for the acquisition. The ownership of real property may be acquired based on a contract, court decision, or the decision of another competent authority, as well as by succession or law.[14] Based on any of these legal bases, the ownership of an immovable may be acquired when all the legal requirements are met.[15] When ownership is acquired on the basis of a contract, according to the model of Austrian property law, the principle of causal tradition applies. To acquire land based on a contract, the ownership of the previous owner and a valid contract made in written form, as well as a valid registration in the land register, are required.[16] When a land acquisition occurs under any other title, an entry in the land register is not a constitutive prerequisite for the acquisition of ownership. When dealing with succession, land acquisition occurs at the moment of the decedent's death.[17] Based on a court decision or the decision of some other authority, land acquisition takes place at the time of the final decision.[18]

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[9] See Gavella 1994, 185–186.

[10] See Art. 33 of the Former Act on Basic Ownership Law Relations (1980).

[11] For example, Croatian land registry started developing as early as in the second half of the 19th century, when in the year of 1850, the so-called 'Carska naredba o Privremenom gruntovnom redu' (The Imperial Order on the Temporary Land Register).

[12] The immovables which cannot be objects of ownership are within the regime of public domains. The PA expressly lays down that there can be no ownership or other real property rights of public goods (Art. 3/2). Only maritime domain is now in the legal regime of public domains. See the Maritime Domain and Sea Ports Act, Official Gazette NN No. 3/23.

[13] In principle, any natural and legal person may own immovables unless otherwise established by law (Art. 1/1, PA).

[14] Art 114/1, PA.

The requirements for the acquisition of ownership under any of the aforementioned titles are provided for by Arts 115–160, PA.

[15] Art. 114/2, PA.

[16] Art. 115, Arts 119-121, PA. The land register is provided for by the Land Register Act (Official Gazette NN Nos 63/19, 128/22) replacing the former Land Register Act adopted at the same time when the Property Act was adopted (Official Gazette NN Nos 91/96, 68/98, 137/99, 114/01, 100/04, 107/07, 152/08, 126/10, 55/13, 60/13, 108/17).

[17] Art. 128, PA.

[18] Art. 126, PA.

Land acquisition by law (by prescription, by building on another's land, etc.) occurs when specific legal conditions have been fulfilled.[19] In any of these cases, the owner of the real property is authorised to request a declaratory entry in the land register to protect his or her right of ownership against any third person.[20]

When a domestic natural or legal person acquires the ownership of an immovable, all general prerequisites must be met, including those that must be fulfilled for land acquisition based on a particular title. Simultaneously, the notions of a domestic natural person and a domestic legal person are interpreted very broadly.[21] A domestic natural person is a national of the Republic of Croatia,[22] regardless of whether he or she has regular temporary or permanent residence in Croatia at the time of the acquisition. A domestic legal person is any legal person with a registered seat in the territory of the Republic of Croatia. The fact that shareholders, members of management boards, members of boards of directors, executive directors, business shareholders, or similar entities are foreign nationals or foreign legal persons does not impact the status of domestic legal persons. Likewise, a legal person established by foreign capital and with a registered seat in the Republic of Croatia is also considered a domestic legal person. In all of the aforementioned cases, a domestic legal person's registered seat must be in Croatia to uphold their status.

2.2. Specific land acquisition rules for foreigners

When reforming the property law (1997), Croatian legislators opted for a restrictive approach to the regulation of land acquisition by foreigners. As this is an exemption from the principle of equal treatment of foreign and domestic persons[23]

[19] Art. 129, 129/1, PA.

[20] Art.128/2, 127, 130, PA.

[21] The notions of domestic natural persons and domestic foreign persons are not expressly provided for in the PA. Any conclusions are made by way of interpretation of the express provisions of the PA on who is under this Act considered as a foreign domestic person or a foreign legal person (Art. 355, PA).

[22] Under the PA, a domestic person is also a natural person who does not have citizenship of the Republic of Croatia if he or she is an expatriate from the territory of the Republic of Croatia or an expatriate's descendant under the condition that an administrative body authorised to decide on citizenship has established that he or she fulfils all the requirements for acquisitioning the citizenship of the Republic of Croatia (Art. 355/2, PA).

[23] In principle, domestic and foreign persons are equated when acquiring ownership and other real property rights (Art. 354/1, PA). An exemption is prescribed only for land acquisition. Specific requirements are prescribed only for the acquisition of immovables by foreigners. In the acquisition of the restricted real rights on immovables, foreign persons are fully equated with domestic persons, unless it is laid down otherwise in separate regulations. Foreign persons may acquire real and personal servitudes, easement, the right of construction, liens under the same conditions as domestic persons (Art. 354/2, PA). Unless it is otherwise prescribed by a regulation or a treaty, foreign persons as holders of real rights on immovables are not treated differently when it comes to factual and legal disposition of the acquired ownership or other real rights on immovables than domestic persons. The principle of equalisation of foreign and domestic persons is also expressed when acquiring obligations regarding real property authorising the holder to use and/or to use real property for economic purposes such as rent, lease, and concessions.

when acquiring property rights, the PA also expressly defines who, in the context of land acquisition, is considered a 'foreigner'. A foreign natural person is not a national of the Republic of Croatia. Such a person has a registered seat outside the territory of the Republic of Croatia.[24]

Restrictive rules on land acquisition by foreigners are based on two major principles. On the one hand, for any land acquisition by foreigners, apart from the general land acquisition rules valid for domestic acquirers, additional requirements must be fulfilled. These specific requirements differ, depending on the legal basis of the acquisition. The fulfilment of such requirements is a precondition for determining whether a foreign person can acquire ownership of an immovable person in the Republic of Croatia. If these specific requirements are not fulfilled, a foreign person may not become the owner of an immovable in the Republic of Croatia because it will be held that he or she cannot be the holder of ownership of real property. On the other hand, separate laws for particular types of real property (e.g. agricultural land and forests) state that they may not be owned by foreign natural or legal persons. They may not be objects of land acquisition by foreigners, sometimes based on legal titles and sometimes solely based on the legal title for which the acquisition by foreigners is expressly excluded under a separate Act.

The concept of specific land acquisition rules under which foreigners may acquire land has remained intact until today. However, while the general land acquisition rules valid for domestic or foreign persons have not changed, specific land acquisition rules for foreigners have been significantly reformed several times in the course of accession negotiations. Some amendments have led to changes in specific land acquisition rules for all foreigners, whereas others have only changed the position of natural and legal persons from other Member States when acquiring land.

When the SAA entered into force (1 February 2005), it did not distinguish between special requirements for land acquisition depending on whether the acquirer was a person from another Member State or a person from a third country. The same land acquisition rules were valid for all foreigners,[25] which discriminated them from domestic acquirers. Upon the entry into force of the SAA, specific requirements for the acquisition of land by foreigners, regardless of whether they were from other EU Member States or third countries, were provided in the following way: (1) For land acquisition by succession, reciprocity was required.[26] (2) For land acquisition based on other legal grounds (contract, court decision, or decision rendered by other competent bodies by law), two specific requirements were required: 1) reciprocity and 2) prior authorisation by the Minister of Foreign Affairs given upon a prior opinion of the Minister of Justice.[27] Prior authorisation was issued on the request of foreigners who intended to acquire ownership of an immovable or of a person who intended to alienate it. It was issued at discretion

[24] Art. 355/1, 3, PA.
[25] Arts 356, 357, PA/1997.
[26] Art. 356/1, PA/1997.
[27] Art. 356/2, PA/1997.

because there were no rules on the conditions for the issuance of prior authorisation.[28,29] Without the prior authorisation given by the Minister of Foreign Affairs, a contract for the acquisition of ownership was not legally valid.[30] A denial of giving prior authorisation prevented the person from acquiring ownership of the same immovable in the following five years from the day of the submission of a denied request, that is, to request again for prior authorisation for the acquisition of ownership of the same immovable in favour of the same foreign person;[31] (3) Foreign persons were not able to acquire ownership of immovables on any legal ground in the excluded areas,[32] agricultural land[33], forestry land, or protected parts of nature.[34]

Such restrictive and specific land acquisition rules were not considered as having been adjusted to EU laws. Therefore, following the entry into force of the SAA (1 February 2005), the deadlines for the Republic of Croatia started to run to fulfil various obligations connected with the liberalisation of legal transactions of real property for natural and legal persons from other Member States. Specific and express obligations regarding the liberalisation of real property transactions were assumed, with the provisions of the SAA providing for the right of establishment and free movement of capital.[35] These obligations envisaged the progressive adjustment of land acquisition rules to EU laws in two phases.

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[28] There were opinions expressed in literature that while assessing whether to give prior authorisation to acquire ownership, the security and economic interests of the Republic of Croatia had to be considered to prevent foreigners from acquiring real property in particular areas. The attention was often drawn to the circumstances that should have been taken into consideration when issuing such authorisation particularly when the legally based acquisition was involved (matrimonial legacy, construction on another person's land). See Jelčić 2002, 256.

[29] When entering into force, the PA stipulated that consent was not considered as an administrative act (Arts 356/5 and 357/5 PA). However, by its decision of 9 February 2000, the Constitutional Court of the Republic of Croatia abolished the provisions of Arts 356/5 and 357/5, PA stating that prior authorisation obtained by the Minister of Foreign Affairs was an administrative act containing all the elements prescribed in the Administrative Disputes Act. After that, in the cases of rejection of prior authorisation, protection could be gained by way of an administrative action. See the decision of the Constitutional Court of the Republic of Croatia No. U-I-1094/1999 of 9 February 2000 (Official Gazette NN No. 22/00).

[30] Art. 357/1, PA/1997.

For example, see the decision of the Supreme Court of the Republic of Croatia, VSRH Rev 570/2005-2, 01/03/2006 (accessible at www.iusinfo.hr, accessed on: 31/10/2023).

[31] Art. 357/4, PA/1997.

[32] Art. 358/1, PA/1997.

The excluded areas are sectors for which, to protect the interests and the security of the Republic of Croatia, the law prescribes that foreigners may not acquire ownership of real property in their territories.

[33] The prohibitoin

[34] Art. 1/3 of the former Act on Agricultural Land (2001), Art. 1/3 of the former Forests Act (1983), Art. 194/2 of the former Nature Protection Act (2003).

The prohibition of the acquisition of ownership of forests by foreigners was entered by the amendments to the Forests Act (1983) of 2002 (Official Gazette NN, 13/02), i.e. after the SAA had been signed (2001) but before it entered into force (2005).

[35] See Art. 49/5 and Art 60/2, SAA.

When the SAA entered into force, the first phase began. In certain cases, the principle of equalisation of EU companies with domestic companies in terms of use and land acquisition was established at that precise point in time. Under the rule regarding the right to establish subsidiaries and branches of EU companies, the same treatment was ensured when domestic companies were involved in using and renting privately owned immovables.[36] The subsidiaries of EU companies were equalised with Croatian companies in the acquisition and enjoyment of ownership of immovables[37] when that became necessary for administrating economic activities for which they had been established.[38, 39] In such cases, no separate preconditions for land acquisition were required, which was normally the case when a foreign person acquired immovables in the Republic of Croatia. Similarly, subsidiaries of EU companies were equated with Croatian companies with respect to the right to use public goods/goods of common interest when those rights were necessary to carry out the economic activities for which they had been established.[40] Natural resources, agricultural land, forests, and forestry land (i.e. the so-called 'excluded sectors') were exempt from the same treatment.[41] Through the free movement of capital rule, and since the entry into force of the SAA, Croatia committed itself to ensure full and expedient use of its existing procedures for land acquisition by the nationals of EU Member States, except for the excluded areas – agricultural land and protected natural resources.[42] In other words, in the first phase of the accession, Croatia neither assumed the obligation to stipulate specific requirements for the acquisition of

[36] Art. 49/5/a, SAA.

[37] The subsidiaries of EU companies, although the overwhelming interest over them belonged to EU companies registered in some other Member State, were considered as domestic legal persons because of their registered seats in the Republic of Croatia. Therefore, in legal transactions of real property, such subsidiaries were not considered as foreign but as domestic legal persons. Separate rules on specific requirements for the acquisition of ownership in favour of foreign legal persons did not apply to them. See Jelčić 2002, 251.

[38] Art. 49/5/b, SAA.

[39] The subsidiaries of EU companies, at the moment of entry into force of the SAA, did not have the right of acquiring ownership of immovables under the same conditions as domestic companies because they were not companies seated in Croatia. There was no separate regime for the subsidiaries of EU companies regarding the acquisition of ownership of real property in the Republic of Croatia. For the acquisition of real property ownership of EU companies who were established in Croatia via their subsidiaries, the existing restrictive and discriminatory regime for the acquisition of ownership of immovables was kept under some specific requirements.

[40] Art. 49/5/b, SAA.

[41] Art. 49/5/b, SAA.

[42] Art. 60/2, SAA, Annex II.

In the context of the free movement of capital, forests were not considered as excluded areas. When the SAA was signed, the acquisition of forests and forestry land by foreigners was not prohibited. It was introduced only as late as in 2002. Thus, the EU moratorium established by the Treaty of Accession for agricultural land did not include forests.

ownership[43] nor organised the procedures by which these requirements were realised from the entry into force of the SAA.[44]

However, in the second phase of the accession process, Croatia bound itself to gradually amend its legislation to equate natural and legal persons from other EU Member States with domestic natural and legal persons when realising EU market freedoms and freedom of land acquisition. Within four years following the entry into force of the SAA, within the right to establishment, it was necessary to consider ways to extend the rights of subsidiaries and branches of EU companies to land acquisition in the excluded areas.[45] Under the rule of the free movement of capital, within four years following the SAA, Croatia was bound to gradually align its legislation regarding the acquisition of real property in the country to ensure the same treatment of nationals of other Member States, as is the case with Croatian nationals.[46] Croatia had, thus, actually assumed the obligation to gradually liberalise land acquisition and, until 1 February 2009, was to fully equalise the position of natural and legal persons from other Member States with domestic persons. However, this obligation did not include the excluded areas (i.e. agricultural land and protected national resources). It was stipulated that only upon the expiry of four years following the entry into force of the SAA would the modalities be examined to extend the same treatment of EU citizens and legal persons to the acquisition of immovables in the excluded areas.[47]

3. Gradual harmonisation of land acquisition rules with EU laws

3.1. Full and expedient application of the existing land rules (PA/2006)

The full and expedient application of existing land acquisition rules for foreigners[48] was accomplished through amendments to the PA of 2006 (PA/2006).[49] These amendments created the conditions for a more efficient implementation of the procedure of issuing prior authorisation for land acquisition by foreigners. At that time, neither the specific land acquisition rules for foreigners nor the rules prohibiting the acquisition of excluded areas, that is, agricultural land, forests, and protected areas of nature, were changed. No legislative interventions to abolish the discriminatory treatment of EU nationals and legal persons acquiring land were made at that point. Simultaneously, the new rules on the expedient application of the existing land acquisition rules did not only apply to nationals and legal persons from EU Member States but also to foreigners from third countries.

[43] In this regard, see the joint statement on Art. 60 of the SAA, which states that the application of Art. 60 SAA shall in no way impact the regulations by which the parties stipulate the system of ownership except when it is expressly provided for in the SAA.
[44] However, it was still allowed to keep the proportional and non-discriminatory restrictions on the acquisition of ownership justified by public interests. See the joint statement on Art. 60, SAA.
[45] Arts 49/5/b, 49/5/c, SAA.
[46] Art. 60/2, SAA.
[47] Art. 60/2, SAA.
[48] Art. 60/2, SAA,
[49] Act on Amendments to the PA (Official Gazette NN 79/06).

In short, the amendments to the PA of 2006 simplified and shortened the procedure of obtaining prior authorisation for land acquisition by any foreigner.

The procedure for issuing prior authorisation was simplified and shortened by placing it under the exclusive jurisdiction of the Ministry of Justice.[50] All competencies for the issuance of prior authorisation for the acquisition of land by foreign persons were transferred to the Minister of Justice of the Republic of Croatia.[51] Any role of the Minister of Foreign Affairs was excluded.[52] However, all other existing land acquisition rules regarding the content of prior authorisation, the prohibition of submitting any new request for such authorisation within a five-year period in the case of initial denial of consent, or any similar requirements, were kept. The only provision that was amended was one on the legal effects of denying prior authorisation on the contract, on the basis of which a foreign person ought to have acquired ownership of an immovable. Without prior authorisation given by the Minister of Justice, the contract was considered to be null and void.[53, 54]

3.2. Equal treatment for the acquisition of land by EU nationals and legal persons (PA/2008)

Equal treatment for the acquisition of land by EU nationals and legal persons was established before the Republic of Croatia acceded to the EU (1 July 2013). Equal treatment was established on 1 February 2009 when the four-year period expired (as prescribed in the SAA), during which Croatia was obliged to ensure equal treatment for the acquisition of land by nationals and legal persons from other Member States. With amendments to the PA of 2008,[55] specific rules for the acquisition of real property by foreigners ceased to be valid for nationals and legal persons from other Member States. Nationals and legal persons from other Member States were allowed to acquire land ownership under the same conditions as Croatian citizens and legal persons seated in Croatia.[56] Equal treatment was established for EU nationals and legal persons as domestic citizens, regardless of the grounds on which they acquired ownership (e.g. contracts, inheritance, court decisions, and laws).

[50] Article 357, PA/2006.
[51] Article 356, PA/2006.
[52] The new procedure of the issuance of prior authorisation for land acquisition also applied to any already initiated procedures transferred to the exclusive competence of the Minister of Justice (Art. 11 of the Act on the Amendments to the PA, Official Gazette NN No. 79/06).
[53] Art. 357/1, PA/2006.
[54] However, the PA did not expressly lay down from which point in time a contract was considered as null and void, i.e. whether the contract had been null and void already at the moment it had been signed, or from the moment when the Minister of Justice rejected prior authorisation. The following questions also remained: What was the impact of issuing prior authorisation on the validity of the contract? Did the convalidation of the contract take place? Did it become valid already at the moment it had been entered into, or only upon the issuance of prior authorisation? For more see Jelčić 2002, 30.
[55] Act on Amendments to the PA (Official Gazette NN No.146/2008).
[56] Article 358a/1, PA/2008.

Consequently, since 1 February 2009, only general land acquisition rules have been applied to land acquisition by EU nationals and legal persons. Only agricultural land and protected areas of nature were excluded from equal treatment.[57]

The effects of such equal treatment, applied retroactively to all contracts on land acquisition, as concluded by EU nationals and legal persons prior to amendments to the PA, became effective on 1 February 2009. The aim was to establish the same non-discriminatory treatment for all EU nationals and legal entities who had already entered into contracts on land acquisition, regardless of when the contract was concluded and whether it applied to prior authorisation under previous regulations or whether the authorisation was refused. Such an approach was necessary because, at the time of the entry into force of the PA/2008, a significant number of contracts entered into by EU nationals or legal persons had already existed; in such cases, no prior authorisation by the Minister of Justice was requested, for which the authorisation procedure was pending or where prior authorisation had already been refused. Under the PA/2006, in all the aforementioned cases, the contracts on land acquisition were considered null and void and did not produce any legal effects. However, for all such contracts, the PA/2008 strictly prescribed that they *ex lege* became valid (convalidation) although entered into prior to 1 February 2009.[58] Therefore, any procedures to obtain prior authorisation initiated before the PA/2009 entered into force *ex officio* were terminated.[59] Finally, such an approach resulted in a situation where land acquisition by EU nationals and legal persons, who had entered into contracts prior to 1 February 2009, only general land acquisition rules applied, similar to the case of domestic persons.

3.3. Gradual extension of equal treatment of EU nationals and legal persons to the excluded areas

The amendments to PA/2008, by which the same legal regime was established for EU nationals as for domestic persons, did not, however, have any impact on the change of rules on land acquisition in the excluded areas. The prohibition imposed on EU nationals and legal persons for the acquisition of agricultural land and protected parts of

[57] Article 358a/2, PA/2008.

[58] Art. 6 of the Act on Amendments to the PA of 2008. As the result and in practice, the actions for establishing the nullity of contracts made without prior authorisation with EU nationals prior to the amendments of the PA of 2008 were rejected. See the decision of the Supreme Court of the Republic of Croatia, Rev 4988/2019-2, 19/01/2021; decision of the County Court in Dubrovnik Gž-1073/15, 28/11/2016. In addition, the claims for the issuance of documents necessary for the registration of ownership in favour of EU nationals started to be accepted even without prior authorisation. See the decision of the Supreme Court of the Republic of Croatia, Rev 660/2010-2, 13/07/2011. However, since the entry into force of the PA/2008 (1/2/2009), regarding the contracts entered into with EU nationals, calculating the limitation period for the real property transaction tax was re-started, although from the conclusion of the contract and until that particular point in time, the limitation period for tax due had already expired. See the decision of the Administrative Court in Rijeka, 8 UsI-1454/12-11, 22/07/2013 (accessible at www.iusinfo.hr, accessed on: 31/10/2023).

[59] Art. 5 of the Act on Amendments to the PA of 2008.

nature continued to exist.[60] The extension of the equal treatment of EU nationals and legal persons to excluded areas was carried out gradually and started before Croatia acceded to the EU. At the time of the entry into force of the PA/2008, the prohibition against the acquisition of forests and forestry land ceased to exist for EU nationals and legal persons. Starting on 1 February 2009, EU nationals and legal persons were allowed to acquire forest and forestry land under the same conditions as domestic persons.[61] The prohibition against the acquisition of protected areas of nature ceased to exist by the entry into force of the Nature Protection Act (6/7/2013) for any foreign person, including those from third countries.[62]

Following accession to the EU, Croatia was allowed to temporarily maintain the discriminatory rules under which all EU nationals and legal persons were banned from acquiring agricultural land for seven years, with the possibility of prolonging it for an additional three years. The transitional period was stipulated in the Treaty of Accession within the transitional measures for the free movement of capital.[63] The prohibition regarded the acquisition of agricultural land by the nationals of another Member State, by the nationals of the States signatories of the European Economic Area Agreement

[60] Art. 358a/2, PA/2008.

[61] The prohibition on forests and forestry land was abolished because, under the SAA, forests and forestry land were not considered to be excluded areas (ANNEX VII).

[62] The Nature Protection Act (Official Gazette NN Nos 80/13, 15/18, 14/19, 127/19).
In the process of accession, the Republic of Croatia did not seek a special moratorium for the protected areas, whereby the prohibition on the acquisition introduced by earlier regulations on the protection of nature would continue to be effective. Following the EU accession (1/7/2013), a new Nature Protection Act was adopted abolishing the prohibition of the acquisition of the protected parts of nature by any foreign persons. By the entry into force of the new Nature Protection Act, the preconditions were that foreign persons, having already entered into contracts on the acquisition of real property in the protected parts of nature but not having been allowed to register it in the land register, were, thus, permitted to make the corresponding entries in the land register as the owners. In the Stephen OGDEN' case against Croatia (Decision of 10/02/2015, Petition No. 27567/13), the European Court of Human Rights held that because of such postponement of the acquisition of ownership, the acquirer was not entitled to indemnification for the infringement of his fundamental rights. The ECHR held that no damage occurred as the acquirer had bought the immovable for his personal needs and was not factually prevented from using it, i.e. he could have always used it for the purpose for which he had bought it.

[63] Annex V to the Accession Treaty. "*The main reason for the transitional period granted at the time of Croatia's accession to the European Union was the need to safeguard the socioeconomic conditions for agricultural activities following the introduction of the single market and the transition to the common agricultural policy in Croatia. In particular, the transitional period aimed to meet concerns raised about the possible impact on the agricultural sector of liberalising the acquisition of agricultural land. This was due to significant differences in land prices and farmers' purchasing power in Croatia compared with Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom (hereinafter the EU-15). The transitional period was also designed to: (i) ease the process of restitution and privatisation of agricultural land; (ii) improve the land registers and cadastre and regulate property rights; and (iii) demine agricultural land."* Taken from point 2 of the Commission Decision (EU) 2020/787 of 16 June 2020 extending the transitional period concerning the acquisition of agricultural land in Croatia, C/2020/3950, OJ L 192, 17/6/2020, pp. 1-3.

(EEAA) and by legal persons formed in accordance with the laws of another Member State or an EEAA State. The prohibition included the acquisition of agricultural land based on a contract and was stipulated in the Agricultural Land Act (2008), which was effective at the time of signing the Accession Treaty. That is, EU nationals and legal persons were still banned from contractually acquiring agricultural land. Regarding other legal bases (i.e. succession, laws, and court decisions), EU nationals and legal persons were permitted to acquire agricultural land. The Agricultural Land Act (2008) prohibits the acquisition of agricultural land only on the basis of contracts/legal transactions.[64] Therefore, additional obligations were stipulated for Croatia. For example, Croatia should not introduce any new restrictions on the acquisition of agricultural land, except for those laid down in the Agricultural Land Act of 2008. Croatia also committed that EU nationals and legal persons, when acquiring agricultural land, would not be treated in a more restrictive way than third-country nationals or legal persons. After all, it was a transitional measure within the principle of the free movement of capital and did not regard the principle of freedom of establishment.[65] It was expressly stipulated that the prohibition on acquiring agricultural land did not include self-employed farmers who were nationals of another Member State and wished to establish themselves and reside in Croatia. During Croatia's accession to the EU, self-employed farmers were allowed to acquire agricultural land when they wanted to start doing business in the country. Upon the expiry of the period of seven years, the European Commission extended the transitional period for the acquisition of agricultural land in Croatia for three years.[66]

The transitional period expired on 30 June 2023. Since then, there have been no prohibitions against EU nationals and legal persons from acquiring real property in the excluded areas. EU nationals and legal persons, when acquiring agricultural land, forests, forestry land, or the protected parts of nature, are fully equated with domestic persons. The principle of equal treatment applies to all the rights and obligations of EU nationals and legal persons as owners of real property. All separate regulations providing specific

[64] Annex V to the Accession Treaty expressly provides that Croatia "*may keep in force the restrictions laid down in its Agricultural Land Act (Official Gazette 152/08), as in force on the date of signature of the Treaty of Accession."* Article 2/2 of the Agricultural Land Act (Official Gazette NN No.152/08) expressly stated that foreign natural and legal persons were not allowed to acquire ownership of agricultural land by way of legal transactions unless otherwise set forth in a treaty.

[65] See Dudás 2022, 25–26

[66] Commission Decision (EU) 2020/787 of 16 June 2020 extending the transitional period concerning the acquisition of agricultural land in Croatia, C/2020/3950, OJ L 192, 17/6/2020, pp. 1–3. The main reasons for extending the transitional period were as follows: agricultural land prices in Croatia that were among the lowest in the EU, the noticeable differences in agricultural land prices between Croatia and almost all other Member States, in particular the EU-15 that could hinder smooth progress towards price convergence, the gap in the *per capita* GDP in the purchasing power standards between Croatia and almost all other Member States, relative high agricultural land prices for the purchasing power in Croatia, the predominance of small family farms and the fragmented agricultural land holdings, a still ongoing consolidation process of these small farms, the lower productivity of Croatian farmers compared to other European farmers, a still ongoing project on privatisation and restitution of land, regulation of property rights, putting the land register and cadastral data in order, continuing the process of demining of agricultural land suspected of still containing mines. See points 4–9 of the Commission Decision.

legal regimes for agricultural land, forests, and protected parts of nature apply in the same manner to EU nationals and legal persons as owners of such immovables, as is the case with domestic persons. The rules governing the acquisition, disposal, or protection of real property apply equally to any owner. Separate regulations proclaim that these immovables are considered goods of interest to the Republic of Croatia and, thus, enjoy special protection.[67] Therefore, any real property owner, regardless of whether they are domestic persons, EU nationals, or legal persons, has many obligations and restrictions regarding the use or disposal of their real property.

4. Land acquisition by foreigners from other countries following the accession

The liberalisation of legal transactions to harmonise land acquisition rules with EU laws has only partly changed the legal position of natural and legal persons from other countries when acquiring real property. Even after acceding to the EU, Croatia retained all pre-existing restrictive and discriminatory land acquisition rules. However, major shifts have occurred in favour of foreigners from other countries. The procedure for obtaining prior authorisation for the acquisition of real property is now under the amended version of the PA/2006, which is simplified and much faster. The Minister of Justice is responsible for issuing prior authorisation for land acquisition.[68] In addition, the cancellation of the prohibition on acquiring protected parts of nature includes people from other countries. Separate rules on financial compensation have been introduced for foreigners who cannot acquire immovables by succession in the excluded areas. The position of foreigners from other countries was not impacted in any way by the transitional period during which EU nationals were banned from acquiring agricultural land or upon its expiry.

The most important change in the status of foreigners from other countries when acquiring land following Croatia's accession is manifested in the application of Article 64(1) TFEU amended by Article 12 of the Treaty of Accession.[69, 70] Article 64(1) of the TFEU now reads as follows: *"The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999. In respect of restrictions existing under national law in Croatia, the relevant date shall be 31 December 2002."*

[67] See Art. 52 of Constitution of the Republic of Croatia.
[68] Art. 357/1, PA.
[69] Art. 12 of the Treaty of Accession reads as follows: *"In Article 64(1) of the TFEU, the following sentence is added: 'In respect of restrictions existing under national law in Croatia, the relevant date shall be 31 December 2002'."*
[70] The amendment to Art. 64/1 of the TFEU in connection with a specific date for Croatia is provided for in Art.12 of the Treaty of Accession of the Republic of Croatia, OJ L 112, 24/4/2012, pp. 10-110.

Under Article 64 (1) of the TFEU, Member States in relation to third countries may apply only national restrictions on the movement of capital that existed on the date specified in Article 64(1). It follows from Article 64(1) that Member States, in relation to nationals and legal persons from third countries, are allowed to apply only the national restrictions that existed on a specific date in connection with any transactions involving real property which, according to the TFEU, were considered the free movement of capital. These measures may be applied even when they discriminate against third-country nationals and legal persons. In addition, Article 64/1, in connection with Article 63/1 of the TFEU, sets forth that Member States can no longer introduce any new restrictions on investing in real property, except for those already existing on the date specified in Article 64/1 of the TFEU. Indeed, Member States may not take any new measures against third countries other than those specified in Article 64/1 of the TFEU and, similarly, tighten or aggravate the requirements for investing in real property in their territories. It is important to add, however, that Member States are not obligated to liberalise legal transactions of immovables in relation to third countries; they are only bound to refrain from measures by which the position of nationals or legal persons from third countries, when investing in real property, would in any way become worse than the status they used to enjoy on the date specified in Article 64(1).[71]

Stipulating 31 December 2002 for the Republic of Croatia as the reference date for allowing restrictions on the free movement of capital, including real property, has made it possible that even after acceding to the EU, restrictions on the movement of capital, in relation to third-country nationals, apply to the acquisition of immovables introduced in the Croatian legal system only after 31 December 1993 and 31 December 2002. This is precisely why Croatian law permits the application of specific land acquisition rules to third countries and prohibits the acquisition of agricultural land, forests, and forestry land. These were specific land acquisition rules adopted prior to 31 December 2002 and were valid for nationals and legal persons from third countries. If no specific date was laid down in Article 64/1 of the TFEU (31 December 2002), the rule on the admissibility of restrictions imposed on third countries valid on 31 December 1993 applied also to Croatia. This would exclude the possibility that after the accession, in relation to third countries, separate requirements for the acquisition of ownership of immovables laid down in the Act on Ownership and Other Real Rights, effective since 1 January 1997,[72] would continue to apply, as well as the restrictions on the acquisition of ownership of forests and forestry land introduced as late as in 2002.[73]

[71] See Calliess & Ruffert 2017, 1065.

[72] If no specific date for Croatia was laid down in Art. 64/1 of the TFEU, only the rules on the acquisition of ownership of real property in favour of foreign persons under Art. 82c of the former Act on the Basic Ownership Relations of 1980 could apply because this Act was valid on 31 December 1993.

[73] The prohibition on the acquisition of forests by foreign persons was prescribed as late as in 2002 (Art. 1 of the Act on the Amendments to the Forests Act, Official Gazette NN 13/02), and it was kept for foreignes from other countries also in the subsequent Forests Acts (e.g. Art. 56/2 of the Forests Act, Official Gazette NN Nos 68/18, 115/18, 98/19, 32/20).

Under Croatian law, no new restrictions can be imposed on the acquisition and use of immovables by third-country nationals, except for those that existed on 31 December 2002. Moreover, the prohibitions against the acquisition of ownership could not be extended to any other type of real property for which no such stipulations existed prior to 31 December 2002. No other measures could be imposed to introduce new direct or indirect discriminatory restrictions on third countries when it comes to investments in immovables, their use and disposal becoming non-existent on 31 December 2002. The imposition of such measures would be contrary to Articles 63 and 64 of the TFEU and would be considered a violation of the obligations specified in the TFEU. The legal position of foreigners from third countries may only change in the days to come if, for them, a more favourable legal regime for land acquisition is established.

Following the accession to the EU and the expiry of the moratorium on agricultural land, the specific requirements for the acquisition of land by natural and legal persons from third countries[74] are regulated as follows: (1) For land acquisition by succession, reciprocity must exist.[75] (2) For land acquisition based on other legal grounds (legal transactions, laws, court decisions, or decisions by other competent bodies), two separate preconditions must be met: 1) reciprocity[76] and 2) prior authorisation by the

[74] The notions of foreign natural and foreign legal persons are still the same as provided for from the very beginning in Art. 355 of the PA. See 2.1. For foreign acquirers, the applicable rules are those valid at the moment of the acquisition of the right. It arises from the case law that the applicable moment is the conclusion of the contract. Therefore, in the cases where the contract had been entered into prior to the dissolution of the Republic of Croatia from Yugoslavia (8/10/1991), the acquirers of immovables under those contracts were not considered as foreigners under the PA. In such cases, no separate requirements were imposed for land acquisition normally required when a foreigner from another country acquired real property. See the decisions of the High Administrative Court of the Republic of Croatia, Us11613/2011-4 of 12/6/2014 i Us-7721/2011-7, 29/05/2013, Decision of the County Court in Varaždin, Gž Zk 32/2018-2, 16/04/2018 (accessible at www.iusinfo.hr, accessed on: 31/10/2023).

[75] Art. 356/1, PA. A foreign person may become the owner of an immovable in the Republic of Croatia by succession only under the condition that a Croatian legal person, or a Croatian national, may acquire ownership of immovables by succession under the law of the country whose national is the foreign person who ought to acquire ownership of an immovable by succession in Croatia. If this specific requirement is fulfilled, a foreign person becomes the owner of the immovable at the moment the procedure of succession is started, i.e. at the testator's death (Art. 128/1, PA). However, this condition of reciprocity must be distinguished from the reciprocity under the Inheritance Act where it is necessary to acquire the status of an heir (Official Gazette NN Nos 48/03, 163/03, 35/05, 127/13, 33/15, 14/19). Under the Inheritance Act, foreigners are, under the condition of reciprocity, equal to Croatian nationals in the matters of succession. The reciprocity is implied unless the opposite is established on the request of the person having legal interest in the matter (Art. 2/2 of the Inheritance Act). When real property is the subject of inheritance, both requirements for reciprocity must be met – the reciprocity of the capacity to inherit (Art. 2/2 of the Inheritance Act) and that of the capacity for acquiring real property by succession (Art. 356/1, PA).

[76] Reciprocity exists if a Croatian national or a Croatian legal person, under the same legal ground, may acquire ownership of an immovable in the country of the foreign person.

Minister of Justice.[77] Prior authorisation is given upon the request of the foreign person intending to acquire ownership of an immovable or the person intending to alienate it.[78] Prior authorisation continues to be issued at discretion but the decision of the Minister of Justice is considered to be administrative in nature, which can be countered with another administrative action.[79] Without prior authorisation by the Minister of Justice, contracts aimed at acquiring ownership are null and void.[80] The same kind of prior authorisation is required for the acquisition of immovable under any other legal ground (court decision, law, etc.).[81] Denying prior authorisation prevents the seeker from acquiring ownership of the same immovable in the next five years following the day of the submission of the subsequently denied request, that is, from repeating the submission of the request for authorisation in favour of the same foreign person.[82] (3) There is no legal basis on which foreign persons may acquire ownership of real property in the excluded sectors, such as excluded areas,[83] agricultural land,[84] forests, or forested land.[85;86] (4) Foreign people who may not acquire ownership of real property in the excluded sectors by inheritance are entitled to monetary compensation based on the regulations governing expropriation.[87]

In every concrete case, the applicant must prove the existence of reciprocity. See the decision of the High Administrative Court of the Republic of Croatia, Us-2755/2007-5, 22/10/2009 (accessible at www.iusinfo,hr, accessed on: 31/10/2023).

[77] Art. 356/1, PA.

[78] Art. 357/2, PA.

[79] Art. 356/3, PA.

[80] Art. 357/1, PA. Therefore, without prior authorisation, a pre-notation in favour of a foreign acquirer cannot even be carried out. See the Decision of the County Court in Varaždin, Gž.586/05-2, 18/08/2005.

[81] Prior authorisation is required even when a spouse or an extra-marital partner ought to acquire co-ownership of an immovable being a matrimonial property acquired during a marital or an extra-marital union. See the Decision of the Supreme Court of the Republic of Croatia, VSRH Rev 1003/2007-2, 19/02/2008.

[82] Art. 357/3, PA.

[83] Art. 358/1, PA. The excluded areas are the areas which, to protect the interests and security of the Republic of Croatia, are proclaimed to be areas where foreigners may not be entitled to any ownership rights.

[84] Art. 2/2 of the Act on Agricultural Land (Official Gazette NN, Nos 20/18, 115/18, 98/19, 57/22).

[85] Art. 56/2, The Forests Act.

[86] Because of the prohibition of acquisition, land register courts reject entries by foreign acquirers as the owners from other countries. See the Decision of the County Court in Varaždin, Gž Zk 469/2018-2, 15/04/2020 (accessible at www.iusinfo,hr, accessed on: 31/10/2023). The prohibition against acquisition is also valid when an immovable in the excluded areas is sold in enforcement proceedings. It is not possible to sell it to a foreign person in a public auction. See the Decision of the County Court in Varaždin, Gž.5129/11-2, 22/02/2012. However, regarding the immovables in the excluded areas of the Republic of Croatia, the rules on prior authorisation do not apply. See the Decision of the Administrative Court of the Administrative Court of the Republic of Croatia, Us-11379/2007-4, 09/03/2011.

[87] Article 358b, PA. For example, see the Decision of the Supreme Court of the Republic of Croatia, VSRH Rev 541/2010-2, 17/03/2015.

Compensation is granted based on the final decision regarding the inheritance. The Republic of Croatia is obliged to pay compensation (the market value of the real property in question) by becoming *ex lege* owner of the real property a foreign person may not inherit.[88,89]

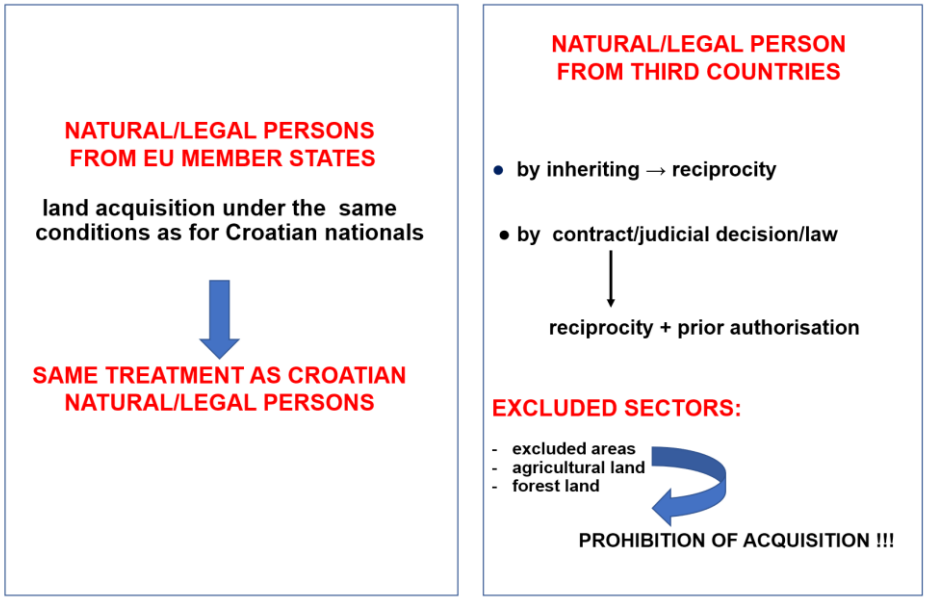

Table no. 1

4. Conclusion

During the process of accession to the EU, the Republic of Croatia fulfilled all its obligations regarding the liberalisation of land acquisition for natural and legal persons from other Member States. The results of the adjustment to EU laws following the moratorium on the acquisition of agricultural land by the nationals of EU Member States (30 June 2023) demonstrate that, in Croatia, two different land acquisition regimes are still valid, depending on whether the land is acquired by domestic citizens and nationals of other EU Member States equated with them or by foreigners from third countries. Such liberalisation of land acquisition has largely increased the acquisition of immovables by nationals from other Member States and, in particular, as their second homes along the Croatian coastal area.

[88] Compensation is determined according to the Expropriation and Compensation Act (Official Gazette NN, Nos 74/14, 69/17, 98/19). The compensation is determined in cash and amounting to the level of the market value of the immovable (Art. 46/1).

[89] Any secured rights on such real estate are transferred to the compensation the heir may claim from the Republic of Croatia (Article 358b/2, PA) while all other encumbrances remain attached to real property (Article 358b/3, PA).

With regard to agricultural land, there are still many obstacles to the acquisition of ownership, particularly because of disorderly ownership relations, small agricultural plots not attractive for foreign investments, dated land register files and small, undeveloped and fragmented agricultural holdings. In the course of the extended EU moratorium, many causes for its introduction, and then also extension, were eliminated. Therefore, various reform measures must be implemented to enhance the use of agricultural land and the development of the entire sector. However, when speaking of EU nationals, such measures may no longer be discriminatory compared to Croatian nationals.

At this point, there are no indications or discussions about the necessity to liberalise land acquisition by natural and legal persons from third countries or to eliminate restrictions and prohibitions against their land acquisition of land. Presumably, specific discriminatory requirements regarding land acquisition will be imposed, and rules banning the acquisition of agricultural and forestry land will not be abolished. This trend has been confirmed by numerous recent amendments to separate the regulations on agricultural land, forestry land, and protected parts of nature. Although such legal regimes involving immovables are frequently amended, the changes do not relate to the legal status of nationals from other countries when acquiring land.

Following accession to the EU, the protection of immovables of special interest for the Republic of Croatia and reforms in the agricultural sector are carried out by non-discriminatory instruments applied in the same way to all owners of such immovables regardless of whether they are domestic or foreign. Separate laws provide for specific owners' obligations and various restrictions for possessing, using, and factually and legally disposing of particular immovables aimed at protecting different economic, cultural, defensive, urbanistic, and other public interests.[90] Violations of such obligations are punished by misdemeanour fines and sometimes by sequestration (dispossessing the owner).[91] There is a growing trend of prescribing specific restrictions on the legal disposal of immovables of interest for the Republic of Croatia (the right of pre-emption)[92] aimed at transferring such immovables to their ownership to ensure their effective protection.

[90] For example, an obligation was determined for agricultural land suitable for agricultural production, and the obligation to pay compensation for the restructuring of land for the purposes of construction (Arts 4, 23 et al of the Agricultural Land Act). About separete restrictive rules for the dissolution of co-ownership of agiruclutural land owned by state and private personse see more in Josipovic 2021, 106. Specific obligations for forests and forestry land were established for the use of forestry land, the picking of forest fruits and for the cutting of trees (Arts 36–38 et al of the Forests Act). Regarding the protected parts of nature, the restrictions against the owners are established depending on the type of the protected part of nature (Arts 165–174 of the Nature Protection Act).

[91] For example, see Art. 14 of the Agricultural Land Act, Art. 32/3, PA.

[92] For example, see Art. 165 of the Nature Protection Act.
Croatian Agricultural Land Act does not regulate statutory pre-emption right in a case of legal disposal of agricultural land. Is some other Member States separate laws regulate pre-emption right for legal disposal of agricultural land. See for example for Slovenia Avsec 2021, 27–29

These restrictions are often accompanied by banning the further alienation of immovables from state ownership[93] or stipulating separate restrictive rules and procedures for their alienation from state ownership.[94]

However, these trends have revealed several challenges. One major challenge is ensuring the effective management, disposal, and protection of immovables, particularly those owned by the state. While establishing separate regimes for individual types of immovables, a challenging task has been to ensure an optimal balance between public and private interests, which is important for the justification and proportionality of ownership restriction. To answer the question regarding how to respond to all these challenges in the future, it is crucial to determine whether the liberalisation of legal transactions involving immovables will be considered a successful contribution to developing the Croatian legal and economic system, particularly its agricultural sector.

[93] For example, see Art. 56/1 of the Forests Act.

[94] For example, see Arts 27- 82a of the Agricultural Land Act. For example, see Arts 51–60 of the Forests Act.

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Ágoston KOROM*

How the KOB SIA case altered the Member States' margin of appreciation: with particular attention to the judgment's possibly consistent characteristics and the relevant provisions of Directive 123/2006

Abstract

Several studies and scientific workshops have considered the member states' rules – within the framework of EU law – on the ownership and use of agricultural and forest property, considering that this area is significant not only for the member states that acceded after 2004, such as Hungary but also for the founding members. These examinations have focused on the public interests acknowledged by the Court of Justice of the European Union (CJEU), such as the preservation of the rural population, the promotion of small- and middle-sized, livable properties, and the easing of speculative pressure on the land market, which should be achieved in practice without compromising EU law – especially its fundamental freedoms. This characteristic of the CJEU's relevant case law primarily led to the application of the free movement of capital; nevertheless, the CJEU's judgment in the KOB Sia case resulted in a significant change in this area, the main subject of the current examination. This article will consider how the CJEU was altered. Moreover, we examine whether this change could be consistent. We find that the judgments referred by the CJEU in the KOB Sia case and Directive 123/2006's relevant provisions can serve as a starting point in deciding how the member states' margin of appreciation was altered.

Keywords: Member state's margin of appreciation in land policy, free movement of capital, targets of the CAP in the land policy, legal development in the KOB Sia case, freedom of establishment, Services Directive the possible consistency of the case law, relevant provisions of the directive

1. Introduction

Several authors[1] have considered member states' margin of appreciation in restricting the ownership and use of agricultural lands and forests within the framework of EU law. This issue is particularly significant for the former socialist member states but can also be relevant for the founding members.

The member states' margin of appreciation on land policy or legislation is defined by the targets of the member states and how they intend to reach these goals.

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[1] See Hornyák 2018, 107–131; Hornyák 2021, 86–99; Csák 2018, 5–32; Olajos 2017, 91–103; Olajos 2018, 157–189; Olajos & Juhász 2018, 164–193; Raisz 2022; Szilágyi 2017a, 214–250.

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The European Union has no power to regulate this field, but the member states own this power; however, this does not mean that introduced measures are free from EU control

Article 345 of the TFEU is often interpreted to exclude the EU's intervention in ownership issues. Nevertheless, this should be approached differently. As seen below, the member states cannot justify restrictions on internal market provisions like the free movement of capital and the freedom of establishment by invoking Article 345.

The CJEU established a practice that any measures of the member state that restrict or can restrict the free movement of capital, labor, goods or investment are subject to EU control. In this light, any measures taken by the member states that can be considered a barrier to exercising fundamental economic freedoms are generally incompatible with the EU law.

However, the member states' measures restricting fundamental economic freedoms can be justified in certain circumstances. Regulation on economic grounds may not be compatible with EU law.

The first criterion for examining a certain national measure is whether the legislation is directly discriminative on the grounds of nationality. Further examination is only possible if the national measure in question does not contain direct or indirect discrimination on the grounds of nationality.

After this, the member state's measure can be examined to decide whether the imposed restriction can be considered public interest. Social objectives can often be acceptable grounds for restricting fundamental economic freedoms. If the member state's measure is directed to reach the public interest, that does not necessarily mean it meets the criteria in EU law. In light of the CJEU's case law, the member state's measures should be examined by further criteria. It must therefore be examined whether the legislation is appropriate or necessary to achieve the objectives.

The principle of proportionality requires that the measures taken by member states are at most the necessary level to achieve the objectives. Under the principle of consistency, a member state's legislation can be considered as realizing public interest only if the member state consistently implements it. This means that a member state cannot derive restrictions on economic freedoms from a particular public interest if its activity is not in line with the public interest in question. For example, it cannot claim that it is in the public interest to discourage certain forms of gambling if the state owns a company carrying out such activities.

Several other - often overlooked – aspects should be taken into account: the fact that a member state's provision has been in force for decades does not involve that it meets the requirement under the EU law and can be transformed into other member state legislation.

On the one hand, unlike public international law, EU law cannot rely on the fact that a similar provision can also be found in other member states' laws. A provision incompatible with EU law may be applied in a member state for decades if the European Commission does not launch infringement proceedings or the CJEU does not examine it in a preliminary ruling.

On the other hand, deciding that a member state's legislation is compatible with the EU law cannot be automatically transposed into the legal order of another member state because the logic of the member states' legislation is different.

We will examine the specifics of the member states' margin of appreciation on land policy in light of the EU's control over fundamental economic freedoms. This will first consider the case law developed by the CJEU on the free movement of capital. Then we will examine how the judgment in the KOB Sia case altered this context.

2. The member states' margin of appreciation on land policy in light of the free movement of capital

Secondary EU acts do not cover the member states' margin of appreciation on land policy, but the CJEU developed them. The following will examine the CJEU's case law before the KOB Sia judgment.

In the Ospelt judgment, the Court of Justice of the European Union examined the compatibility of an act of the Republic of Austria with the free movement of the capital.[2] The provision in question required prior authorization for the acquisition of agricultural lands. The CJEU found the legislation compatible with the EU law as it aimed to preserve the rural population, prevent speculation and create viable farms.

According to the CJEU, these objectives align with Article 39 of the then-numbered Treaties, which, among other things, focuses on preserving farmers' quality of life. This latter objective is one of the main targets of the Common Agricultural Policy (CAP): besides the public interests, the positive integration form – the CAP's goals can also strengthen the limitation of the fundamental economic freedoms in this area.

The Court examined the requirement of residency in the Festersen case in light of the Danish regulation in question and found that this condition was incompatible with the EU law.

In one's view, in the Festersen and Osplet judgments, the CJEU recognized that the objectives of the land policy could restrict fundamental economic freedoms and are in line with the objectives of the CAP. Nevertheless, the control on the negative form of integration, i.e. the fundamental economic freedoms,[3] combined with the requirements of the general principles of EU law and fundamental rights – delivered from the ECtHR's case law – does not allow the enforcement of land policy's objectives. It should be noted, however, that judgments resulting from preliminary rulings are relatively rare in this area and that the European Commission does not typically launch infringement proceedings.

The Segro[4] and the Commission v. Hungary case judgments related to Hungarian usufruct rights' terminations cannot be considered purely related to the member states' margin of appreciation on land policy. These judgments are closely linked to the derogation period and its expiration on the Hungarian land market.

In one's view, a positive form of integration, i.e. the objectives of the CAP, would play a more prominent role in land policy to solve the uncertainties of the member states' margin of manoeuvre on legislation. This would strengthen the national legislation while not compromising the filtering of possibly protectionist measures. We will examine the CJEU's judgment in the KOB Sia case below, which has generated some particularly significant changes in land policy.

[2] CJEU C-452/01.
[3] See: Kurucz 2015; Szilágyi 2018 Szilágyi, 2015; Szilágyi 2017.
[4] CJEU C-52/16.

3. Analysis of the KOB Sia case

The case considered KOB, an agricultural company established in Latvia and owned by German nationals. In 2018, the plaintiff in the main proceedings concluded a sales contract to purchase a relatively small agricultural land area.

To conclude the sales contract, the consent of the national authorities was requested. They did not provide it for the KOB, which brought the case before the Latvian courts stating that the authorization in question is discriminative based on nationality and does not comply with the requirements of the freedom of capital and the freedom of establishment to prohibit direct discrimination on the grounds of nationality.

The Latvian legislation allows legal persons to acquire agricultural land. If the legal person's representatives are from another member state, the Latvian legislator has laid down two additional requirements. First is that the citizen from another member state shall be registered as an EU citizen in the member state in question; second, the citizen in question should have a certain knowledge of the Latvian language.

The interpretation of Article 345 TFEU[5] has not changed, as explained above. According to the consistent case law of the CJEU, the autonomy of property cannot justify a restriction of fundamental economic freedoms.

The CJEU examined whether the freedom of establishment or the free movement of capital should be applied. This is noteworthy because, according to the consistent case law of the CJEU, in the case of property transactions, the free movement of capital should be applied.

In the first decades of integration, the free movement of capital was the least significant freedom due to the low level of international investment and the state's important role in the economy. According to Jacques Pertek, the strengthening of the free movement of capital and other fundamental freedoms in the CJEU's practice began in the early 1980s,[6] inspired by economic theories. The EU's legislator codified these changes and amended the founding treaties in this light. The 1988 directive[7] implementing the free movement of capital also expresses adequately, among other things, through the non-limitative nomenclature, that national operations regarding this freedom must be interpreted broadly.

In the CJEU's case law prior to the judgment in the KOB Sia case, if the member state's provision was examined under the requirements of the free movement of capital, it should not be examined again in light of the other fundamental freedoms. In the present case, the Court referred to the 2017 judgment in the Van der Weegen case, in which the CJEU declared that a national measure should be examined only in the light of one fundamental freedom if the other fundamental freedoms play only a secondary role to the examined fundamental freedom.

The CJEU adds that the national legislation in question applies not only to the acquisition of agricultural land, which, according to settled case law, is subject to the free movement of capital. The free movement of capital applies to cross-border acquisitions

[5] CJEU C-206/19.
[6] Pertek 2005.
[7] Directive 88/361.

of real estate. The CJEU stated that the examined national legislation covered the continuous exploitation of agricultural land that belongs to the freedom of establishment, which can be applied when economic operators carry out permanent economic activity in the territory of other member states.

In the KOB Sia case, the CJEU found out that the provision's objectives did not allow to determine clearly whether the freedom of establishment or the free movement of capital[8] was decisively[9] at issue in the case. Consequently, in determining which of the fundamental economic freedoms are applied, the Court examined the factual elements[10] of the case.[11]

In the judgment, the CJEU, based on its decision that the freedom of establishment should be applied, and not the free movement of capital, that a company can only acquire land for agricultural use if it proves that its members and representatives have residency in the member state in question and have a certain knowledge of Latvian.[12]

Building on the judgment in Van des Weegen and others, the CJEU decided that, unlike in other cases, including the Segro case,[13] this case fell primarily within the scope of the freedom of establishment, and the national legislation[14] in question should therefore be examined solely based on the requirement of freedom of establishment.[15]

The CJEU mentioned the Segro judgment, which is not primarily related to the margin of appreciation on the land policy of member states and the Ospelt and Festersen judgments, in which[16] the parties also intended to acquire agricultural land for agricultural use.

The CJEU ultimately decided not to examine the free movement of capital and analyzed the member state's provisions only in light of the freedom of establishment.

According to the case law,[17] national measures introduced in areas subject to complete EU harmonization are not to be examined on the basis of primary law but on secondary EU law.[18] Therefore, the relevant provisions of Directive 2006/123 apply.

In the Court's interpretation, the additional requirements imposed by the Latvian legislation only apply to citizens of other member states. The provisions are, therefore, contrary to Articles 9, 10 and 14 of Directive 2006/123.

[8] CJEU C-206/19, para 25.
[9] However, according to the files, the CJEU noted that the party in the main proceedings intended to purchase agricultural property to use. The national legislation does not relate exclusively to acquiring agricultural land but also intends to provide its continued use for agricultural purposes.
[10] CJEU C-206/19, Point 25.
[11] As an analogy to the CJEU C-375/12
[12] CJEU C-206/19, para 26.
[13] CJEU C-52/16.
[14] European citizenship.
[15] CJEU C-206/19, paras 27-28.
[16] See: Vauchez 2019.
[17] Ibid. para 30.
[18] CJEU C-205/07, para 33.

4. Which Change was Caused by the Judgment in the KOB Sia Case?

One can assume that the judgment in the KOB Sia case belongs to the decisions related to land policy. Noteworthy, if the provisions in question were not discriminative based on nationality, and therefore, the provisions would have been subject to a compelling examination, we would know more about changes in the member states' margin of appreciation on land policy. If the member state's legislator makes agricultural lands' purchase conditional, these provisions should be examined in the light of the freedom of establishment and Directive 2006/123.

Mark Fallon emphasized that the internal market was never reformed comprehensively. However, the Single European Act and the Treaty of Maastricht introduced particular changes in this area.[19] In the Festersen case, the agricultural land in question was intended to be bought for agricultural reasons, but the free movement of capital was applied.

According to Valérie Michel,[20] fundamental freedoms mainly contain prohibitions against the member states, which means that the EU legislator has little role in this area. Individuals and economic operators can claim their entitlements derived from EU law against the member states before the member states' courts. With this, they are asserting their interest and becoming the EU's additional agent regarding the negative integration form.[21]

5. CJEU Judgments Related to Directive 2006/123

The CJEU cited the Rina Services case[22] in the judgment of the KOB Sia case. In the Rina Services case, the CJEU sought to determine that it was compatible with the provisions of Directive 2006/123/EC and the requirements of freedom of establishment and free movement of capital requiring a registered office in a member state for this particular activity. Article 14 of the Directive prohibits the requirement of a registered office in a member state.[23]

Advocate General Pedro Cruz Villalón's general opinion shall be considered as he recalls that the harmonization measures of the secondary law should be applied and not the primary law's provisions.[24]

According to the CJEU, the exception of freedom of establishment set in Article 51 of TFEU cannot be applied in cases mentioned in the main proceeding, and the member states' regulation is against Article 14 of Directive 2006/123, which requires the companies to be established in that member state.

[19] Dubout & Maitrot de la Motte 2013, 413–455.
[20] Azoulai 2011, 283.
[21] R. Lecourt realized first that the most efficient way to force member states to implement EU law is through the procedures started by individuals in the work *L'europedesjuges*. Lecourt 2008, 283.
[22] CJEU C-593/13.
[23] Ibid. paras. 26–27.
[24] General Opinion in 'European Commission v. Hungary' Case (2015) no. CJEU C-179/14, ECLI:EU:C:2015:619. [hereinafter: General Opinion in case no. CJEU C-179/14]. paras. 21–22.

6. Judgment in the Commission/Hungary Case[25]

The other referred decision is the judgment in the commission/Hungary case, in which the commission – among others – required the CJEU to determine whether Hungary violated Directive 2006/123 about the internal market services by introducing the so-called Szécheny Leisure Card. Furthermore, its term of use and the other related measures were also against the directive.

This general opinion raised the question of whether Directive 2006/123 could be applied in this case. According to the advocate general's interpretation, it should be examined that the directive includes a complete harmonization that should be judged in light of the case law and not decided by the primary law.[26] The advocate general noted that deciding whether an area is subject to complete harmonization would lead to consequences. In this case, justifications excluded from Directive 2006/123 – the ones regulated in Articles 52 and 62 of the TFEU – and the existence of imperative reasons for major public interest could not be claimed.[27] Yves Bot adds to the general opinion that this issue is debated in the legal literature.[28]

The general opinion[29] mentions the judgment in the Rina Services case, where the CJEU decided that Article 3 paragraph 3 of Directive 2006/123 cannot be interpreted in a way that allows the member states to justify the prohibited requirements of Article 14 by referring to the primary law because this would be a barrier to the directive's harmonization. The general opinion concluded that the Court considered Advocate General Pedro Cruz Villalón's general opinion of the Rina Services case. According to him, the directive's scope concerns a broad range of services, as it is horizontal. However, it does not aim to harmonize member states' different substantive rules. Despite this, certain factors lead to complete and accurate harmonization.

The European Commission – among others – asked the CJEU to determine that the Hungarian regulation, which reserved banks and other financial institutions for the possibility of issuing the SZÉP-card, was against Articles 15 (1), (2), and (3).[30]

The CJEU emphasized that these requirements did not contain discrimination based on citizenship or establishment.[31] In contrast, Hungarian regulation required institutions issuing the SZÉP-card to establish an office open to customers in each municipality with more than 35, 000 inhabitants. Only banks and financial institutions could meet the requirements of the rule. Therefore, the CJEU determined that this requirement of Hungarian rule was against the directive, led to discrimination, and was not in line with the requirements set in Article 15 (3) of the directive.[32]

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[25] CJEU C-179/14.
[26] General opinion in case no. CJEU C-179/14, paras. 68–69.
[27] Ibid. para. 69.
[28] Ibid. para. 70.
[29] Ibid. para. 71.
[30] During the hearing, the Hungarian Government acknowledged that the relevant Hungarian rules have no reference to the fact that issuing the SZÉP-card is only reserved for banks; however, the conditions set by the provision could, in practice, only be reached by banks and financial institutions.
[31] CJEU C-179/14 paras. 84-85.
[32] Ibid. para. 90.

The Hungarian government believed these requirements protected consumers and creditors with solvency, professionalism, and accessibility. The CJEU did not exclude these arguments; thus, it did not reject foregoing its indirect discriminative features, but these arguments could not be considered because the Hungarian government did not prove that the goals could be reached with provisions that are less restrictive to the freedom of establishment.[33]

It should be noted that the CJEU did not find it necessary to examine the commission's argument regarding violating Articles 49 and 56 of the TFEU, which is part of the primary law.[34]

The CJEU declared that the Hungarian provisions violated Article 14 (3) by excluding the companies' branches in other member states from issuing Szécheny Leisure Cards. The fact that Hungarian rule did not acknowledge companies that were not established by Hungarian law was against Articles 15 (1), (2), and (3). Only Hungarian banks and financial institutions can issue SZÉP-cards therefore, requiring the Hungarian establishment to issue SZÉP cards violates Article 16 of the directive.

7. Did the Judgment in the KOB Sia Case Damage the CJEU's Case Law Consistency?

Antoine Vauchez stressed that the CJEU's case law was designed to preserve the developed l'acquis as a CJEU working routine. The fluctuation of judges and the joining of new member states did not alter this phenomenon.[35]

The question arises: was the case law altered, or did the EU legislator create Directive 2006/123, which led to the change that in cases concerning member states' rules on agricultural property, the Court started to apply the free establishment and the directive instead of the free movement of the capital?

In the case of the latter, we cannot state that the consistency of the CJEU case law was damaged because the implementation period of the directive expired on 28 December, 2009, and the most significant judgment related to land policy – like the Ospelt[36] or the Festersen[37] judgments – was delivered way before the adoption of the directive.

Does it also emerge why the primary law and the free movement of capital were applied in the Segro[38] and commission/Hungary[39] cases when the examined regulations of the member states were adopted after the expiration period of Directive 2006/123?

[33] Ibid. para. 91.
[34] Ibid. para 118.
[35] See: footnote 21.
[36] CJEU C-452/01.
[37] CJEU C-370/05.
[38] CJEU C-52/16.
[39] CJEU C-235/17.

The reason for this could be that in the judgments in the Segro case and the commission/Hungary case, the land policy-related characteristics – that can be evaluated by the EU law's criteria[40] – of the examined rules were not too remarkable.

Undoubtedly, without creating Directive 2006/123 as an act of the EU, the case law's direction alternates.

8. Will the judgment of the KOB Sia Case be a Consistent Part of the Case Law?

The CJEU examined the factual basis of the case because the rule's purpose did not determine whether the free movement of capital or freedom of establishment should be applied.[41] The factual element referred to by the Court[42] is that a company can only acquire agricultural land in the member state to conduct agricultural activities if its representative and members prove that they have residency in the member state and have a certain knowledge of the Latvian language.

It is unclear why the CJEU finds the criteria of Latvian law as factual reasons. The judgment clearly expresses that Latvian regulation is relevant to agricultural lands intended for agricultural operation.

Freedom of establishment is applied if an economic actor permanently operates in another member state's territory. In the case of the free movement of capital, a permanent economic operation is not a requirement; instead, capital investment is highlighted, such as purchasing residential property or shares.

If a member state's regulation requires agricultural use to purchase agricultural lands, the freedom of establishment is applied by the reason behind the law.

This is underlined by the other parts of the CJEU's judgment when it refers to 'regulation' that can consider the freedom of establishment.[43]

9. How is the Member States' Margin of Appreciation on Land Policy Changing after the KOB Sia Case?

The preamble of Directive 2006/123 reveals that it aimed to strengthen negative integration. Thus, it is designed to break down the existing barriers of the internal market to achieve economic advantages. However, some of the preamble's provisions set exceptions: according to Recital (8), the specific activities' openness to competition is acceptable to determine how the freedom of establishment and the free movement of services are applied. In this light, member states are not obliged to liberalize the services of general economic interest and terminate the monopoles regarding certain services.

Recital (40) of the preamble mentions overriding public interest reasons related to the freedom of establishment and services referred to by the directive's provisions that the CJEU develops in the freedom of constantly evolving capital and services.

[40] The examined legal acts of these judgments are about agricultural lands. However, the regulation's goal is to prevent abuse of rights and shows a more substantial connection with the expiration of the derogation period.
[41] CJEU C-206/19.
[42] Ibid. para. 26.
[43] Ibid. para. 33.

The provision states that public interest includes several reasons.[44] This leads to the conclusion that the CJEU should consider other public interests. The preamble lists the overriding public interests, such as social policy objectives, the protection of the environment and the urban environment, and various social policy elements' protection.

Recital (42) of the preamble does not aim to harmonize the administrative procedures but to remove overly burdensome authorization schemes that obstruct – among others – the freedom of establishment. At the same time, the Recital (43) of the preamble mentions exceptions from prior authorization procedures that can be essential in certain circumstances.

Recital (56) also refers to the CJEU's case law and declares that public health, consumer protection, and animal health are overriding public interests that can serve as a reason to facilitate authorization systems and other restrictions. Regarding these restrictions, the principles of proportionality and necessity should be considered.

Recital (65) can also be relevant in light of the margin of appreciation on land policy: it prohibits requiring establishment or residency as a condition of an entitlement's enjoyment.

Recital (66) refers to the urban environment's protection as an exemption in the case of certain prior authorizations, but does not mention the CJEU's case law on land policy.

Recital (69) can also be relevant, as it requires evaluating the member states' measures that restrict the internal market in light of the CJEU's case law on the freedom of establishment. The evaluation examines whether these measures meet the CJEU's case law requirements for freedom of establishment. The evaluation can differ depending on the nature of the activity and should follow social policy objectives. Recital (71) emphasizes that this evaluation does not concern the member state's margin of appreciation to reach the public interest but highlights the services on general economic interest, public health, and social policy.

Recital (73) can also be significant concerning the member states' margin of appreciation requiring professional qualifications does not violate the directive. However, member states are not allowed to require service providers to operate in a particular form; for example, it cannot be required that only natural persons can provide services.

Article 1, paragraph 7, does not affect the exercise of fundamental rights recognized in member states' law and Community law. How this provision can be applied to member states' margin of appreciation for land policy is unclear.

[44] Public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

It is also worth mentioning that according to Article 4, paragraph 8, overriding reasons relating to the public interest are the reasons acknowledged by the Court, like environmental protection, urban environment protection, and social policy goals.

In light of Article 9, paragraph 1, member states are only allowed to introduce authorization schemes if there is no discrimination and they are based on overriding reasons relating to the public interest and if a less restrictive measure cannot reach the goal of the schemes. This is in line with the CJEU's case law[45] on land policy, where in the case of secondary properties, only ex-post authorization schemes are allowed but are related to the agricultural lands' specific features, and prior authorization is not against EU law.

Article 12, paragraph 3 allows overriding reasons other than the public interest if it is necessary to establish a selection procedure.

It is relevant to the member states' margin of appreciation for the land policy that Article 15, paragraph 2, subparagraph (a) allows them to evaluate their legal systems in case of quantitative or territorial restrictions, especially restrictions based on a minimum geographical distance between providers. Similarly, paragraph 2 subparagraph (b) prohibits providers from operating in a specific legal form.

According to the Directive's Article 15, paragraph 3, the requirements set in paragraph 2 should be examined in light of the necessity proportionality test.

10. Conclusion

It seems clear that there has been a change in EU law. Instead of the free movement of capital, the freedom of establishment and Directive 2006/123 should be applied in the case of member states' rules on land policy so that the member state requires agricultural activity or other conditions to acquire agricultural property. It can be assumed that the judgment in the KOB Sia case changed the consistent case law of the CJEU in this regard. However, in properties related to those different from the ones mentioned above, the free movement of capital is likely to be applied.

How this change alters, member states' margin of appreciation for land policy is still a question. In the KOB Sia case, the CJEU referred to its prior considerations related to Directive 2006/123, but we cannot gain information about the EU control mechanism within the framework of the directive that can be relevant in the context of the member states' margin of appreciation on land policy.

The directive does not mention the public interest goals developed in the CJEU's case law, like preserving the rural population, easing the speculative pressure on agricultural lands, and the fact that certain measures realize the positive integration's goals, in particular, the objective of the CAP related to the improvement of the farmers' life standard.

It can be assumed that during the Article creation, the drafters did not consider that the directive was applied in the case of the member states' measures on land policy.

Advocate General Yves Bot concluded in the general opinion on the Hungary/commission case that the directive realized a complete harmonization that excludes the member states from claiming to override public interest reasons that are not

[45] CJEU C-452/01.

listed in the Directive's Article 14 and are developed by the CJEU because this could be a barrier to the exhaustive harmonization aimed by the secondary legal act.

We think this opinion – debated in the legal literature – is irrelevant to Article 15 of the directive. This argument is evidenced by Article 4, graph 8, which declares that the overriding public interest reasons mean the reasons acknowledged by the CJEU.

In the decisions on land policy, the CJEU is likely to allow the public interest reasons developed in this field in the directive's scope. Therefore, the member states' margin of appreciation for land policy is not likely to be significantly changed because of the legal development of the KOB Sia case.

Nevertheless, the KOB Sia judgment carries the possibility of significant change. The member states' margin of appreciation to regulate with non-discriminative instruments on the land policy is a given. By modifying the directive, the EU legislature can incorporate the positive integration form's goals as overriding public interest reasons and consolidate the member states' margin of appreciation.

We can conclude that provisions on land policy are excluded from the directive, probably because the legislature did not consider that the directive is applied instead of the free movement of capital related to the EU control of the member states' regulations on agricultural lands. If the directive refers to the public interest related to the purchase of agricultural land, it would certainly ease the uncertainties in this area. However, this should be the subject of further research.

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Paulina LEDWOŃ*

The National Raw Materials Policy in Poland as an instrument of implementation of the constitutional principle of ensuring the security of citizens (Article 5 of the Constitution of the Republic of Poland)**

Abstract

The author focuses on presenting the nature of the legal relationship between the principle of sustainable development established in the Constitution of the Republic of Poland and the policies adopted by the Council of Ministers: The National Raw Materials Policy, The Energy Policy of Poland, and the National Environmental Policy – the development strategy in the area of environment and water management. The author analyzes the concept of ensuring security as one of the constitutional obligations of the state authorities in the Polish Constitution and derives from it the concept of raw material security of the state, implemented by establishing The National Raw Materials Policy in 2022, which is understood as a long-term public policy conducted at the national level, to ensure that manufacturing enterprises have access to the raw materials necessary for their operations at a price enabling them to maintain their competitiveness, while taking care of the natural and social environment at every stage of the raw material cycle and the current and long-term economic security of the state.

Keywords: raw materials policy, sustainable development, constitution, Poland, constitutional principles

1. Introduction

Article 5 of the Constitution of the Republic of Poland[1] introduces one of the key principles of the political system of the state, stating that *"the Republic of Poland shall safeguard the independence and inviolability of its territory, ensure the freedoms and rights of man and citizen as well as the security of citizens, protect the national heritage and ensure environmental protection, guided by the principle of sustainable development."* Therefore, the Constitution is obligated to ensure the security of the state through its organs. This article discusses issues related to shaping the raw material security of the Polish state through the adoption of a coherent raw material policy at the central level, which is closely connected to the above-mentioned provision of the Constitution. The thesis put forward at the beginning of the

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[1] Constitution of the Republic of Poland, Journal of Laws 1997 No. 78, item 483.

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undertaken considerations is that the level of security of citizens within the meaning of Article 5 of the Constitution in an era of contemporary economic change and the needs of the modern economy are significantly influenced by the level of raw material security. In connection with the above, the adoption of a coherent raw material policy, which took place in Poland in 2022, significantly increased the security of the state, including the increasingly important raw material security, complementing the existing regulations and instruments of administrative law, thus implementing the basic program objectives facing the authorities of the Polish state, implementing the postulate of ensuring real security, and a coherent policy for the use of raw material resources. The legal area related to long-term strategic and economic planning is undoubtedly one that significantly affects the security of the modern state, including raw materials. Through various regulations, the legislature and public administration can significantly influence the economy.

2. The concept of security within the meaning of the Constitution of the Republic of Poland

The concept of security under Article 5 of the Constitution of the Republic of Poland should be understood broadly as a state that provides a sense of certainty, stability, and a guarantee of its protection. This is not only about political or military security but also about material, social, and ecological security. According to the widely accepted interpretation of this concept in Polish jurisprudence, the state should provide its citizens with freedom from real and potential dangers. Ensuring citizen security is a special dimension when threatened. The state, acting through its organs, is then obliged to take specific preventive measures of a protective nature towards its citizens. However, the objective referred to in Article 5 of the Constitution must be achieved when there is no direct threat to citizens. Then, the state is obliged to watch over the security of citizens and strengthen their sense of certainty and stability as elements of trust in the state and the protection guaranteed by it.[2] Similarly to environmental planning legal acts, which undoubtedly serve to implement the constitutional value of ecological security,[3] it seems that it will be correct to say that the state's raw materials policy also serves to ensure the state's raw materials security, which can also be derived from the constitutional value of providing security to citizens.

In recent years, raw material security has increasingly emerged in political debates as well as economic and legal discussions. There is a clear need to develop long-term policies related to the abovementioned areas in the European Union countries. However, it is impossible to discuss instruments that ensure the security of raw materials in the state without explaining this term. It is also necessary to outline its importance to both the national economy and security of the European Union as a whole.[4]

The concept of citizens'security has traditionally been understood as the activity of public authorities counteracting threats to the public order, life, health, and property of citizens, and stopping and repelling all actions detrimental to these goods, both from

[2] Safjan & Bosek 2016.
[3] Majchrzak 2023, 53.
[4] Grzywacz 2022.

outside the state and from inside the country. Currently, they should be understood more broadly, including in the spheres of ecological and energy security. In this last aspect, it should be emphasized that in EU countries, the active attitude of the state in the field of energy security was opted for, and appropriate economic relations were subject to legal regulation. Among the norms concerning the economic system or, more broadly, the economy, the Constitution of the Republic of Poland does not contain any provisions directly related to the energy sphere. At the same time, however, it is commonly accepted that today's world is of great importance to the functioning of the economy of every country, and one of the constitutional tasks of the state resulting from the obligation to ensure the security of citizens is to ensure energy security.[5] The resources of raw materials, which are important for the proper functioning of the modern economy, are decreasing. The time at which most important raw materials are produced exceeds the lifespan of many generations. In addition, the location of the Polish and the complicated geopolitical situation and painful historical experiences mean that despite their presence in the structures of many international organizations (European Union, United Nations) and military alliances (NATO), in the opinion of many analysts and historians, the foundations of our security are still fragile.[6] Thus, every effort should be made to guarantee stable sources of raw materials from outside and the rational management of owned raw materials, preparing for many possible scenarios.

3. Raw materials policy of Poland

Raw materials policy is commonly understood as a long-term public policy conducted at the national level to ensure that manufacturing companies have access to the raw materials necessary for their operations at a price that allows them to maintain competitiveness while taking care of the natural and social environment at every stage of the raw material cycle and the current and long-term economic security of the state.[7]

The Council of Ministers is the body constitutionally responsible for ensuring state security in Poland, and it is this body that the laws grant the related executive, supervisory, and control powers. Poland adopted the state's raw material policy in 2022. Pursuant to Article 21f(4) of the Act of December 6th, 2006, on the principles of conducting development policy,[8] based on the resolution of the Council of Ministers of March 1st, 2022, this long-awaited document was adopted. Until then, there was no coherent, comprehensive, and centralized raw materials policy, which was widely criticized, as there were voices that the lack of a coherent raw materials policy is conducive to chaos and irrational use of resources. This state of affairs also meant that often specific decisions regarding deposits of strategic importance for the country were actually made at the level of the commune – the smallest local government unit in Poland.[9] The Polish Supreme

[5] Banaszak 2012.
[6] Zapałowski 2015, 317.
[7] Hausner (ed.) et al. 2015, 121.
[8] Act of 6 December 2006 on the principles of conducting development policy, Journal of Laws of 2021, item 1057.
[9] Hausner et al. 2015, 5.

Audit Office[10] in 2018 published information on the results of the audit *"Management of strategic fossil raw materials deposits,"* in which it indicated that Poland, although it is a country rich in energy resources, does not have a clearly defined raw material policy of the state. According to the verification carried out by the Supreme Audit Office, reliable work on this document began for good only in 2016. The current low level of development of deposits is a consequence of the long-term dispersion of competences and regulations and the lack of a list and plans for the use of mineral deposits of strategic importance for the economy, despite Poland being a major producer of copper and silver in the world.[11] Poland is also rich in metallic raw materials (zinc and lead), rare metals (rhenium), chemical raw materials (sulfur, rock salt, potassium salts, and phosphates), and energy resources (coal, methane, and natural gas). However, a significant proportion of these factors have not yet been identified. Elements of the policy covering the management of key raw materials have previously appeared in various government documents, but owing to the dispersion of competences, ministers responsible for the economy and environment have committed numerous omissions in this area. It was not until the Interministerial Team for the State Raw Materials Policy, established in 2016, that work began on the document 'National Raw Materials Policy'. In 2016, The Minister of the Environment began to implement the activities indicated in the Strategy for Responsible Development concerning the development of a raw materials policy, and the Chief National Geologist prepared a draft raw material policy. According to the Supreme Audit Office, the ministers responsible for the economy and environment did not develop a list of mineral deposits of strategic importance for the economy. They have also not issued regulations on the list of hard coal and lignite deposits of strategic importance to the country's energy security. They did not recognize strategic domestic natural gas deposits and did not ensure their protection by including them in spatial development plans. The minister responsible for the economy did not prepare, although he was to do so in cooperation with the ministers competent for environmental, water management, construction, spatial, and housing management, a list of all strategic mineral deposits along with the range of their occurrence.[12] The audit conducted by the Supreme Audit Office concluded that the implementation of an integrated raw material policy was a pressing problem for the country's raw material security.

Regional consensus conferences were held throughout the country in 2018 with the status of a discussion forum on the draft State Raw Materials Policy, a strategic document for the entire economy. These meetings were attended by many interested parties representing both the government and parliament as well as local governments at various levels, State Treasury companies, and scientific units. At each conference, a number of postulates were submitted, which made the participants even more aware of the enormity of work to be done, taking into account the different groups of raw materials with different impacts on the economy, as well as the number of useful minerals

[10] Supreme and independent state audit body in Poland.
[11] KGHM S.A. took first place in the list of 'the largest silver mines in the world' in the World Silver Survey 2022, and is also the sixth producer of electrolytic copper in the world, see KGHM is the largest silver mine in the world 2022.
[12] Management of strategic fossil resources 2018, 8–12.

from domestic deposits and imports. The development of the National Raw Materials Policy not only resolved the problem of raw materials, but also forced the analysis of raw material potential, determination of the areas of their industrial occurrence, development of a list of strategic deposits for the economy, and creation of an up-to-date map of raw materials of the country, which is the basis for spatial development planning, taking into account areas for future exploitation of raw materials. It also created tools for the effective protection of the interests of the state and society.[13]

The implementation of activities included in the State Raw Materials Policy aims to ensure permanent access to mineral deposits through the intensification of activities in the field of exploration, recognition, and documentation of mineral deposits (including the so-called anthropogenic deposits) carried out by both the State Geological Survey and the geological and mining industry, as well as entities implementing geothermal projects (including municipalities). The protection of mineral deposits and the cooperation of competent authorities to secure the supply chain of imported raw materials are also extremely important. Effective implementation of the activities specified in the State Raw Materials Policy should secure the resource base of mineral deposits for the production of raw materials, access to which is necessary to implement other strategic tasks of the state, such as energy security and stable economic development, based on relevant sectoral strategic documents or other programs.[14]

Defining the scope of the State Raw Materials Policy, it should be pointed out that as a strategic document, it defines the most important areas of action to ensure access to raw materials that are of the greatest importance for the national and EU economies. Therefore, it is extremely important to prepare a list of strategic and critical raw materials for the domestic economy, which, considering the list of critical raw materials of the EU, clarifies and specifies the main objective of the State Raw Materials Policy, defined as ensuring the security of raw materials in the field of these raw materials. In addition, based on the classification of the raw materials, minerals occurring in Poland were selected for extraction. Therefore, raw materials subject to the state's raw material policy are mineral resources from primary and secondary sources, as well as groundwater (thermal), which are minerals within the meaning of the provisions of the Geological and Mining Law. The analyses conducted thus far regarding the importance of individual raw mineral materials for the national economy have allowed the determination of two of their collections: strategic and critical raw materials.

Raw materials strategic for the Polish economy are divided into two subgroups: (a) Strategic raw materials are of fundamental importance for the proper functioning of the economy and satisfying the living needs of society – raw materials whose permanent supply must be ensured – both those whose national resource base is large and which, thanks to their use, are the basis for the operation of industry, as well as important scarce raw materials. (b) Strategic raw materials of fundamental importance for national security and innovative technologies: raw materials that are not sufficient (min. 90%) extracted from domestic sources or whose possibilities of permanent extraction from these sources are limited or threatened, and other raw materials not extracted at home (scarce)

[13] Ciechanowska 2018, 958.
[14] National Raw Materials Policy 2022, 14.

necessary for the defense of the country and national security and for the development of innovative technologies. Raw materials critical for the Polish economy – strategic raw materials whose possibilities of extraction from both primary and secondary sources are either high-risk or very difficult to extract them, and the possibilities of their substitution are low. These are, in particular, raw materials included in the list of raw materials critical for the EU, but also raw materials that, despite being present in large quantities, are impossible to extract, for example, owing to planning conditions, social protests, etc.

Based on the prepared list of strategic and critical raw materials[15], the minerals present in Poland that can be used for production were determined. A list of the selected minerals is presented in Annex 2 of the National Raw Material Policy. Based on the selected group of minerals, a plan for documenting mineral deposits was developed, which will be implemented as part of the specific objective *"Prospecting, exploration, and documentation of mineral deposits"* and periodically verified and updated based on changing geopolitical, economic, legal, and environmental conditions.

The National Raw Materials Policy states that sustainable development, economic progress, and an increase in raw material security, both in Poland and the whole of Europe, are not possible without responsible and effective management of the Earth's interior, including the mineral resources located there and the effective use of so-called anthropogenic deposits. To ensure this, it is necessary to develop a strategy paper that defines measures that will contribute to the rational management of mineral raw materials as an important factor for the development of the Polish and EU economies. The measures specified in the National Raw Materials Policy related to securing access to raw materials primarily refer to domestic resources, whereas imports should complement the demand for scarce raw materials. This approach reduces the risk of raw material supply by building independence based on resources. Detailed data on Poland's resource base are published annually by the Polish Geological Survey (PGS).

The thematic structure of the National Raw Materials Policy in the introduction includes a description of the position of the policy in the legal system and the system of managing the country's development, the institutional framework, and the raw materials policy in the European Union. Next, we diagnose the geological conditions of the national resource base and trends in the domestic economy's demand for raw materials, the geological conditions of the national resource base, consumption assessment and forecast of demand for strategic and critical raw materials for the Polish economy, and the role of mineral resources in energy transformation. In the following section, we describe the objectives and methods of their implementation. The main objective is to ensure the raw material security of the country by guaranteeing access to the necessary raw materials (domestic and imported), both now and from a long-term perspective that considers the changing needs of future generations. Access to raw materials should secure the country's long-term economic needs resulting from the adopted priorities of economic development, thus ensuring a high living standard for citizens.

The specific objectives of the state's raw materials policy are divided into eight main categories: (1) Ensuring access to raw materials from mineral deposits; (2) Exploration, appraisal, and documentation of mineral deposits; (3) Ensuring favorable

[15] Included in Annex No. 1 to the National Raw Material Policy 2022.

legal conditions for current and future investors, as well as the development and modernization of the geological and mining industry; (4) Protection of mineral deposits; (5) International cooperation in securing access to raw materials; (6) Obtaining raw materials from anthropogenic deposits and supporting the development of a circular economy; (7) Ensuring the consistency of strategies implemented by companies of significant importance to the state economy and companies performing a public mission with the activities of the Chief National Geologist acting as the Government Plenipotentiary for Raw Materials Policy; (8) Dissemination of knowledge.

Subsequently, the basic measures envisaged for the implementation and monitoring of the achievement of these objectives and the financial framework were considered. Five annexes were attached to the state's raw materials policy: (1) List of strategic and critical raw materials for the Polish and EU economy; (2) List of minerals for obtaining raw materials in Poland; (3) Consumption assessment and forecasting of demand for strategic and critical raw materials for the Polish economy (metallic aluminum, antimony, bauxite and alumina, chromium, tin, zinc, silicon metal, magnesium, manganese, copper, molybdenum, nickel metal, lead, rare earth elements, platinum metals, silver, titanium, tungsten metal, gold, iron, ferroalloys, coking coal, natural gas, steam bituminous coal, lignite, gypsum and anhydrite, elemental sulfur, potassium salts, salt, and petroleum); (4) Schedule for the implementation of the State Raw Materials Policy; (5) Summary of current and forecasted demand for individual analyzed mineral resources.

4. Definition of raw materials

We do not currently have a uniform legal definition of the term 'mineral resource' in the Polish legal system.[16] However, this concept is used or created *ad hoc* for the purposes of specific scientific or research articles, there are also proposals for a universal definition of the concept of mineral raw material, an example of such a definition will be the statement that *"a mineral raw material is a material / product obtained from the earth's crust (from minerals, rocks and mineral substances), as well as from secondary and waste sources using technological processes, thanks to which it obtains certain quality parameters and market value, although for the most part it is not intended for direct consumption"*[17], Finally, one of the next exemplary definitions states that "*a mineral raw material can be any body of inorganic or organic origin, which in the eternal circulation of chemical elements receives in the accessible part of the outer crust of the Earth a composition and form technically suitable for practical use, i.e. mass use for the good and use of humanity. These are metals and their compounds as well as non-metallic bodies, including water."*[18] It would seem that we should look for a uniform definition of a mineral raw material in the act concerning geology and mining, i.e. the Geological and Mining Act[19], However, this act does not contain a definition of the concept of raw material or mineral raw

[16] Galos & Lewicka 2004, 5–25.
[17] Ibid. 25.
[18] Bohdanowicz 1952, 16.
[19] Geological and mining law of 9 June 2011 (Journal of Laws, No. 163, item 981), i.e. of 7 April 2022 (Journal of Laws of 2022, item 1072).

material, although in art. 6(1)(19) of the act it defines the concept of mineral deposit, stating that a mineral deposit is *"a natural accumulation of minerals, rocks and other substances the extraction of which may bring economic benefits."* On its basis, it is indicated that a mineral may be considered *"a mineral, rock or other solid, gaseous or liquid substance, economically useful, and present in the quantity and conditions enabling its acquisition, which brings measurable economic benefits; It can be obtained by mining methods (open-pit, underground, or special boreholes) and then it becomes a mineral raw material that can be marketed directly or after processing."*[20]

Article 5 of the Constitution closely intersects the issues of environmental protection and broadly understood security as indicated by the inclusion of these programmatic objectives in one article. These dependencies are also well illustrated by the arrangement and relationships between individual state policies in the implementation of the principle of sustainable development and the use of the environment. On February 14th, 2017, the Council of Ministers adopted a new medium-term national development strategy, the Strategy for Responsible Development, for the period up to 2020 (including the perspective up to 2030). This is a binding and key document defining the main development directions of the Polish state in the areas of medium- and long-term economic policies. The directions specified in the Strategy for Responsible Development form the basis for developing a strategy related to mineral resource management.[21]

The National Raw Materials Policy is a project under the Strategy for Responsible Development. The Strategy for Responsible Development for the period up to 2020 defines The National Raw Materials Policy as a project concerning the development of an efficient and effective management system for all types of minerals and mineral raw materials in the entire value chain and for their resources owned by Poland, as well as adequate – related – legal and institutional changes. As envisaged by the Strategy for Responsible Development, the National Raw Materials Policy supports the transition to a circular economy. The National Raw Materials Policy was directly related to the Energy Policy of Poland until 2040,[22] adopted by the Council of Ministers, as well as the National Environmental Policy 2030, the development strategy in the area of environment and water management.[23] The Energy Policy of Poland until 2040, which is a strategy for the development of the fuel and energy sectors, is one of nine integrated sectoral strategies that set directions for the development of the energy sector. Poland's energy policy defines its three elemental objectives: energy security, competitiveness, and energy efficiency, as well as the limited environmental impact of the energy industry. Poland's energy policy to be implemented is based on three pillars–transition, a zero-emission energy system, and good air quality–which form the basis for eight specific objectives along with the measures to achieve them. The National Raw Materials Policy, whose

[20] Hausner et al. 2015, 10.
[21] Resolution No. 8 of the Council of Ministers of 14 February 2017 on the adoption of the Strategy for Responsible Development for the period up to 2020 (including the perspective up to 2030) (Polish Monitor, item 260).
[22] Annex to the notice of the Minister of Climate and Environment of 2 March 2021 (Polish Monitor, item 264).
[23] Resolution No. 67 of the Council of Ministers of 16 July 2019 on the adoption of the National Environmental Policy 2030 – development strategy in the area of environment and water management (Polish Monitor, item 794).

overriding objective is to ensure the raw material security of the state (inter alia, related to ensuring access to raw energy materials), is an additional coherent element that determines the achievement of the objectives laid down in Poland's energy policy.

The main objective of the National Raw Materials Policy is to *"ensure raw material security of the country by guaranteeing access to necessary raw materials (domestic and imported), both now and in the long term, which takes into account the changing needs of future generations. Access to raw materials should secure the country's long-term economic needs resulting from the adopted priorities of economic development, thus ensuring a high living standard for citizens. The achievement of the main objective should result from the achievement of the listed specific objectives as a consequence of the planned set of measures."*

Article 5 of the Constitution of the Republic of Poland imposes an obligation on all entities exercising state power with the help of competencies granted directly to them by the Constitution and ordinary laws regarding the implementation of key program objectives. These include the care of the security of citizens. In addition, there are many other legal acts in the Polish legal system that provide elements of raw material security, such as the Act on Preserving the National Character of the Strategic Natural Resources of the Country. However, this short legal act (having only eight articles) focuses on the calculation of the country's strategic natural resources[24] and says that the natural resources (listed in Article 1 of the Act) owned by the State Treasury are not subject to ownership transformations, subject to the provisions contained in special acts, and their management is carried out on the principles of sustainable development. This regulation, which includes, in principle, a prohibition on ownership transformations, constitutes a normative basis for the actual exclusion of these resources from privatization processes. In this sense, owing to the systemic nature of these solutions, it is a constitutional matter, but omitted from its applicable regulations. However, this solution has been criticized in the literature.[25] Another legal act ensuring the security of raw materials is the Act on Stocks of Crude Oil, Petroleum Products, and Natural Gas, and the Rules of Conduct in Situations of Threat to the Fuel Security of the State and Disturbances to the Oil Market. This Act specifies the principles of creating, maintaining, and financing stocks of crude oil, petroleum products, and natural gas; rules of conduct in situations of threat to the fuel security of the state and the gas security of the state; and fulfillment of international obligations regarding the supply of crude oil, petroleum products, and natural gas

[24] According to the Act, such resources are: (1) groundwater and surface water in natural watercourses and in the sources from which these watercourses originate, in canals, lakes, and reservoirs with a continuous flow within the meaning of the provisions of the Act of 20 July 2017 - Water Law; (2) the waters of Polish maritime areas together with the coastal range and their natural living and mineral resources, as well as natural resources of the bottom and interior of the earth located within the boundaries of these areas within the meaning of the Act of 21 March 1991 on maritime areas of the Republic of Poland and maritime administration; (3) state forests; (4) mineral deposits that do not constitute components of land property within the meaning of the Act of 4 February 1994 - Geological and Mining Law; (5) natural resources of national parks.
[25] Radecki 2009, 79.

markets.[26] Finally, the Act on Strategic Reserves can be mentioned here.[27] Strategic reserve may include raw materials, materials, critical infrastructure, and petroleum products. The accumulated stocks, as well as the procedures for their release in the event of disruptions in the continuity of supply necessary for the proper functioning of the economy, undoubtedly have an impact on the process and guarantees of ensuring the state's raw material security.

5. Article 5 of the Constitution of the Republic of Poland

In Article 5 of the Constitution, the basic objectives of the highest importance are included because of its leading place in the layout of the Constitution. It seems that in their generality they even surpass the wording of the introduction (preamble) to the constitution, which emphasize various aspects of its genesis rather than design the goals and tasks of the Polish statehood, although it is difficult to precisely separate these two trends, after all, goals for the future also result from a negatively assessed past.[28]

Art. 5 of the Constitution is defined in terms of its legal nature as a provision of a programmatic nature, requiring all entities of public authority to be involved, using all their competences, in the pursuit of these objectives, an interpretation Polish confirmed by the Constitutional Tribunal, explaining that *"The analysis of constitutional provisions leads to the conclusion that the tasks of different bodies may overlap. Protecting the independence of the state and the indivisibility of its territory, as well as ensuring the security and inviolability of its borders, is a constitutional task of the President of the Republic of Poland, the Council of Ministers, and all other public authorities."*[29] The same applies to the principle of sustainable development indicated in this provision. It is addressed to both law enforcement and law-making bodies.[30]

"Including constitutional provisions defining the general political and social goals of the state constructed by a given constitution is a common practice of both contemporary and historical constitutions. At the same time, the definition of these objectives justifies the Constitutions themselves. This is why we often find such formulations in constitutional introductions (preambles) that are not divided into articles."[31],[32] Similarly, the preamble to the 2011 Hungary Fundamental Law states, inter alia, that *"The common objective of citizens and the State is to ensure prosperity, security, order, justice and freedom."*[33] In like manner, Article 2 of the 1999 Swiss Constitution includes among the fundamental objectives of the Swiss Confederation *"the protection of the freedoms and rights of the nation, the safeguarding of the independence and security of the State, the promotion of the*

[26] Act on stocks of crude oil, petroleum products and natural gas and rules of conduct in situations of threat to the fuel security of the state and disturbances on the oil market of 16 February 2007 (Dz.U. No. 52, item 343).
[27] Act on strategic reserves of 17 December 2020 (Journal of Laws of 2021, item 255), i.e. of 11 January 2023 (Journal of Laws of 2023, item 294).
[28] Garlicki & Zubik 2016.
[29] Judgment of the Constitutional Court 2008.
[30] Rakoczy 2021, 126.
[31] see the preface to the U.S. Constitution, the preface to the French Constitutional Charter of 1814, the introduction into separately numbered articles, to the Constitution of France of 1848.
[32] Garlicki & Zubik (eds.) 2016
[33] The Fundamental Law of Hungary 2015, 39.

general welfare, sustainable development, internal cohesion, and cultural diversity of the country, the guarantee of equal opportunities for citizens and the commitment to the permanent preservation of natural living conditions and a peaceful and just international order." The objectives of the state are also formulated in Article 5 of the Constitution of the Republic of Slovenia of 1992, indicating that *"the basic objectives of the state also include concern for the preservation of natural wealth and cultural heritage, as well as ensuring the harmonious development of Slovenia's civilization and culture."*[34]

6. Raw materials policy of the European Union

The policy on raw materials in the European Union is currently subject to extensive scrutiny, especially in the context of the need to increase its economic resilience, which has been highlighted by shortages following COVID-19 and the energy crisis following the Russian invasion of Ukraine. The European Union also undertakes a number of initiatives aimed at securing raw materials and key resources for citizens of member states. It is worth mentioning here that e.g. The European Union has a history of over 30 years of drinking water policy in order to protect EU citizens' health.[35]

In November 2008, the European Commission adopted the Raw Materials Initiative, which established a strategy for access to mineral resources in the European Union (EU) based on three pillars aimed at ensuring: (1) stable supplies of raw materials from global markets; (2) sustainable supply of mineral raw materials within the EU; (3) efficient use of resources and supply of secondary raw materials as part of recycling.

This strategy applies to all raw mineral materials used in European industries, except raw materials from agricultural production and fuels. Securing sustainable access to raw materials is crucial for the competitiveness and growth of the European Union (EU) economy and for the objectives specified in Europe's 2020 strategy. The European Commission also developed another document tackling the challenges in commodity markets and raw materials (2011). It defines raw materials as critical to the EU and describes the EU's trade strategy for non-energy raw materials. This document also presents new opportunities for research and innovation, guidelines for implementing legislation within the Natura 2000 network, and directions for more efficient resource management (including recycling). Future directions for implementing the Raw Materials Initiative include ensuring stable raw material supplies from global markets, supporting supplies from internal EU sources, and supporting the efficient management of raw material resources. To implement the provisions of the Raw Materials Initiative, the European Innovation Partnership on Raw Materials (EIP RM) was established, bringing together representatives of industry, public administration, academia, and non-governmental organizations that provide the EC, EU countries, and private entities with information on implementing innovative approaches in the raw material supply chain. Its activities include, inter alia, research and development, policy recommendations, dissemination of the best practices, building a knowledge base and support for international cooperation. In addition, an expert Raw Materials Supply Group was established, consisting of representatives of EU countries, European Economic Area

[34] Safjan & Bosek 2016.
[35] Szőllős 2020, 403.

countries, candidate countries for the EU, and organizations representing stakeholders – industry, research, and civil society–that advise the EC and supervise the implementation of the initiative. Communication from the Commission to the European Parliament, Council of the European Economic and Social Committee, and Committee of the Regions on Critical Raw Materials on September 3rd, 2020.

On September 3rd, 2020, the Commission published a Communication from the Commission to the European Parliament, the Council of the European Economic and Social Committee, and the Committee of the Regions entitled 'Critical Raw Materials Resilience: Charting a Path towards Greater Security and Sustainability.'[36]

The role of critical raw materials has also been highlighted in the updated European Industrial Strategies. The COVID-19 crisis revealed dependencies on access to strategic resources from third countries and signalled the need to secure open strategic autonomy in Europe, including the adoption of a coherent regulatory framework and multinational investments to ensure a level playing field and a competitive single market. New updates to the strategy consider the need to diversify supply chains, increase the use of secondary raw materials, and transition to a circular economy. Sustainable access to resources is fundamental for industry and the green and digital transition of the EU economy.

On December 2nd, 2015, the EC adopted the CE Circular Economy Action Plan 'Closing the loop – An EU action plan for the circular economy' (COM/2015/0614 final). It summarizes existing work and determines priority areas regarding issues such as plastics, food waste, critical raw materials, demolition, and construction waste, as well as biomass and bio-based products. At the same time, the document stressed the importance of innovation in designated areas of activity. According to the report presented by the Commission on the Implementation of the Circular Economy Action Plan, work on waste that has already been initiated has been presented. These are legislative proposals on fertilizers, the launch of the innovation deals project, counteracting food waste, waste-to-energy communication, legislative proposals related to the subject of hazardous substances in electrical and electronic equipment, the circular economy financing platform, and others. On January 26th, 2017, the Commission published a report to the European Parliament, European Economic and Social Committee, and Committee of the Regions on the Implementation of the Circular Economy Action Plan (COM/2017/33 final). On March 11th, 2021, the EC published a new Circular Economy Action Plan for a cleaner and more competitive Europe (COM/2020/98 final). It envisages making economic growth independent of the use of resources and extending the scope of the circular economy to include economic operators, such as the creation of a highly efficient EU market for secondary raw materials.

Regulation of the European Parliament and of the Council (EU) 2017/821 of May 17th, 2017, laying down supply chain due diligence obligations for union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability.'

high-risk areas entered into force on January 1st, 2021. The regulations aim to ensure that the income of entities importing minerals and metals such as tin, tantalum, tungsten, their ores, and gold in EU countries will not be a source of financing for conflicts and hostilities. The EU is also actively involved in the OECD initiative to promote the responsible extraction of minerals from conflict-affected areas. This has resulted in a government-supported multi-stakeholder process leading to the adoption of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[37]

On March 16, 2023, the Commission announced the Regulations of the European Parliament and Council, establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724, and (EU) 2019/1020. The reasons for and objectives of this proposal indicate that raw materials are found at the beginning of all industrial value chains. This regulation focuses on non-energy and non-agricultural raw materials that are important for the EU economy, the supplies of which are subject to high levels of supply risk. These critical raw materials are often indispensable inputs for a wide set of strategic sectors, including renewable energy, digital industry, space and defense sectors, and health sector. At the same time, their extraction and processing can have negative environmental and social impacts, depending on the methods and processes used. The EU relies almost exclusively on the imports of many critical raw materials. Suppliers of these imports are often highly concentrated in a small number of third countries during both extraction and processing stages.[38] This concentration exposes the EU to significant supply risk.[39]

It should be noted that both the US States, Western Europe, Canada, and Australia have historically preferred to limit the state to the role of an impartial regulator, sometimes combined with the role of a silent shareholder (primarily in energy and fuel companies, but not mining companies in the area of metal and coal mining), with veto rights in special situations, but who does not interfere in the day-to-day management of mining companies and does not formulate regulations because of its ownership role. Central Europe had an intermediate situation. The ownership structure inherited from the centrally planned economy has been modified in a larger (Czech Republic) or smaller part (Poland) by admitting private capital to mining companies (e.g., in the Czech Republic and partly in Poland) and fuel and energy companies (Poland, the Czech Republic, and Hungary). However, this process advanced to varying degrees. Particularly, large state ownership occurs in Poland, where public capital controls copper, coal, and gas mining and dominates the private capital present in these sectors. China's emergence

[37] National Raw Materials Policy 2022, 10–12.

[38] For example, as we can learn from the published rationale for the new regulations, the EU sources 97% of its magnesium in China. Heavy rare earth elements, used in permanent magnets, are exclusively refined in China. 63% of the world's cobalt, used in batteries, is extracted in the Democratic Republic of Congo, while 60% is refined in China. This concentration exposes the EU to significant supply risks. There are precedents of countries leveraging their strong position as suppliers of CRMs against buyer countries, for instance through export restrictions.

[39] Critical Raw Materials: ensuring secure and sustainable supply chains for EU's green and digital future.

in the world market as a player that strongly promotes state capitalism has placed Western countries in an uncomfortable position. Western private companies involved in the extraction of raw materials operating on market principles have become subjects of both direct takeovers and strong competition for resources from state-backed Chinese companies. The conflict of values between the principles of liberal capitalism and China's actions causes concern in EU countries, no less than Russia's significant influence on energy resource prices in Europe. The result is to strengthen the rank in the public agenda in: – renewable energy sources (as independent of fuel imports from abroad), – cooperation with the USA, Canada, and Australia as democratic countries, and at the same time rich in raw materials, recycling of raw materials, promotion of circular economy and energy efficiency and investment in RDI (Research, Development, Innovation) in these areas; also carrying out other activities limiting the demand for imports, – abandoning regulated prices and replacing them with market mechanisms in the energy sector and implementing the TPA (third party access) principle on markets with a large share of natural monopolies, – removing infrastructural and regulatory barriers reducing the EU's bargaining power vis-à-vis its suppliers (non-democratic raw material states). There is also increasing discussion about the need to strengthen capital and trade ties (joint ventures) with state-owned companies belonging to resource-rich countries, even if they prefer the model of state capitalism. However, in the case of some of them (Russia), promoting this form of cooperation does not work because of their desire to expand their dominance at the expense of their neighbors.[40]

7. Closing thoughts

As this article shows, the state's raw material policy in Poland is closely related to the security referred to in Article 5 of the Constitution. The objective of the raw materials policy cannot be reduced to the security of raw materials; however, it is an important reference for this policy. The security of raw materials is an element of the much broader security of citizens, as indicated in Article 5 of the Constitution, covering many dimensions of security, including energy security and the security of economic transactions. Economic security, on the other hand, is one of the dimensions of national security. The wide scope of the National Raw Materials Policy described in this article as well as the work undertaken in this area at the EU level allows us to state that this activity is highly desirable and is currently one of the most important actions of the state to implement the postulate of ensuring the security of citizens.

[40] Hausner 2015, 31–32.

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Bartosz RAKOCZY*

Legal instruments of financial support for low-carbon energy in the legal system of Poland**

Abstract

In Polish law, legal instruments for financial support for low-carbon energy can be described and evaluated according to certain general criteria. First, it should be noted that low-carbon energy is not a self-contained goal of financial support. However, it can be concluded that Polish law provides for such a value protected by law, and consequently, it is eligible for financing. Furthermore, legal instruments of financial support for low-carbon energy take the form of both public and non-public funds. Moreover, these instruments are characteristics of both public and private law. However, the predominant legal instrument providing such support is a contract, although sometimes it is deeply rooted in public law. Alternatively it should be noted that the practical uses of instruments of financial support for low-carbon energy are complicated. This requires elaborate applications with numerous attachments, including documents and declarations. In addition, the process of granting such funds lasts a long time and is preceded by audits. Consequently, the instruments were not used to their fullest extent.

Keywords: low-carbon energy, energy policy, climate change, environmental protection law, legal instruments

1. Introduction

Issues related to the significance of energy policy and its references in specific normative solutions in Poland are relatively new. This problem has only been perceived for a few years from a wider perspective, encompassing not only local conditions but also European or global dimensions. Politicians and society have become aware that undertaking specific and relatively quick solutions are historically necessary.

The identification of energy problems in Poland and the effects of certain energy policies are not necessarily reflected in practice. As mentioned in other studies, Poland's energy policy is still based on coal, and coal mining is not connected only with environmental protection (or rather the lack thereof) but also with social and economic issues and sometimes explicitly with populism. Unfortunately, the hazards related to climatic change are also underestimated. Maslin lists potential examples of climate change, including shoreline changes, storms and floods, heat waves and droughts, human-induced changes, biodiversity, acidity, and agriculture.[1]

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[1] Maslin 2014, 91.

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Climate change is not just an environmental or sociological issue; it also is a moral and philosophical problem. In his encyclical letter 'Laudato si', Pope Francis directly indicates that humankind bears moral responsibility for climate change and the need to undertake protective measures.[2] A new, conclusively successful direction is proposed in theology, known as ecotheology or ecological theology, and deals with climate change.[3]

Climate change and its prevention or mitigation has been a subject of interest to philosophers. James recognized climate change as a fundamental problem of eco-philosophy (ecological philosophy[4]).[5] A similar treatment was administered by another researcher, Belshaw.[6]

Despite the broad treatment of climatic change and the need to prevent it, this process progresses at a relatively slow pace in Poland, with mental, political, and legal obstacles. This is determined by various factors, and their analysis exceeds the scope of this study. However, there is no doubt that assumptions about certain energy policies are reflected in specific legal solutions. Moreover, it provides tools for implementing certain energy policies using legal instruments, including financial instruments. This also, perhaps primarily, refers to low-carbon energy sources.

This study aims to analyze the issues related to legal instruments used by the legislature to provide financial support for low-carbon energy. In addition, this study analyzes the efficiency of such instruments from the perspective of goal accomplishment.

The predominant research method in this study was the formal dogmatic method. It consists of interpreting the legal norms in force. Regarding the law of the Republic of Poland, the predominant method of interpretation is linguistic, which is also referred to as grammatical. It analyzes the linguistic layer of a legal norm based on a common understanding of the meaning of specific words, at the same time considering the grammar of the Polish language. Other methods of interpretation, such as systemic and functional interpretations, were not used in this study. These methods of interpretation are considered when the results of linguistic interpretation are unsatisfactory or give rise to doubts. However, if linguistic interpretation leads to satisfactory results, other methods of determining the content of legal norms are redundant.

This study presents the legal norms regulating the financing of low-carbon energy. These norms are then discussed in terms of the elements that determine the availability of specific financial support. When any solution is subject for critical evaluation, *de lege ferenda* postulates will be made. This study does not use other legal examination methods, such as sociological and psychological examinations of law, and the economic interpretation of law is limited. This study focuses strictly on legal science.

[2] These issues are analyzed in detail in the monograph Miller (ed.) 2017.
[3] Ozorowski & Kierunku 1999, 252.
[4] The name is disputable, and this is not the focus here.
[5] James 2015, 134.
[6] Belshaw 2005.

2. Low-carbon energy as a goal of the Polish legislature

Low-carbon energy is an extra-legal issue; however, it is regulated by law. In exploring the meaning of this phrase in legal language, its role in Polish law should first be emphasized.[7]

Low-carbon energy is a goal that both energy policy and law should aim for. The underlying assumptions of low-carbon energy are indicated above, and they make it possible to assume that humans have an influence on climate change and, through their own behavior, can eliminate or at least reduce such change. Climate change is identified to be associated with the greenhouse effect, which, in turn, is attributed to the impact of human activity on the ozone layer. The assumptions underpinning the above-mentioned views indicate that humans are responsible for and can prevent climate change.

The prevention of climate change takes the form of both preventive and corrective measures. On the one hand, humans attempt to eliminate unfavorable changes; on the other hand, they want to prevent them. In this context, the analyzed problems are of a remarkably preventive nature. The essence of prevention is that humans reduce, minimize, or discontinue their effects on the ozone layer. This effect may be achieved by reducing or completely eliminating emissions. Such a result is possible because of a low-carbon energy policy, that is, a policy that causes zero or minimum emissions.

Thus, legislators should aim for low-carbon energy through various legal instruments. Therefore, it assumed the form of a self-contained value. In axiological terms, low-carbon energy is rooted, among other things, in the above-presented representative views. Hence, this goal can be attained by certain means, and the choice is made by the legislature. These may be, and are, actually, mostly financial means.

3. Notion of low-carbon energy in Polish law

First, the meaning of emissions in the Polish legal system should be explained. Emission has a normative definition, as given in Article 3 paragraph 4 of the Environmental Protection Law of April 27, 2001. This provision reads: *"For the purposes of this Act: […] (4) emission is understood as: (a) substances, (b) energy, such as heat, noise, vibrations, or electromagnetic fields emitted or released into the air, water, soil, or ground directly or indirectly as a result of human activity."*

As noted in the doctrine, this notion is an important anti-pollution environmental protection regulation and, as consequently, is significant for the scope of this protection.[8] Thus, the notion of emissions is confronted by pollution. It is emphasized that emissions are the release of substances or energy in a way and to an extent that is deemed acceptable (lawful), whereas pollution is also a type of emission; however, because of its effects, it is qualified as an emission that causes negative consequences that should not occur at all. Thus, such an emission is unacceptable.[9] Therefore, emissions are an acceptable environmental effect, whereas pollution is also an emission – only one that is unacceptable.

[7] See also Giecman & Szulga, 2008, 34.; Kaminska, Kaminskij & Kunenko 2013, 23.
[8] Bar, Górski, Jendrośka, Jerzmański & Pchałek 2014, 40.
[9] Ibid. 41.

Further studies should focus solely on the emissions. This implies that further studies should be limited to the acceptable, admissible, and lawful environmental effects. This deals with an admissible effect that is acceptable to the legislature. Thus, emissions are not about eliminating environmental impacts. This is only about ensuring that such an impact complies with the principles of sustainable development.[10] The principle of sustainable development enables the reconciliation of values that represent natural axiological conflicts. This idea was aptly interpreted by the Polish Constitutional Tribunal in the statement of reasons for the decree issued in case reference number K 23/05 on June 6, 2006, stipulating that *"The contested provisions are thus consistent with Article 5 and with Article 74 paragraphs 1 and 2 of the Constitution. Public authorities are first required to pursue a policy ensuring ecological security for present and future generations."* This phrase is typical of the determination of the tasks (policies) of the state; however, it does not directly give rise to the subjective rights of an individual. The term 'ecological security' must be understood as bringing the environment to a condition that allows safe staying in such an environment and using such an environment to enable human development. Environmental protection is an element of 'ecological security', however, the tasks of public authorities are wider as they also cover activities that improve the current condition of the environment and program its further development. The fundamental method to accomplish this objective is, pursuant to Article 5 of the Constitution, to be guided by the principle of sustainable development, which refers to international agreements, particularly those made at the conference in Rio de Janeiro in 1992 (cf. J. Boć, [in:] Constitutions of the Republic of Poland and the commentary to the Constitution of the Republic of Poland from 1997, ed. by J. Boć, Wrocław 1998, p. 24 et seq.). The principles of sustainable development comprise not only environmental protection or land management but also due care for social and civilization development related to the need to build relevant infrastructure required for – considering needs of civilization – the life of man and respective communities. Thus, the idea of sustainable development incorporates the need to consider different constitutional values and properly balance them.

Furthermore, this study aptly notes that the *"definition treats emission as an object and not an activity, so it is different from the meaning normally assigned to this term in informal language; emission is not the act of releasing substances or energy into the environment, but it denotes the very substances or energy released into the environment."*[11] Thus, emissions do not mean the act of releasing a substance or energy but rather the substance or energy that is released and, therefore, exists.

Considering the lack of a legal definition of low-carbon energy, I propose a definition designed for the needs of this study. Low-carbon energy refers to specific behaviors, actions, and activities as a result of which energy security is ensured, and at the same time, the release of substances or energy into the environment is reduced to the minimum. Energy security is identified as the absence of the risk of interruptions in the supply of energy and energy resources.[12] Energy security is an important element of

[10] Bukowski 2012.
[11] Bar, Górski, Jendrośka, Jerzmański, & Pchałek 2019, 41.
[12] Lubieńczuk 2014, 162.

national security.[13] In addition, this is considered social security because of the wide range of entities to which energy security refers.[14]

Hence, we are dealing with a situation in which, on the one hand, it is necessary to ensure energy security and, on the other, emissions must be reduced to the minimum.

Considering these aspects are not a one-off act, and it is not possible to do so in a single action. This process involves a sequence of activities distributed over time. In the legal language, these are referred to as transformations. This transformation has several advantages. First, as Stypuła aptly notes, it has ecological, ethical, and sociopolitical dimensions.[15] It must also be realized consistently and separately from current needs, particularly political ones. Long-term activities do not foster consistency and lead to interim compromise, which adversely affects transformation. In addition, it must incorporate all entities participating in energy security. Finally, adequate legal instruments must be considered to achieve these goals.

Thus, the legislature is responsible for identifying the instruments to achieve these goals and maintaining the consistency and continuity of transformation in an effort to achieve its long-term intentions.

4. Support mechanisms

To fulfill the European Union (EU) renewable energy goals described in the previous chapters, the following support mechanisms were introduced: (1) system of green certificates; (2) the auction support system, which is ultimately to replace the green certificate system; (3) the feed-in-tariff (FIT) and feed-in-premium (FIP) intended for producers of biogas and electricity from hydropower plants; (4) a special discount system; and (5) the obligation to purchase 'green energy' from installations with a total installed electrical capacity of <500 kW by obligated sellers (including energy companies and industrial customers) at a price equivalent to the average selling price of electricity on the competitive market in the previous quarter announced by the President of the Energy Regulation Office.[16]

These instruments were also introduced to constantly increase the installed capacity.

The above support systems are separate for electricity producers in renewable energy micro-, small renewable energy, and higher-power installations. According to the Act on Renewable Energy, a micro-installation is a renewable energy installation with a total installed electric power of not more than 50 kW, which is connected to a power grid with a rated voltage lower than 110 kV. This provision clearly defines the power range for prosumer installations, which can certainly be photovoltaic microinstallations or small wind turbines. A small installation is a renewable energy installation with a total installed electrical capacity higher than 50 kW and lower than 500 kW and is connected to a power grid with a rated voltage lower than 110 kV.

[13] Brzeziński, 2009, 33.
[14] Korzeniowski 2017, 145.
[15] Stypuła 2015, 299–325.
[16] Paska, Surma, Terlikowski & Zagrajek 2020, 4261.

Regarding the general instruments of the support system, it must be emphasized that since 2005, only the system of green certificates has been binding.[17] The auction system was introduced in 2015.[18] Currently, the two support systems for reticuloendothelial system (RES) installations >40 kW operate in parallel. The auction system is dedicated only to new RES installations. The strengths and weaknesses of both the systems have been widely discussed.[19]

The assumption of the green certificate system was quantitative support for the production of electricity from RES; that is, for each kilowatt hour of electricity generated from RES, there is a certificate of origin issued by the President of the Energy Regulatory Office. The price of green certificates is market-driven by demand for certificates, their supply, and substitution fees. This is specified by law, and the President of the Energy Regulatory Office announces the amount each year. The system does not provide a minimum price for certificates. Obtaining green certificates and selling them is an additional profit for electricity producers, in addition to sales profits or savings from energy consumption for their own needs.

According to the assumptions of the auction system, auctions are organized by the President of the Energy Regulatory Office, where producers of electricity from RES submit their bids.[20] The offer includes the amount of energy that the producer undertakes to deliver for over a period of 15 years and the unit price of the energy produced (price per MWh). The price provided in the offer may not exceed the reference price specified for a given type of RES installation in the Regulation of the Minister of Energy. Support is granted only to projects that declare the lowest price per unit of offered energy until the volume specified by the President the Energy Regulatory Office is exhausted. The winning auction price is subject for annual indexation with the average annual consumer price index for the previous year. In 2019, 12 RES auctions were held in the current state of the auction system.

In 2018, new mechanisms were introduced to support electricity production. The FIT and FIP systems are concerned only with installations using agricultural biogas, biogas obtained from landfills, a combination of the above, sewage treatment plants, and hydropower. For these types of RES installations with an installed capacity not exceeding 500 kW, guaranteed purchase prices for electricity (FIT) have been introduced, whereas for installations with a capacity of not less than 500 kW and less than 1 MW, there is a system of subsidies to the market price (FIP). Support in the FIT or FIP formula applies for 15 years, but not beyond December 21, 2035.

A discount system was introduced in 2016. The discount system initially covered only prosumers. They were defined as *"the end user who purchases electricity on the basis of a comprehensive contract and generates electricity only from renewable energy sources in a micro-installation, in order to use it for his own needs, not related to the conducted business activity."* However, since 2019, the definition of a renewable energy prosumer has been extended and allowed for settlements in the discount system, not only for households but also for entrepreneurs

[17] Brzezińska-Rawa & Goździewicz Biechońska 2014, 79–87.
[18] Gnatowska & Moryń-Kucharczyk 2019, 232–237.
[19] Trela & Dubel 2017; Adamczyk & Graczyk 2020; Jerzy, Lissoń, Pokrzywniak & Szambelańczyk 2016.
[20] Kitzing & Wendring 2016.

with a renewable energy micro-installation, that is, an installation with a total installed electricity capacity of no more than 50 kW, regardless of the scale of their activity.[21]

The discount system is based on the assumption that the energy generated in an RES micro-installation connected to the power grid of the distribution system operator (DSO) and not used for current needs is fed into the grid. Therefore, the power grid is a type of 'virtual energy storage.' When the generator does not produce electricity or its production is insufficient to satisfy the current demand, it is possible to withdraw up to 80% of the stored energy from the grid (for installations with a power of up to 10 kW) or 70% (for installations of more than 10 kW) but less than 40% (50 kW) at no additional cost. An entity wishing to become a prosumer must have a contract to purchase and distribute energy. Support in the discount system formula was provided for prosumers for 15 years, but not beyond December 31, 2035.[22]

5. Legal system of financing low-carbon energy in Poland by means of a contract

There is a rich choice of legal measures (legal instruments) through which goals can be achieved. The starting point was the provision of the Constitution of the Republic of Poland of April 2, 1997. The Polish Constitution presents a modern approach to environmental protection. The constitutional legislature perceives and addresses these problems. The Polish constitutional legislature also points out that environmental protection is the responsibility of public authorities.

The study assumes that public authorities can exercise their constitutional obligations on four levels. The first level is the making of law, which considers environmental protection issues. The second level involves performing certain organizational activities in the form of factual activities. The third level involves educational activities that fulfill these constitutional obligations. The last level involves financing environmental protection tasks, including tasks related to low-carbon energy.[23]

It must be emphasized that the possibility of protecting the environment without sufficient financial support is a myth. At present, the environment cannot be protected, even through attempts to adopt a low-carbon policy, only by means of legal norms, efficient organization, education, or awareness of citizenship without simultaneous financial support for such protection.

Environmental protection is financed by public funds; hence, its expenditure requires the design of a specific set of legal instruments.

First, the legislature makes laws allowing the use of public funds to finance various projects that foster low-carbon energy. Only clear and direct legal norms make public expenditure possible. It is also necessary to adopt relevant organizational solutions that will determine the provider of funds, type, and recipient of funds; the principles of providing them; their amounts; and the relevant process framework.

The system for financing environmental protection, including low-carbon energy, should source funds from the budget. However, it can also be a system of extra-budgetary resources. In Poland, the legislature assumed a very good solution regarding

[21] Sękulski & Żuchowski 2018, 99.
[22] Woźniak, Krysa & Dudek 2020.
[23] Rakoczy 2005, 78.; Bukowski, Czech, Karpus & Rakoczy 2013, 5.; Rakoczy 2009, 22–24.

the source of funds allocated to environmental protection, including low-carbon energy, that is, extra-budgetary funds. This means that money from different environmental use fees is not fed into the budget but to specialized entities that can spend it only on purposes defined by law.

In Polish law, such specialized entities are legal persons other than the State Treasury; thus, they can take part in legal transactions on their own and independently of the State Treasury. What is important for the analyzed issues is that they can enter into agreements and contracts and do not have to use solely administrative law-binding instruments.

The system provides two levels of support: central and regional (voivodeships). The national (central) level is represented by the National Fund for Environmental Protection and Water Management (i.e., legal person). Pursuant to Article 33 of the Civil Code, *"legal persons are the State Treasury and organizational units that are accorded legal personalities by specific regulations."* Thus, the State Treasury is not liable for a state-owned legal person who, in turn, is not liable for the State Treasury.

The regional (voivodeship) level is represented by regional funds for environmental protection and water management, which are self-governed legal persons independent of the State Treasury and any local authority unit. Each of the 16 voivodeships has a separate regional fund for environmental protection and water management, with competence limited to the territory of the voivodeship in which it operates.[24] The money available to the funds is public money.

A contract is a fundamental instrument by which funds dispose of public money to finance low-carbon energy. A catalogue of the types of contracts that such funds can conclude is a closed catalogue. This is defined in Article 411 paragraph 1 of the Environmental Protection Act of April 27 2001.[25] According to this provision, *"financing of the activities mentioned in Article 400a paragraph 1 and Article 410a paragraphs 4–6 from the resources of the National Fund and regional funds takes the form of interest-bearing loans, including loans for maintaining financial liquidity of projects co-financed by the EU; grants, including surcharges on banking loan interest; partial repayment of the principal amounts of banking loans; surcharges on interest or bond redemption price; and surcharges on lease instalments or other payments indicated in the lease contracts pursuant to Article 23a paragraph 1* of the act *of July 26, 1991, on personal income tax (Dz. U. [JL] of 2018 item 1509, as amended) and Article 17a paragraph 1* of the act *of February 15, 1992, on corporate income tax (Dz. U. [JL] of 2019 item 865, 1018, and 1309). Financing can also take the form of grant awards for environmental protection and water management activities not related to performing obligations by the government and local government officers."* In addition, the EPL indicates the tasks, investments, and projects for which expenditure from such funds is allowed.

[24] Compare in Italien Law – Marchello, Perrini & Serafini, 2007, 76.; Maglia 2009, 165.; Mariotti & Iannantuoni 2011, 23.
[25] Dz. U. (JL) 2019.1396 consolidated text of 2019.07.29, here the EPL.

6. Financing of low-carbon energy from the funds for environmental protection and water management

Interestingly, the goals that may be deemed related to low-carbon energy are given separate treatment in Polish law. It is significant that the legislature does not mention low-carbon energy as a separate goal but points to other goals (indirect goals) aiming at low-carbon energy.

The revenue of the National Fund includes but is not limited to receipts from the sale of assigned amount units (AAU). Other revenues of the National Fund are from the sale of emission allowances under the system of trading in greenhouse gas emission allowances. Receipts from the sale of AAU collected in a climate account are allocated to the financing of tasks related to support undertakings under programs and projects covered by the National Green Investment Scheme referred to in Article 22 paragraph 1 *of the act* of July 17, 2009, on the system to manage the emissions of greenhouse gases and other substances and the coverage of expenses on the service of the Advisory Board.

The resources of the National Fund other than revenues and proceeds from the sale of AAU accumulated in the climate account referred to in Article 23 paragraph 1 *of the act* of July 17, 2009, on the system to manage the emissions of greenhouse gases and other substances may also be allocated, with the approval from the Minister of Environment, to provide aid under an international cooperation scheme for development to countries not listed in Annex I of the United Nations Framework Convention on Climate Change formulated in New York on May 9, 1992,[26] making payments for international organizations, institutions, schemes, and funds, ensuring that financial mechanisms to accomplish the objectives of the Convention on Climate Change are in place. Aid is provided to support projects and investments related to the reduction or avoidance of greenhouse gas emissions, the absorption or sequestration of carbon dioxide (CO2), adaptation to climate change, and institutional reinforcement.[27] The resources of the National Fund, other than revenues and proceeds from the sale of AAU conducted by a state budget unit, are transferred to the respective units.

Resources from the National Fund are also allocated to indemnification for non-performance or improper performance of contracts of the concluded sale of AAU according to the *act* of July 17, 2009, on the system to manage the emissions of greenhouse gases and other substances.[28]

Polish law also treats financial instruments associated with renewable energy sources as instruments supporting low-carbon energy. Issues related to renewable energy sources are beyond the scope of this analysis; nevertheless, certain relationships can be clearly identified between renewable energy sources and the issues analyzed.

The study generally focuses on the relationship between renewable energy sources and energy policies.[29]

[26] Dz. U. (JL) of 1996 item 238.
[27] In Czech Law see Kindl & David 2007, 56.
[28] These issues are analyzed in detail, among other authors, by Urban, 2019, 991.; Gruszecki, 2019, 1192.
[29] See, for instance Szyrski 2017.

As aptly noted by Elżanowski and Sokołowski, *"in the Energy Policy of Poland until 2030, in the context of measures for the development of renewable energy sources, the following are indicated without limitation: maintaining support mechanisms for producers of electricity from renewable sources, example, the system of certificates of origin, maintenance of the obligation to gradually increase the share of biocomponents in transport fuel in order to achieve the intended targets, introduce additional support instruments encouraging a wider scale of generation of heat and cold from renewable energy sources, implementation of the directions of construction of agricultural biogas plants [...]."*[30] This connection must also be considered true. However, regulations concerning renewable energy sources indirectly address issues related to low-carbon energy. This relationship is simple. The higher the support for renewable energy sources, the better the low-carbon energy sources. Thus, the support for renewable energy sources is directly reflected in low-carbon energy sources. Green certificates play an important role as legal instruments that provide financial support for low-carbon energy. In the Polish legal system, energy certificates are subject to legal transactions, and a portion of the funds is allocated to low-carbon energy. The certificates of origin are also green certificates issued on the grounds of a separate act, the Polish Energy Law, which is discussed in a separate chapter.

7. Conclusions

It should be noted that the efficiency and effectiveness of financial support instruments for low-carbon energy are low. The instruments were not utilized to the fullest extent. There were several reasons for this observation.[31]

The primary reason for the inefficiency and ineffectiveness of the aforementioned instruments is bureaucratic obstacles preventing access to and use of such instruments. The first refers to obtaining money from funds for environmental protection and water management. Jendrośka and Bar view the problem from a slightly different angle and indicate that *"in practice, recently, the most efficient stimulus to observe the Community law has been the requirements for requesting the financing from the Community funds and the risk that the funds will not be allocated if any irregularities are found."*[32]

Entities allocate funds pursuant to applications that must satisfy several formal conditions. The applications are subject to an evaluation that, despite the efforts of the Polish legislature, has still been arbitrary and is often performed by individuals who are not familiar with these problems. Controlling the utilization of such funds is also difficult; it often becomes irrationally focused on completing the forms and columns instead of evaluating the real effects or their lack of.

Furthermore, the use of public funds in Poland is characterized by a high degree of suspicion regarding corruption-related motives because the allocation and continued use of such funds are subject to high risk.[33]

[30] Elżanowski & Sokołowski 2010, 133.
[31] See Koch 2007, 313.
[32] Jendrośka & Bar 2008, 67–68.
[33] In Spanish Law see Asunción, López & Garcia, 2015, 67.

Another drawback is approaching the money obtained from funds for environmental protection and water management and allocated to objectives related to the support of low-carbon energy as a necessary evil. To ensure the efficiency of these measures, it is insufficient to formally provide the possibility of obtaining money. It is also necessary to create a friendly, practical environment, including the attitudes of different entities that make decisions on the allocation of funds and evaluate their utilization, the axiology of activities, and state priorities. In Poland, the atmosphere is, at best, neutral but closer to reluctance rather than willingness. This is mostly associated with supporting a coal-based energy policy, which is truly competitive with low-carbon energy. A general axiological approach to environmental protection is relevant.

Therefore, energy certificates are useful. These functions serve as specific property rights. Thus, their demand and supply are determined by the market and reasonably supported by public instruments. However, in practice, resistance from energy companies reluctant to participate in legal transactions involving energy certificates has been observed.

Another drawback is the mentality that still views the policy supporting low-carbon energy as a necessity or order without noticing the values and benefits it provides and will provide. However, no legislator can help reconstruct this mentality. It is a question of responsibility, axiology, and consciousness.

In summary, it must be noted that legal instruments of financial support for low-carbon energy in Polish law can be described and evaluated according to certain general criteria. First, it should be noted that low-carbon energy is not a self-contained goal of financial support. However, as previously shown, it can be concluded that Polish law provides for such a value protected by law and, consequently, is eligible for financing.

Furthermore, legal instruments of financial support for low-carbon energy take the form of both public and non-public funds. Moreover, these instruments are characteristic of both public and private law.

However, the predominant legal instrument providing such support is a contract, although it is sometimes deeply rooted in public law.

Furthermore, it should be noted that the practical uses of instruments of financial support for low-carbon energy are complex. This requires elaborate applications with numerous attachments, including documents and declarations. In addition, the process of granting such funds lasts a long time and is preceded by audits. Consequently, the instruments were not used to their fullest extent.

However, the use of these funds has become increasingly popular. We can only hope that the procedure of awarding such funds will be deformalized and that they will become a popular means of putting low-carbon energy into effect.

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Hajnalka SZINEK CSÜTÖRTÖKI*

Agricultural land succession rules in the Visegrád countries and the relevant case-law of national constitutional courts**

Abstract

This study aims to review and compare the agricultural land succession rules in four countries of the Central European region, namely Slovakia, the Czech Republic, Poland, and Hungary (the Visegrád countries), using a comparative method. The results show that, in the case of Slovakia and the Czech Republic, there are no specific rules on the inheritance of agricultural land; the general succession rules of civil law shall be applied. The same is true in Poland, where there are no specific regulations that differentiate the inheritance of agricultural property or farms from other types of property. However, some specific rules can be found in the Act of April 11, 2003, on the Shaping of the Agricultural System. On the contrary, in the case of acquiring ownership of agricultural land by inheritance, in addition to acquiring it by testamentary disposition, the Hungarian legislator introduced several special rules for acquiring it by intestate succession. Furthermore, in connection with the research topic, the inheritance tax issues, and the relevant case-law of the national constitutional courts are examined in detail.
Keywords: succession, agricultural land, land law, national land law, Visegrád countries

1. Introduction

In recent years, various Member States have witnessed a decline in the number of active farmers, particularly among the younger generations, attributable to technological, social, and economic transformations. Furthermore, European farming is facing the menace of an increasingly intensive concentration process. As a result, the subject of succession has become a significant priority for the Common Agricultural Policy of the EU (hereinafter referred to as the CAP) and the plans of the European Commission. Numerous political discussions are ongoing to introduce initiatives that aid young farmers in establishing and guaranteeing long-term sustainability and profitability of their activities.[1]

Currently, economic and legal tools are primarily used to support European agriculture. At this point, it should be highlighted that the CAP employs a financial instrument to incentivize the establishment of farms for young farmers through

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[1] Palšová, Bandlerová & Ilková 2022, 130–131.

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payments.[2] Not only in European but, for example, in African countries as well, acquiring land and capital is a significant challenge for both new 'entrants' and farming successors.[3] Research suggests that the likelihood of young people engaging in farming is closely tied to their expected land inheritance because family succession is the most prevalent way of entering farming in both regions.[4] Although succession within the family is the most common way of entry into farming, it should be highlighted that access to land is limited due to several factors, including a lack of opportunities for inheriting land from parents; a low supply of land available for sale or lease; and competition from other farmers, investors, and residential users, which increases land prices.[5] The rising value of agricultural land has made farmers hesitant to sell or transfer control to the next generation. The increasing costs of starting and running a business and the challenges in accessing capital are commonly identified as obstacles to generational change.[6]

In agreement with the general statements found in the scientific literature on this subject matter, state intervention is necessary to preserve farms through legal regulation of succession and to create a supportive environment for successors to continue agricultural production effectively. Moreover, the state should specifically regulate the legal succession of agricultural holdings and land when developing long-term sustainable agricultural concepts.[7]

In this respect, this study examines the rules in Visegrád countries[8] regarding the succession of agricultural lands. Furthermore, concerning the research topic, the inheritance tax issues, and the relevant case-law of the national constitutional courts will also be examined.

2. Slovakia

In Slovakia, there are no specific rules on the inheritance of agricultural land.[9] The general succession rules of Act No. 40/1964 Coll., the Civil Code, as amended[10] (hereinafter referred to as the Slovak Civil Code) apply to such cases.[11]

The rules on succession are set out in Sections 460–487 of the Slovak Civil Code. Generally, in Slovakia, succession passes through the operation of law, by will, or both.[12] It can therefore be concluded that the Slovak legal system recognizes the testator's total freedom of testamentary disposition beyond intestate succession, a principle that is also

[2] In this respect, see the compulsory scheme of young farmer payment that Member States are obliged to implement.
[3] Żmija et al. 2020, 2.
[4] Leonard et al. 2017, 147–149. See also: FAO 2012.
[5] Żmija et al. 2020, 2.
[6] Beckers et al. 2018; Meyer 2015.
[7] Palšová, Bandlerová & Ilková 2022, 131.
[8] For the rules of acquisition of ownership of agricultural land in the Visegrád countries, see Csirszki, Szinek Csütörtöki & Zombory 2021, 29–52.
[9] Regarding the detailed rules on the succession of agricultural land in the Slovak Republic (in Hungarian), see Szinek Csütörtöki 2023, 91–104. See also Szilágyi & Szinek Csütörtöki 2022a, 271.
[10] Zákon č. 40/1964 Zb., Občiansky zákonník.
[11] Slovak Civil Code, Part 7.
[12] Slovak Civil Code, Section 461(1).

taken into account by the Slovak Civil Code. The Slovak legal system does not provide for any other title of succession, and the rules in force therefore exclude succession by inheritance contract or the joint will of multiple persons.[13]

Regarding intestate succession, the Slovak Civil Code considers the persons closest to the testator to be legal heirs. These individuals are related to the heir through blood, marriage, or other close personal relationship. Therefore, they usually lived in the same household as the deceased, shared property, and often looked after them. It should be highlighted that an amendment to the Slovak Civil Code, effective from January 1, 1992,[14] added a fourth class to the existing three types of heirs and extended the third class[15] to include children of siblings, that is, nephews and nieces.[16]

In Slovakia, intestate succession takes primacy over testamentary disposition. From a social perspective, it seems 'fairer' and better promotes the strengthening of family ties, as it is easier to remember the closest relatives or people in a similar relationship to the testator, who often contributed together with the testator to the creation of the assets that are the subject of the succession.[17] The tendency towards favoring intestate succession is particularly emphasized by the provision of Section 479 of the Slovak Civil Code, which protects 'forced heirs' *(neopomenuteľný dedič)*. According to this regulatory provision, minor descendants must receive at least as much as their share of the estate under the law, whereas descendants of age must receive at least half of their share. In the case of a will that contradicts the abovementioned rules, the relevant part of the will is void unless the specified descendants have been disinherited.[18]

As mentioned earlier, in the case of intestate succession, the Slovak legislator defines four classes *(dedičské skupiny)* of heirs.

Regarding the first class, the deceased's children and spouses are each entitled to inherit in an equal share.[19] It can be stated that in the case that any of the children do not inherit, their share shall be acquired by his/her children (they shall inherit equal shares).[20] If the deceased person has no descendants, or if their descendants do not inherit, the second class becomes relevant. The second class of legal heirs includes the spouse, the deceased's parents, and anyone who had lived with the deceased person in a common household for at least one year before his/her death and, for this reason, took care of the typical household or were dependent on the deceased person for maintenance.[21] The heirs in this group inherit in equal shares; however, it is worth highlighting that the spouse must always inherit at least one-half of the inheritance.[22] If the heirs of the second class do not inherit equal shares, then the heirs of the third class shall inherit.

[13] Fekete 2011, Section 461.
[14] Act No. 509/1991 Coll. (Zákon č. 509/1991 Zb., ktorým sa mení, dopĺňa a upravuje Občiansky zákonník).
[15] The Slovak Civil Code uses the term 'group' *(skupina)*.
[16] Plank et al. 2009.
[17] This is also confirmed by the wording of Section 461(2) of the Slovak Civil Code. For further, see Plank et al. 2009.
[18] Slovak Civil Code, Section 479.
[19] Slovak Civil Code, Section 473(1).
[20] Slovak Civil Code, Section 473(2).
[21] Slovak Civil Code, Section 474(1).
[22] Slovak Civil Code, Section 474(2).

This class includes the deceased's siblings and anyone who had lived with the deceased person in the same household for at least one year before their death and took care of the home or was dependent on the deceased person for maintenance.[23] The fourth class becomes relevant when none of the deceased's siblings inherit; their share of the inheritance is distributed equally among the children of that sibling.[24] Given that the intestate succession ends with the fourth class, the other persons can no longer be legal heirs. It is also worth noting that if no heir acquires an inheritance, it passes to the State.[25]

Regarding testamentary disposition, it should be noted that under Slovak law, neither inheritance contracts nor joint will[26] are permitted. The Slovak legislator provides three ways of making a will[27]: a holographic will (handwritten will), an allographic will[28] (will using a different method of writing), and a will in notarized form.

Although there are no specific rules applicable to the inheritance of agricultural land in Slovakia, we draw attention to Act No. 180/1995 Coll. on Certain Arrangements for the Holding of Land, as amended,[29] which prohibits an inheritance decision resulting in the division of existing land outside the built-up area of the municipality;[30] this applies to land of less than 3000 m² in the case of agricultural land and 5000 m² in the case of forest land.[31]

A further restriction on the transfer of ownership of agricultural land also arises from the relevant provisions of Act No. 97/2013 Coll. on Land Associations, as amended,[32] according to which the transfer of shares in joint property may not result in a co-ownership share on common property that corresponds to an area of less than 2000 m². Furthermore, the merging of claims may result in a share corresponding to an area of less than 2000 m².[33]

To sum up the above-mentioned, the heirs can be both natural and legal persons.[34] However, as previously stated, who can be an heir depends on the title of the succession. In the case of intestate succession, only natural persons can become heirs. If there are no heirs, the estate is passed on to the State by default. In the case of testamentary disposition, both natural and legal persons can be heirs. It should also be noted that, in Slovakia, there is no land acquisition limit according to current legislation. However, in probate proceedings, provisions prohibiting the fragmentation of agricultural and forestry land must be considered.

[23] Slovak Civil Code, Section 475(1).
[24] Slovak Civil Code, Section 475(2).
[25] Slovak Civil Code, Section 462.
[26] Slovak Civil Code, Section 476(3).
[27] Slovak Civil Code, Section 473.
[28] For example, by computer.
[29] Zákon č. 180/1995 Z. z. o niektorých opatreniach na usporiadanie vlastníctva k pozemkom
[30] Except for vineyards. On the exception, see Martvoň 2021, 104.
[31] Act No. 180/1995 Coll. on Certain Arrangements for the Holding of Land, Section 23(1). It should be noted that the amendment has been in force since September 1, 2022. Until August 31, 2022, the limit – as regards the agricultural land – was 2000 m².
[32] Zákon č. 97/2013 Z. z. o pozemkových spoločenstvách.
[33] Act No. 97/2013 Coll. on Land Associations, Section 2(3).
[34] While they must have legal capacity (see Section 7 of the Slovak Civil Code) and be entitled to inherit (for example, they cannot be disinherited).

As regards the tax issues, it can be stated that Slovakia does not impose an inheritance tax, as it was abolished as of January 1, 2004. In addition, according to Act No. 595/2003 Coll. on Income Tax, as amended,[35] income from the sale of immovable property is exempt from tax if anything acquires the immovable property by inheritance in direct succession (such as from parents) and the sale takes place after the expiry of a five-year period from the acquisition of ownership of the immovable property or co-ownership of the testator(s).[36]

3. The Czech Republic

In the Czech Republic, similar to Slovakia, the general succession rules of Act No. 89/2012 Coll., the Civil Code, as amended (hereinafter referred to as the Czech Civil Code)[37] apply.[38] Therefore, general rules apply to agriculture provided that they do not obstruct the continuous fragmentation of agricultural land. This fragmentation is considered one of the primary reasons owners rent out land instead of farming it. Furthermore, the law does not prohibit the inheritance of land by foreign citizens across borders based on the legal hierarchy of succession or inheritance agreements made during the testator's lifetime.[39]

It is worth mentioning that until 2011, it was not possible for foreigners, including both natural and legal persons, to purchase agricultural land in the Czech Republic, except for a few exceptions. These exceptions included foreigners who had Czech citizenship or were married to a Czech citizen, who inherited the land or had pre-emptive rights from co-ownership, who could not separate the land from another asset already owned by the foreigners or exchange it for domestic land, and EU-citizen farmers who were registered as self-employed and permanently staying in the Czech Republic for at least three years. Eligibility conditions have eased since November 2010, with the only requirement being official registration as a farmer. Individuals who are natural residents of the Czech Republic and have been farming on leased land for a minimum of three years, as well as Czech legal entities that combine both domestic and foreign capital, have been allowed to purchase private agricultural land, provided they can demonstrate their integrity, professional farming knowledge, and proficiency in the Czech language. However, since November 2010, the Czech government eased the eligibility criteria for foreigners seeking to purchase private or state-owned land. Previous requirements of permanent residency, three years of farming experience, and language and farming knowledge were eliminated.[40]

The rules of succession are set out in Sections 1475–1720 of the (new) Czech Civil Code. It can be stated that succession passes by operation of law, by will, or by an inheritance contract. Similar to Slovak law, Czech legislation does not recognize succession by the joint will of multiple persons. However, succession by inheritance

[35] Zákon č. 595/2003 Z. z. o dani z príjmov.
[36] Act No. 595/2003 Coll. on Income Tax, Section 9(1) point b).
[37] Zákon č. 89/2012 Sb., Občanský zákoník (nový).
[38] Szilágyi & Szinek Csütörtöki 2022b, 345.
[39] Vomáčka & Leichmann 2022, 132.
[40] Ciaian, Kancs, Swinnen, Van Herck & Vranken 2012, 9.

contract is allowed,[41] which is a bilateral act: the decedent designates the other party as the heir, and the other party must accept this designation. However, the heir's agreement is also necessary to cancel contracts. Regarding the form of the contract, it must always be in the form of a public document *(veřejná listina)* and may only cover up to three-quarters of the estate, with the remaining quarter to be decided through other means, such as a testament. In addition, the testamentary clause in a legacy is similar to a testament, but it does not appoint heirs. Instead, it is used to modify aspects, such as legacies, mandates, and determinations of time, that were not initially included in the testament.[42]

In the absence of an established order of succession in an inheritance agreement or will, the legal order of succession is determined by law through what is known as succession classes *(dědické třídy).*[43] At this point, the Czech legislator sets out six classes of heirs, while Slovakia sets out only four.

According to Czech law, in the first class of heirs, the deceased's children and spouse shall inherit each of them equally. If a child does not inherit them, their share in succession passes, in equal measure, to that child's children.[44] The second class includes the following persons: the spouse, the deceased's parents, and anyone who had lived with the deceased person in a common household for at least one year before his/her death and, for this reason, took care of the common household or were dependent on the deceased person for maintenance.[45] The heirs in this group inherit in equal shares; however, it is worth highlighting that the spouse must always inherit at least one-half of the inheritance.[46] It should be highlighted that if neither the spouse nor any of the parents inherit, the siblings of the deceased person and anyone who had lived with the deceased person in the same household for at least one year before their death and took care of the household or was dependent on the deceased person for maintenance shall inherit the third class in equal shares.[47] If no heirs in the third class inherit, the grandparents of the deceased inherit them equally in the fourth class.[48] The fifth class becomes relevant when no heirs of the fourth class are inherited. According to Section 1639 of the Czech Civil Code, only the grandparents of the deceased person's parents shall inherit in this class. The grandparents of the deceased person's father receive half the inheritance, and the grandparents of the deceased person's mother receive the other half. The two sets of grandparents equally share half that accrues to them.[49] If none of the heirs of the fifth class inherits, the children of the deceased's siblings and grandparents shall inherit in the sixth class, each in equal shares. If none of the children of the deceased's grandparents

[41] Czech Civil Code, Sections 1582–1593.
[42] For detailed information, see an article by Radomír Ježek titled Last will, testaments and inheritance in Czech Republic.
[43] For more on this topic, see: Šešina 2019.
[44] Czech Civil Code, Section 1635.
[45] Czech Civil Code, Section 1636(1).
[46] Czech Civil Code, Section 1636(2).
[47] Czech Civil Code, Section 1637.
[48] Czech Civil Code, Section 1638.
[49] Czech Civil Code, Section 1639.

inherits them, their children will inherit them.[50] Similar to the Slovak regulation, if no heir acquires an inheritance, it shall pass to the State.[51]

Regarding the 'forced heirs' *(nepominutelný dědic)*, the construction of the rights of forced heirs differs significantly from the previous regulation. Forced heirs became heirs by law if they asserted their rights under Section 479 of Act No. 40/1964 Coll., as amended,[52] the compulsory portion is now only understood as a claim of the forced heirs against the heirs, who are obliged to pay the compulsory amount in cash unless the deceased person provides otherwise, or unless the forced heir and heirs agree on another method of settling the compulsory portion.[53] The compulsory heir is no longer an heir unless the testator leaves them a share in the inheritance; they have the status of creditor of the heirs. The heirs are solely responsible for all estate debts.[54]

It can be concluded that the Czech succession law adheres to universal succession, meaning that the heir automatically assumes the deceased's position, including their debts, regardless of the inheritance's value. The heir has the option to renounce the entire inheritance or a portion thereof in favor of the other heirs. However, the heir cannot relinquish their right to inheritance in favor of a person who is not entitled to any inheritance asset. It should also be highlighted that the heirs can be both natural and legal persons. However, who can become an heir depends on the title of the succession.

Regarding the tax issues, it should be highlighted that the inheritance tax at the end of 2013 was abolished in the Czech Republic.[55] Since 2014, the regulation of inheritance (and also gift) taxes is no longer separate but rather incorporated under the income tax law. This means that inheritance tax is subject to progressive taxation, similar to other forms of personal income. However, this incorporation resulted in a significant increase in gift taxes compared with previous legislation. Note that exemptions may be available, such as total exemptions from inheritance taxes for certain persons.[56]

4. Poland[57]

First of all, it can be stated that in Poland,[58] there are no specific regulations that differentiate the inheritance of agricultural property or farms from any other types of property.[59] It is worth mentioning that, previously, the Act of April 23, 1964, the Civil Code[60] (hereinafter referred to as the Polish Civil Code) contained such regulations. Still,

[50] Czech Civil Code, Section 1640.
[51] Czech Civil Code, Section 1634.
[52] Zákon č. 40/1964 Sb., Občanský zákoník (starý).
[53] Czech Civil Code, Section 1654 (1), first sentence.
[54] Šešina 2019.
[55] Act No. 586/1992 Coll. on Income Tax (Zákon č. 586/1992 Sb. o daních z příjmu), Section 4a point a).
[56] Borkovec 2023.
[57] I would like to thank Katarzyna Zombory, PhD, senior researcher at the Central European Academy for her help and advice while preparing this subchapter.
[58] On the Polish legislation, see, for example: Zombory 2020, 282–305 and Zombory 2021, 174–190.
[59] Kubaj 2020, 123.
[60] Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny.

they were deemed unconstitutional by the Constitutional Tribunal *(Trybunał Konstytucyjny)* for violating, *inter alia*, the principle of equality[61] enshrined in the Constitution of the Republic of Poland of April 2, 1997.[62,63]

The Polish Civil Code regulates the inheritance of agricultural properties and farms only when the opening of the inheritance took place before February 14, 2001, that is, before the day the above-mentioned judgment of the Polish Constitutional Court came into force.

When a person inherits[64] agricultural land, it does not necessarily mean that they will retain it because of the National Agricultural Support Center's (hereinafter referred to as the NASC)[65] right to acquire such property. According to Article 4 of the Act of April 11, 2003, on the Shaping of the Agricultural System,[66] the NASC can purchase agricultural land resulting from inheritance or legacy by making a declaration of acquisition against the payment of its market value. It should be emphasized that this right of the NASC is not absolute and is subject to certain exceptions. For instance, it does not apply if agricultural real estate is acquired by a close relative of the seller or an individual farmer owing to a windup bequest. In addition, the NASC's right to acquire agricultural real estate is excluded in the case of statutory inheritance, in which the designated testamentary heir is an individual farmer.[67] This regulation protects family farms and ensures the appropriate management of agricultural land.[68]

The NASC's right to acquire agricultural real estate has been a subject of much uncertainty. However, it is noteworthy that the Constitutional Tribunal has examined Article 4 of the Act in question. According to the Tribunal's ruling on March 18, 2010, signature K 8/08[69], this provision is in line with the Constitution of the Republic of Poland on April 2, 1997, and does not violate the principle of a democratic state of law[70] and the right to property.[71]

To understand this situation, we consider it necessary to emphasize that the Polish legislator has formulated strict rules on the acquisition of ownership of agricultural land. Since 2016, due to an amendment to the Act of April 11, 2003, on the Shaping of the Agricultural System, a twofold obligation has been imposed on the acquirer of agricultural property in Poland aimed at the utilization of agricultural land and preventing capital investments in such land, and also to ensure food security in the country.[72] According to the Act, the acquirer is required to run the agricultural holding to which the real agricultural property belongs for a minimum period of five years from the date of

[61] See the Judgement of the Constitutional Tribunal of January 31, 2001, No. P. 4/99.
[62] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.
[63] On the constitutional issues, see Blajer 2022.
[64] According to the Polish law, an estate may be inherited through intestate succession or testate. On this issue see further Oleśkowska 2023.
[65] Krajowy Ośrodek Wsparcia Rolnictwa (KOWR).
[66] Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego.
[67] Ledwoń 2022, 204–205.
[68] Kubaj 2020, 124.
[69] Wyrok Trybunału Konstytucyjnego z dnia 18 marca 2010 r. sygn. akt K 8/08.
[70] Constitution of the Republic of Poland of April 2, 1997, Article 2.
[71] Constitution of the Republic of Poland of April 2, 1997, Articles 21 and 64.
[72] Csirszki, Szinek Csütörtöki & Zombory 2021, 44.

acquisition.[73] During this period, the acquirer is prohibited from selling agricultural property or transferring possessions. However, these restrictions are not absolute as the Act provides various exemptions. These exemptions refer to the acquirer, the type of acquisition (e.g., by inheritance), or the location of the real agricultural property.[74] Even in the absence of statutory exemptions, the acquirer may still sell the land or transfer its possession within a five-year period if approved by the general director of the NASC. Such exemptions require justification based on the acquirer's important public interest. Failure to comply with the obligations outlined in Article 2b, paras. 1 and 2 may result in state control and scrutiny. If the acquirer fails to farm the land or violates the prohibition on disposal, the NASC, acting on behalf of the State Treasury, can request that the court enforce the buyout of the misused land.[75]

So, regarding the heirs, it doesn't matter (because the legislation places inheritance within the scope of exceptions) whether the inheritance results from an act or a will; they don't necessarily have to be individual farmers, nor do they have to meet the maximum area standard. Furthermore, in the case of a designation under will, not only a natural but also a legal person is entitled to inherit.[76]

Regarding testamentary disposition, it should be noted that under Polish law, a joint will is not prohibited. The Polish legislator provides four ways of making a will: a holographic will (handwritten will); a will in notarized form; a will made orally in the presence of two witnesses before the mayor of a municipality (*wójt)*, the mayor of a town *(burmistrz)* or the head of a town council *(prezydent miasta)*; and an oral will[77] in the presence of three witnesses.

It should also be highlighted that inheritance waiver agreements are the only type of agreements on succession recognized in the country. These agreements can be made by the future testator and the legal heir and must be in the form of a notarial deed to be considered valid.

Turning to the tax issues, it can be stated that in Poland, a common way for young farmers to obtain their initial agricultural land is through inheritance from their family members. The Polish government provides tax remissions if certain conditions are met to incentivize farmers to continue running farms. An essential act in connection with this topic is the Act on Tax Inheritance and Donations of July 28, 1983,[78] which states that the acquisition of agricultural land by natural persons is typically subject to an inheritance tax. However, it can be tax-free if the acquisition in the creation or enlargement of a farm has an area between 11 and 300 hectares, and the successor manages the farm for at least five years.[79] The Act of July 26, 1991, on Income Tax from Natural Persons[80] provides further tax relief by exempting the revenue from agricultural activities from personal

[73] Act of April 11, 2003, on the Shaping of the Agricultural System, Article 2b Section 1.
[74] Csirszki, Szinek Csütörtöki & Zombory 2021, 45.
[75] Id. 45. See further: Ledwoń 2022, 206.
[76] Ledwoń 2022, 204.
[77] Only when death is imminent and it is impossible or very difficult to make a will in the ways described above.
[78] Ustawa z dnia 28 lipca 1983 r. o podatku od spadków i darowizn.
[79] Act of July 28, 1983 on Tax Inheritance and Donations, Article 4 Section 4 point 1.
[80] Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych.

income tax. Additionally, young farmers can take advantage of exemptions under the Act of November 15, 1984, on agricultural tax,[81] which exempts land intended for creating or extending a farm up to 100 hectares from agricultural tax for five years. According to the Act of September 9, 2000, on taxes on civil law transactions,[82] the sale of land constituting a farm is also tax-free if the buyer of land that includes a farm creates or expands a farm with an area between 11 and 300 hectares and manages it for at least five years from the date of purchase.[83]

5. Hungary

The Hungarian land transfer regulations[84] that came into force in 2014 differ from the rules of other EU countries, such as France and Austria, and from non-EU countries that have established EU-compliant rules, such as Switzerland.

From the time of their adoption, Hungarian regulations showed similarities to the comprehensively regulated restrictive system; at that time, there were no significant special rules[85] regarding the intestate succession of agricultural lands and holdings. However, there were some about the testamentary dispositions. The situation changed significantly owing to the amendment of Act LXXI of 2020 on the termination of undivided co-ownership of land[86] (hereinafter referred to as the Co-ownership Land Act), which came into effect on January 1, 2023.[87] This can be considered a definite step towards developing special state succession rules for agricultural properties.

In the Co-ownership Land Act, a separate rule is established for cases in which the object of succession is immovable property[88] or the ownership interests (shares) of immovable property.[89]

The provisions of the Act regarding immovable property[90] state that if the deceased owns a property solely inherited jointly by multiple heirs under intestate succession, they must take measures to avoid creating undivided co-ownership. The amendment, taking into account the specificities of inheritance and probate proceedings, establishes different rules when heirs and non-co-owners divide immovable property to prevent the formation of undivided co-ownership.

Regarding the second issue, the co-heirs have some options during the probate procedure to avoid further division of the ownership share. These measures included reaching an allocation agreement, selling shares, and donating shares to the state.

[81] Ustawa z dnia 15 listopada 1984 r. o podatku rolnym

[82] Ustawa z dnia 9 września 2000 r. o podatku od czynności cywilnoprawnych

[83] Kubaj 2020, 124–125.

[84] See for example, Hornyák 2019a; Hornyák 2019b; Hornyák 2020; Hornyák 2021; Csák 2006; Csák 2010; Csák, Kocsis & Raisz 2015; Olajos 2022; Olajos 2018.

[85] The general rules of the Hungarian Civil Code should be applied to the issues in question. See for example, Barzó 2016; Vékás 2008; Vékás 2019.

[86] 2020. évi LXXI. törvény a földeken fennálló osztatlan közös tulajdon felszámolásáról és a földnek minősülő ingatlanok jogosultjai adatainak ingatlan-nyilvántartási rendezéséről.

[87] See further: Hornyák & Prugberger 2016, 58.

[88] Co-ownership Land Act, Section 18/A.

[89] Co-ownership Land Act, Section 18/B.

[90] Co-ownership Land Act, Section 18/A (1)–(4).

If none of these happens, then, although the heirs[91] inherit the share in the immovable property in accordance with the rules of intestate succession,[92] they must sell it within five years,[93] transfer it to one of them, offer it free of charge to the State, or terminate the undivided joint ownership of the property by initiating proceedings. If they fail to do so, there will be a forced sale of the ownership shares involved in the inheritance.

With regard to testamentary disposition, given that the acquisition of land by means of a testamentary disposition has already been dealt with in several studies,[94] we do not intend to analyze it in detail in this paper but only to outline what we consider most relevant.

Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter referred to as the Land Transfer Act)[95] imposes restrictions on the creation of usufruct rights for agricultural land, which is provided in Act V of 2013 on the Civil Code (hereinafter referred to as the Hungarian Civil Code), by invalidating such rights established through contracts or testamentary dispositions, unless they are created for the benefit of a close relative. However, if a usufruct is established between close relatives, the Land Transfer Act's provisions on property acquisition apply with certain exceptions: the usufruct may be set for a maximum period of 20 years; the validity of the contract or testamentary disposition establishing the usufruct does not require the approval of the agricultural administration body; the provisions on land acquisition limit and land possession limit shall be applied to the extent of the permitted acquisition of the usufruct, with the notion that the right of ownership shall be understood as the usufruct and when setting the permitted extent, the area of land owned by the recipient shall be considered; the ownership of the land may be transferred by retention of the usufruct only to a close relative.[96]

It is common for testators to designate a non-farmer as their heir, but it should be emphasized that the legislator has established strong restrictions regarding the size of the acquired land for such individuals. As a general rule, a not agricultural national producer *(földművesnek nem minősülő belföldi személy)* and citizens of EU Member States may acquire ownership of agricultural land only if the total area of the land they already possess does not exceed 1 hectare when combined with the area of the land they intend to acquire.[97] An exception to this rule applies when a person transferring ownership is a close relative of a non-agricultural producer or citizen of an EU Member State.[98] In the case of farmers, when a non-agricultural producer or citizen of an EU Member State is a close relative of the person transferring ownership, or in the case of land acquisition for recreational

[91] See Act Co-ownership Land Act, Section 18/A (3).
[92] Ibid.
[93] Ibid.
[94] See, for example, Hornyák 2019a; Hornyák 2021, 86–99.; Kurucz 2018, 5–23.; Paic-Karsai 2022, 98–119.
[95] A mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvény.
[96] Land Transfer Act, Section 37(5). See also: Szilágyi 2022, 159.
[97] Land Transfer Act, Section 10(2).
[98] Land Transfer Act, Section 10(3).

purposes, the general land acquisition limit[99] applicable to agricultural producers must be considered. This means that they can acquire ownership of agricultural land up to a total area of 300 hectares (including ownership and usufruct) when considering the area of land already in their possession and under their usufruct.[100] Of course, these restrictions, including the 1-hectare limit or, in certain cases, the 300-hectare land acquisition limit, must also be considered in the case of testamentary disposition.

It should be also pointed out that in the case of the acquisition of ownership of agricultural land through testamentary disposition, the approval of the agricultural administrative authority is required.[101]

Moreover, certain special rules shall also be applied in the proceedings.[102]

It is worth mentioning that the rules of acquisition of ownership incorporated in the Land Transfer Act do not cover all legal bases and methods of acquisition in question, as they do not apply to intestate succession; donations to the state in the probate proceedings; of expropriation and acquisition by auction for restitution.[103] The acquisition of ownership by intestate succession also occurs when the testamentary inheritor can become an intestate inheritor (assuming the lack of a testament and the exclusion of other intestate inheritors from inheritance). Therefore, in these cases, instead of special rules for the land transfer regime, the general rules set out in the Hungarian Civil Code should be applied.[104]

According to the inheritance tax, in the case of direct relatives, surviving spouses, and siblings, there is no inheritance tax *(öröklési illeték)* to be paid, which also applies to the inheritance of agricultural land. From January 1, 2023, when a landowner passes away, four options are available to legal heirs to keep the land together, as highlighted earlier. These rules apply only to intestate succession and not in the case of testamentary disposition. However, if the heirs do not complete one of the alternatives within one year from the beginning of the probate proceedings, they lose their exemption from the inheritance tax. Therefore, as a general rule, a 9% inheritance tax must be paid for the land value.[105]

6. The Relevant Case-Law of the National Constitutional Courts

During our research, we aimed to explore the case law of the national constitutional courts of the countries examined. Only in Hungary is a relevant decision

[99] An exceptional land acquisition limit for the exchange of land acquired by intestate succession is established by the Hungarian legislator without the time limit of May 1, 2014. It is worth mentioning that land acquired through this way may exceed the 300 hectares and 1 hectare limit, respectively. See: Land Transfer Act, Section 17(2).

[100] Land Transfer Act, Section 16(1) and Section (10)3 and 3a.

[101] Land Transfer Act, Section 7(1). On detailed rules, see: Hornyák 2019a, 190 and Paic-Karsai 2022, 115.

[102] Hornyák 2019a, 91.

[103] Land Transfer Act, Section 6(2).

[104] Szilágyi 2022, 160.

[105] See the MAGOSZ's (Magyar Gazdakörök és Gazdaszövetkezetek Szövetsége) technical summary.

delivered by the constitutional court that explicitly deals with the inheritance of agricultural lands.

Regarding Hungarian case law,[106] the Constitutional Court of Hungary, decision no. 24/2017 (X. 10), delivered on October 3, 2017,[107] examined the right to property[108] and the protection of natural resources[109] with regard to the inheritance of land through testamentary disposition. The petitioner challenged the constitutionality of the definition of agricultural producer, the 1-hectare land acquisition limit for non-producers,[110] and the acquisition of land through testamentary disposition.[111] The petitioner inherited three arable land plots through testamentary disposition and the notary handled the case by applying for an official certificate from the competent government office. However, the request was rejected, as the petitioner already possessed more than one hectare of land and did not qualify as an agricultural producer. Consequently, acquiring more land would violate the property acquisition restriction and the conditions stipulated in the disputed law provision for property acquisition would not be met.[112]

As a result, the notary proceeded to transfer agricultural immovable property to the Hungarian state following the rules of intestate succession. The petitioner believed that this decision breached the rule of law, unduly limited fundamental rights, and violated the right to property and the principle of equality.[113]

The ruling of the Constitutional Court not only declared the legislator's omission unconstitutional but also stated that the testamentary disposition in question, for which the authority refused approval, is still valid. However, the Court acknowledged that the testamentary heir faces an uncompensated financial disadvantage if official permission is denied, which goes against the principle of proportionality enshrined in the Fundamental Law.

To correct the omission mentioned above, the Constitutional Court ordered the state to provide pecuniary compensation to the testamentary heir, who is a necessary heir. The court found that the lack of compensation amounted to a violation of fundamental rights and called on parliament to establish a compensatory rule by December 31, 2017.[114] Additionally, the court nullified the last sentence of the Land Transfer Act in section 34(3).[115]

[106] On this topic see: Olajos, Csák & Hornyák, 2018, 5–19. See also Csák 2018, pp. 19–32.
[107] 24/2017. (X. 10.) AB határozat a mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvény 34. § (3) bekezdésével kapcsolatos mulasztásban megnyilvánuló alaptörvény-ellenesség megállapításáról, valamint a mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvény 34. § (3) bekezdése utolsó mondata alaptörvény-ellenességének megállapításáról és megsemmisítéséről.
[108] Fundamental Law of Hungary, Article XIII.
[109] Fundamental Law of Hungary, Article P).
[110] Land Transfer Act, Section 10(2).
[111] Ibid. Sections 5(7), 10(2), 34(1) and (3) of the Land Transfer Act.
[112] Szilágyi 2022, 184.
[113] Ibid.
[114] Constitutional Court of Hungary, Decision No. 24/2017, para. 44.
[115] Ibid. para. 45.

7. Conclusions

This study uses the legal comparative method to review and analyze agricultural land succession rules in four Central European countries: Slovakia, the Czech Republic, Poland, and Hungary (i.e., the Visegrád countries).

The results show that in Slovakia and the Czech Republic, there are currently no specific regulations governing the inheritance of agricultural land, and the general succession rules of the Civil Code shall be applied. However, in Slovakia, although there are no special rules for the inheritance of agricultural land, it is necessary to consider provisions prohibiting the fragmentation of agricultural and forestry land in probate proceedings. Analyzing the legal regime for the inheritance of agricultural land has revealed the weak intervention of the State in connection with these issues. The Slovak government plans to address this issue in the future; however, the basic concept still needs to be outlined. In my opinion, the Slovak state should embark on comprehensive land reform and adopt specific rules for the inheritance of agricultural land. However, this would require an amendment to the Civil Code. Undoubtedly, Act No. 180/1995 Coll. on Certain Arrangements for the Holding Land, as amended, and still in force, contains criteria to prevent the fragmentation of agricultural (and forestry) land.

Regarding Poland, basically, there are no specific provisions that differentiate the inheritance of agricultural property or farms from other types of property. However, some particular rules can be found in Article 4 of the Act of April 11, 2003, on the Shaping of the Agricultural System.

By contrast, Hungarian legislator introduced special rules for acquiring ownership of agricultural land through intestate succession and testamentary disposition. Thus, the legislator moved toward a special regime for the intestate succession of agricultural land.

Slovakia and the Czech Republic do not impose inheritance taxes. Simultaneously, the acquisition of agricultural land in Poland is typically subject to an inheritance tax. Nevertheless, exemptions are available for natural persons who create or enlarge a farm within a specific size range and manage it for at least five years. Revenue from agricultural activities is also exempt from personal income tax, and young farmers can benefit from agricultural tax exemptions for land intended to create or extend farms by up to 100 hectares. The sale of land constituting a farm is tax-free if the buyer creates or expands the farm within a certain size range and manages it for at least five years. In Hungary, inheritance tax exemptions, including agricultural land, apply to direct relatives, surviving spouses, and siblings. Since 2023, legal heirs have four options for keeping land together, but they only apply in the case of intestate succession. Failure to complete one within a year results in a loss of inheritance tax exemption, leading to a 9% tax on land value.

Regarding the constitutional court's case law, only in the case of Hungary can a relevant decision be found that deals explicitly with the inheritance of agricultural lands.

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Constitutional legal protection of ecological values in the Republic of Serbia**

Abstract

The constitutional legal protection of ecological values in the Republic of Serbia is regulated through a complex and multi-layered protection of the right to a healthy environment. It is first seen in the constitutional guarantees and declarative emphasis on the developed ecological values and the principles that have been translated into constitutional human rights. The practice of the Constitutional Court of the Republic of Serbia with respect to environmental protection is modest for the educational constitutional formulation that reduces ecological values to an abstract and general right to a healthy environment that cannot be adequately protected.

Keywords: ecological principles or values, right to a healthy environment, constitutional appeal, normative control of laws and other general acts of the Constitutional Court.

1. Introduction

The right to a healthy environment is guaranteed by Article 74 of the Constitution of the Republic of Serbia. To protect the environment, numerous laws have been adopted that regulate its various elements and aspects. As environmental protection requires a comprehensive approach, these laws exist in varied legal disciplines and contain various qualifications of violation of ecological rights, such as misdemeanors, criminal offenses,[1] and civil offenses,[2] including sanctions (criminal offenses, misdemeanor sanctions, and compensation) for all forms of unlawful conduct. Special measures exist for

protecting ecological values in administrative law.[3]

The protection of basic ecological values achieves the protection of public and individual interests. Therefore, the ultimate goal of environmental protection is reducing environmental risk to an acceptable level, following the laws established by the limit values.[4]

The protection of the right to a healthy environment – the highest legal act in the Republic of Serbia – indicates that this is one of the most important human rights. It is a basic and universal right that belongs to everyone. To achieve this unhindered, it is the duty and responsibility of the government to preserve and improve the environment.

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[1] Faure 2017, 321.

[2] Miščević & Dudás 2021, 55–69.

[3] Lilić 2010, 34; Masyitoh 2020, 1–15.

[4] Joldžić 1997, 97.

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2. Ecological values, principles, and rights

The content and importance of ecological values is a doctrinal issue with important practical significance in the field of law. Ecological values are linked to the fundamentals that determine people's behavior in the natural environment. They must establish a balance that people live in harmony with the environment and respect the use of natural resources, thus preserving, protecting, and maintaining the environment, ecosystems, and living things. Hence, ecological values form a catalog of ecological ethics.

Ecological values facilitate harmony with the environment. This contributes to the protection and strengthening of the quality of life on the planet in a balanced manner, which should be the supreme ecological value. The application of ecological values plays an important role in the development of human beings to achieve the transformation of the present society toward a more balanced world, thus ensuring a better quality of life. Ecological values allow us to take care of the space that we inhabit and, thus, achieve truly sustainable development. These values comprise actions and behaviors that benefit the environment.

Ecological values include love and respect for the environment, environmental initiative and participation, natural identity, ecological responsibility, ecological honesty, and environmental awareness. Ecological love is based on the care, preservation, and respect of the planet and each of its elements. Ecological respect allows people to accept, recognize, and value the qualities and rights of all living beings. Our environment must be in harmony with nature. Environmental participation means that values can be achieved through the active participation of every citizen. Cooperation and participation in campaigns for ecological benefit is the most important task. Responsibility implies that we learn to take both individual and collective responsibility for the degradation of nature. All our actions bring consequences, which may harm us indirectly.[5] With respect to achieving these goals and ecological values, the law has an important role and task.

In addition to ecological values, we can distinguish the basic principles of environmental law that are contained in international documents and national legislation regulating environmental protection matters. In the Republic of Serbia, the Law on Environmental Protection defines 11 general principles of environmental law: (1) Principle of integrality; (2) Principle of prevention and precaution; (3) Principle of preservation of natural values; (4) Principle of sustainable development; (5) Principle of responsibility of the polluter and his legal successor; (6) Principle of 'polluter pays'; (7) Principle of 'user pays'; (8) Principle of subsidiary liability; (9) Principle of application of incentive measures; (10) Principle of information and public participation; (11) Principle of protection of the right to a healthy environment and access to justice.[6]

Additionally, in certain areas of environmental protection, we find several special principles of importance for the application of special laws. In comparative law, we find other principles, elucidated as follows: (1) Principle of access and equal participation in

[5] What are the Ecological and Environmental Values?

[6] Art. 9. Environmental Protection Act, (Official Gazette of RS, No. 135/2004, 36/2009, Other Law, 72/2009, Other Law, 43/2011, Decision us, 14/2016, 76/2018, 95/2018, other law and 95/2018, other law).

the distribution of natural resources;[7] (2) Principle of intergenerational equality; (3) Principle of solidarity within generations.[8]

These stand out from the principle of sustainable development and adapt to the needs of the development of protection in climate change.[9] The principle of accountability and transparency in decision-making in environmental matters more closely defines the principle of public participation in decision-making and that of protecting the right to a healthy environment.[10]

The principles of environmental law refer to all special environmental protection procedures, which ensure the equal application of basic attitudes on ecological values in all areas of environmental protection. Bearing in mind the abundance of sources of environmental law and frequent use of legal standards, the principles of environmental law form the basis for interpreting the law and applying environmental laws in specific cases.

Ecological values and principles have gradually been translated into concrete environmental rights. Environmental rights were initially challenged in the doctrine of the character of human rights, considering them as the goals and values that states should strive for.[11] Environmental rights belong to the rights of the third generation, which refer to the collective rights of a society or people, such as the right to sustainable development, peace, or a healthy environment. Through them, new problems are recognized that threaten the right to life of all people, and they can also be labeled as rights of solidarity whose realization is not only conditioned by positive or negative duties, but also by the behavior of each individual.[12]

Ecological rights protect human life and the life of flora and fauna, which are threatened by human activity and an unhealthy environment.[13] A special value of environmental rights is that they relate to the right to life and combine other rights that are a condition of human survival, such as the right to drinking water and healthy food, clean air and unpolluted land, and protection from noise.

Environmental rights, in addition to the right to life, include the right to a healthy environment, the protection of physical and moral integrity, inviolability of life, freedom of thought and choice, information, and health protection.[14]

Environmental legal protection is based on two basic approaches – namely, establishing the environment and its protection in the form of an individual right to a healthy environment, and widely placing collective responsibility as a general obligation of individuals and public authorities to protect the environment.[15]

[7] Heffron et al. 2018, 382–388.
[8] Orlović 2014, 161-175.
[9] Milligan & Macrory 2018, 23–37.
[10] Morgera 2020, 11–20.
[11] Stojanović 2017, 129.
[12] Nastić 2011, 210.
[13] Orlović 2014, 163.
[14] Rabasović 1986, 151.
[15] Porena 2010, 299; Cvetić 2013, 121; Nikolić 2019, 72.

The environment can be truly protected if people are convinced that preserving the environment is the only way to ensure their survival. This forms the basis of the anthropocentric viewpoint, which focuses primarily on preventing and 'treating' only those environmental problems that directly concern human beings. The ecocentric approach holds that nature must defend itself against environmental pollution. This results in obligations for the state and all individuals to protect the environment and refrain from implementing measures that may disturb the ecological balance.

3. Constitutional guarantees of environmental values in comparative constitutional systems

In today's comparative constitutionality, about 30 constitutional documents contain no provisions guaranteeing environmental values.[16] The reasons for the absence of constitutional guarantees of environmental rights are different. In some cases, these are constitutions adopted before the global environmental policy, or they are the first generation of constitutions that are primarily focused on key political institutions.[17]

However, an increasing number of countries are guaranteeing environmental protection with different approaches.[18] Certain constitutions provide environmental protection by linking it with a certain quality of the natural environment, the degree of harmony of the environment with nature, or with the right to a healthy environment and introduce the right of nature to 'existence, flowering, renewal, and development.'[19] The Constitution of The Republic of France contains the Charter of Environmental Protection, which contains the basic ecological values that enjoy protection and rights that play a fundamental role in environmental protection, namely, the right of access to environmental information, the right to public participation in decision-making, and the right to access justice.[20] The German Constitution obliges the state to establish a legal system that provides adequate protection to basic ecological values, taking into account the protection of the rights and interests of future generations, and protects the natural foundations of life and wildlife. Both of these major constitutions have a broad approach because they start from the ecological values guaranteed by the Constitution, considering that environmental rights are more of a legislative matter.

[16] Some constitutions that do not contain provisions governing the right to a healthy environment are those of the United States (1787), Argentina (1853), Luxembourg (1868), Australia (1900), Liechtenstein (1921), Lebanon (1926), the Republic of Ireland (1937), Iceland (1944), Japan (1946), Canada (1867), Denmark (1953), Kuwait (1962), and Pakistan (1973). If a constitution does not contain a constitutional guarantee on the environment, it does not necessarily mean that this protection is not achieved in practice. The quality of legislation and good practices of state authorities depends on the protection of the environment.

[17] Mikić 2012, 213–214.

[18] United Nations Environment Programme (UNEP) 2019, 16 and 142–143; Feris 2008, 29.

[19] In the first case, the Constitution of the Republic of the Philippines (1987), Article 2, Part 16, is characteristic, and in the second, the Constitutional Law of the Kingdom of Sweden (1974) Sveriges Riksdag, Part I, Article 2. Drenovak-Ivanović et al. 2020, 42.

[20] The Constitution of France, the Charter of Environmental Rights, Charte de l'environnement de 2004, Article 1. Marrani 2009, 52.

The constitutional guarantee of the right to the environment starts from the idea that human rights and the human ecological environment are inseparable. The inclusion of environmental rights in the corpus of constitutionally protected rights makes this right judicially protected. Constitutional guaranteeing this right means recognizing new ecological values that can have a positive effect on the protection of human rights. In addition, there are real difficulties in the constitutional legal protection of environmental rights due to their nature.

Environmental rights are guaranteed in the socio-economic rights or connection with a group of human rights. The constitutional guarantees of these rights are reflected in general and principled provisions, and the law is referred to as an act that closely regulates the manner of realization and protection of these rights, the conditions under which they are acquired, and the entities to which the law is guaranteed. Hence, environmental rights are considered legal instead of constitutional rights. However, it must be understood that environmental rights are guaranteed by the Constitution and, as an obligation, primarily by the state, in addition to other public legal collectivities (such as local self-governments).

4. Constitutional guarantee of the right to a healthy environment in the Republic of Serbia

The beginnings of constitutional legal guarantees and environmental protection are found in the Constitutional Amendment to the Constitution of the Socialist Federative Republic of Yugoslavia (SFRY) from 1963. It established the federation's obligation to *"protect the environment from dangers to the life and health of people that endanger the entire country."*[21] The Constitution of Serbia (2006) contains a provision (Article 74) that forms the basis of constitutional legal protection and several provisions governing certain other rights, which indirectly relate to environmental protection. According to Article 74, everyone has the right to timely and complete information on the state of the environment, which includes the right to both active and passive information.[22] The responsibility for the protection and improvement of the environment applies to everyone, especially the Republic of Serbia and the autonomous province.

The Constitution contains provisions for the limitation of certain rights when necessary to achieve environmental protection. Thus, the freedom of entrepreneurship may be restricted by law, if necessary for the protection of the environment, natural resources, or human health and safety.[23] This is supported by the constitutional provision

[21] Amendment XXX, Official Gazette of SFRY, No. 29/1971, Article 2, Point 9.

[22] Constitution of the Republic of Serbia, Official Gazette of rs, No. 98/06, Article 51. Using the legally neutral subtitle 'healthy environment,' the Constitution has defined as an object of environmental rights, and according to its personal validity, the right to a healthy environment has been established as a human right.

[23] Constitution of the Republic of Serbia, Article 83, Stanza 2. One of the decisions of the Constitutional Court stated that the restriction of freedom of entrepreneurship may be done only within the limits of the law, and the adoption of a decree introducing a stricter restriction to protect nature exceeds constitutional and legal powers. Decision of the Constitutional Court of Serbia, IUo-49/2009, of March 29, 2012. Another decision noted that restricting entrepreneurship by banning the construction of nuclear power plants is not unconstitutional. This is because the

for the use and disposal of agricultural, forest, and urban construction land in private ownership, which may be restricted by law to avoid the risk of environmental damage.[24]

In the constitutional system of Serbia, the right to a healthy environment is a basic individual right because the Constitution of Serbia has included it in its catalog of basic and general human rights. The constitutional regulation of the right to a healthy life is reproached that it is *"determined in such a way as to narrow the field of the legal protection of the environment because it is established in the function of human health."*[25]

4.1. The right to a healthy environment as a universal right

The right to a healthy environment has been established as a universal human right. This stems from the constitutional norm that *"everyone has the right to a healthy environment"* and from the fact that this article is in the section establishing human rights and freedoms.[26] The phrase, 'man has a right,' aims to emphasize the value and significance of this right; to give him a universal dimension.[27]

As the right to a healthy environment is a universal human right, it is directly applied, which means that the law is not a necessary mediator for the application of the constitutional norm in practice. The direct application of human and minority rights is guaranteed by Article 18 of the Constitution. Article 10 of the Constitution mentions that the law may prescribe the manner of exercising these constitutional rights only if it is expressly provided for by the Constitution or if it is necessary for the exercise of a particular right due to its nature, whereby the law must not affect the essence of the guaranteed right.

Owing to the general formulation and nature of the right to a healthy environment, it follows that legal regulation is necessary because the environment is a broad concept that contains inherent elements, such as water, air, soil, plants, animals, and other living and inanimate worlds. This reduces the effectiveness of the constitutional legal protection of such a formulated environmental law.

4.2. Right to be informed regarding the state of the environment

By constitutionally guaranteeing the right to timely and complete information on the state of the environment, the procedure of 'processualization of environmental law'

law that introduces the ban was adopted to protect the environment, which does not prohibit further research and development of experts in the field, which can lead to the formation of conditions that guarantee the safety of the construction of nuclear power plants and adequate risk management for years. Decision of the Constitutional Court of Serbia, IUz-1575/2010, of July 8, 2011.

[24] Constitution of the Republic of Serbia, Article 88, Paragraph 2. Decisions of the Constitutional Court No. Už-1198/2008 from March 3, 2011, Už-1424/2008 from March 31, 2011, Už-2945/2013 from December 23, 2015, and Už-7702/2013 from December 7, 2017, 62. Decisions of the Constitutional Court No. Už-7702/2013 from December 7, 2017. Bulletin of the Constitutional Court for 2017, Belgrade 2019, pp. 612–629.

[25] Šogorov-Vučković 2018, 406.

[26] Ibid.

[27] Rabasović 1986, 151.

has been established. The right of access to environmental information and the obligation of the authorities to inform the public about the state of the environment is reinforced by Article 51. Article 10 of the Constitution guarantees the right to truthful, complete, and timely notification on issues of public importance.[28]

4.3. Liability and obligation to protect the environment

The obligation of the state to protect the environment is prescribed by a general and principled constitutional provision. The content of this constitutional provision is not specifically defined in the Constitution nor does the Constitution delegate the issue to the legislator for closer regulation. The obligation of the state, thus, formulated is a kind of proclamation, which has found its place in the constitution as the highest legal act. This has its significance; nevertheless, it has no immediate practical consequences because non-compliance with this obligation is not sanctioned.[29]

The obligation of citizens to protect the environment is "*a duty primarily in an ethical sense,"* except when by their behavior; that is, by doing or not doing, they are committing certain ecological offenses. Preserving and improving the environment is the primary duty of the state; however, it must be elaborated and specified in the law; otherwise, it remains a 'dead' duty. This constitutional duty of each person shall protect and improve the environment, as referred to in Paragraph 3 of Article 74. Thus, the Constitution of Serbia can be linked to the *"idea of sustainable development."*[30]

4.4. Restrictions on other rights to protect the environment

The importance of the environment is conditioned by certain other constitutional provisions that are the basis for its protection. One such provision establishes the possibility of limiting one of the basic principles of economic order – the freedom of entrepreneurship. Entrepreneurship may be restricted by law for the protection of human health, the environment, and natural resources, and for the safety of the Republic

[28] Drenovak-Ivanović 2018, 226–242. These articles are reserved only on the right of access to environmental information and the obligation to actively inform the public, according to the first pillar of the Aarhus Convention. Bearing in mind the importance of the Aarhus Convention, the other pillars of the Convention should be covered by constitutional legal protection. The Aarhus Convention is an international agreement that introduces the concept of the right to an adequate environment at the European level and regulates, in detail, the most important elements of that right, the so-called three pillars – the right to environmental information, the right to public participation in the field of environmental protection, and the right to access justice. Komnenić 2012, 161. The Republic of Serbia ratified the Aarhus Convention in 2009. Law on Ratification of the Convention on Access to Information, Public Participation in Decision-Making and the Right to Legal Protection in Environmental Matters (Official Gazette of the Republic of Serbia – International Treaties, No. 38/09).

[29] Pajvančić 2011b, 201. This defined responsibility justifiably suffers criticism, bearing in mind that local communities, cities, and municipalities are omitted from this context, especially since environmental problems, at the beginning, always have a local character, that is, they erupt in a narrower area and later expand and require state intervention; the autonomous province.

[30] Drenovak-Ivanović 2018, 226.

of Serbia (Article 83, Paragraph 2). The law, based on the Constitution, may limit forms of use and disposal, that is, prescribe conditions for the use and disposal of agricultural land, forest land, and city construction land in private ownership, though the freedom of use and disposal is guaranteed (Article 88, Paragraph 1). Legislative intervention, in this sense, is possible to eliminate the risk of environmental damage or prevent violations of the rights and interests of other persons based on the law (Article 88, Paragraph 2).

In these situations, the constitutional norm leaves the discretionary authority to the legislator, whereby 'it can', nevertheless, not have to restrict entrepreneurship or freedom of land disposal. Even if restrictions are established, they can be excluded. For example, in the case of forest land, *"if required by the general interest established by a special law or by an act of the Government."*[31]

5. Constitutional judicial protection of the right to a healthy environment in the Republic of Serbia

The protection of human rights before the Constitutional Court is a specific form of protection. This type of protection of human rights can be exercised in parallel with the judicial protection of rights. As the guardian of the constitution, the Constitutional Court decides on the protection of constitutionality and legality, which is an indirect yet significant aspect of the protection of human rights. In addition, by relying on the general constitutional principle on the immediate application of constitutional provisions on human rights, the Constitutional Court has the jurisdiction to decide on the protection of constitutional human rights. Both groups of competencies of the Constitutional Court are a reason for the citizens to be guaranteed the opportunity to apply to the Constitutional Court and establish legal instruments that serve this purpose.[32]

One form of protection of human rights before the Constitutional Court is in general and can be considered the primary form of protection before the Constitutional Court. This type of protection is exercised through the basic jurisdiction of the Court in the procedure of control of constitutionality and legality. It is an indirect form of protection of human rights before the Constitutional Court since the protection of rights is indirectly reflected in the position of the individual whose right has been violated. In some constitutional systems, this is the only form of constitutional protection of human rights.

Another form of protection of human rights before the Constitutional Court is the direct constitutional protection of human rights guaranteed by the Constitution. The value subject to the direct protection afforded by the Constitutional Court is the specific human right of the violated individual. A legal instrument at the disposal of anyone whose constitutional right is violated is a constitutional appeal. Under the constitutionally prescribed conditions, citizens can directly address the Constitutional Court when they have violated a freedom or right by an act of public authority.

[31] Cvetić 2013, 119. Article 10, Paragraph 1, Point 2 of the Law on Forests (Official Gazette of RS, No. 30/2010, 93/2012, 89/2015 and 95/2018 (other law).
[32] Drenovak-Ivanović 2018, 228.

The constitutional ranking of the right to a healthy environment is particularly important in protecting this right. In this regard, the provisions of Article 22 of the Constitution stipulate that anyone who has been violated or denied a human or minority right guaranteed by the Constitution has the right to judicial protection and the right to the elimination of harmful consequences caused by the violation. The constitutional rank of this right, moreover, provides him with protection upon constitutional appeal.[33]

5.1. Normative control of laws and other general legal acts

The primary function of the Constitutional Court is to exercise control of the legislative power and other holders of normative activity, thus, ensuring the constitutionality of the law and preventing the abuse and exceeding of the powers of the legislative authorities.[34]

The Constitution of the Republic of Serbia established the jurisdiction of the Constitutional Court to control the constitutionality and legality of the normative acts.[35]

When it comes to the normative control of the law, as one of the competencies of the Constitutional Court at the time of the existence of the Federal Republic of Yugoslavia (FRY) (1992–2006), we can name two laws in the field of environmental protection whose compliance with the Constitution (Constitution of the FRY) was assessed by the then Constitutional Court:

The Law on the Prohibition of The Construction of Nuclear Power Plants in the Federal Republic of Yugoslavia (Official Gazette of the FRY, No. 12/95 and Official Gazette of RS, No. 85/05) where the Constitutional Court assessed that the disputed law was adopted to protect the environment from nuclear risk and the harmful effects of ionizing radiation, which could occur during the operation of nuclear power plants, that is, in the production, use, and disposal of radioactive nuclear material, which is the objective of the protective provision stipulated in Article 74.The Law on Determining the Jurisdiction of the Autonomous Province of Vojvodina (Official Gazette of RS, No. 99/09), where the Constitutional Court rejected the proposal for determining the unconstitutionality of the provision of Article 25, Point 5, of this law, which stipulates that the Autonomous Province of Vojvodina regulates, improves, and provides environmental protection for its territory, which led to the transfer of the entire area of environmental protection to the original jurisdiction of the Autonomous Province.

The Constitutional Court has witnessed cases assessing the constitutionality and legality of the general legal acts of lower legal force than laws relating to environmental protection. These are the Statute of the Autonomous Province of Vojvodina (Official Gazette of the APV, No. 17/09), Regulation on the Protection of Nature Park 'Šargan-Mokra Gora' (Official Gazette of the RS, No. 52/05, 105/05 and 81/08), and others.

[33] Nastić 2011, 221.
[34] Stojanović 2014, 75.
[35] Stojanović 2018, 35.

The subject of the Constitutional Court's assessment was the decisions on compensation for the protection and improvement of the environment of local self-government units. The Constitutional Court has determined the unconstitutionality of the provisions of the Statute of the Autonomous Province of Vojvodina[36] and the Decree on the Protection of the Nature Park Šargan-Mokra Gora.[37] Regarding the Decisions on compensation for protecting and improving the environment, the Serbian practice knows cases that were inconsistent with the established Constitution and laws,[38] along with when decisions on rejecting the initiative were made.[39]

5.2. Constitutional appeal

The Constitution stipulates that a constitutional complaint may be filed against individual acts or actions of state bodies or organizations entrusted with public powers, which violate or deny human or minority rights and freedoms guaranteed by the Constitution if they are exhausted or no other legal remedies are provided for their protection (Article 170 of the Constitution of The Republic of Serbia).[40] Hence, specialized constitutional legal protection of human rights is established.[41]

[36] Decision of the Constitutional Court IUO-360/2009 of December 5, 2013.
[37] Decision of the Constitutional Court IUO-49/2009 of March 29, 2012.
[38] The Constitutional Court found neither the Decision on compensation for the protection and improvement of the environment of the Municipality of Ćuprija nor the Decision on compensation for the protection and improvement of the environment of the Municipality of Mionica were in accordance with the Constitution and law. For the adoption of a decision IUO-1256/2010 of December 20, 2012, it took the Constitutional Court two years and one year for the IUO-338/2013 decision of March 20, 2014.
[39] An initiative was submitted to the Constitutional Court to initiate proceedings for the assessment of the constitutionality and legality of the Decision on compensation for environmental protection and improvement (Official Gazette of the Municipality of Bor, No. 6/10 and 12/10). A request was submitted along with the initiative to suspend the execution of an individual act, which was rejected. Two years after the submission of the initiative, the Constitutional Court issued a decision rejecting the proceedings for the assessment of the constitutionality and legality of the Decision on compensation for environmental protection and improvement. In the second case, two identical initiatives were submitted to the Constitutional Court to initiate proceedings to assess the constitutionality and legality of Article 2 of the Constitution. Decision on compensation for environmental protection and improvement (Official Gazette of the Municipality of Vrbas, No. 25/09, 1/10, 4/10, 16/10, and 13/11) and Article 2 Regulation on determining activities whose performance affects the environment (Official Gazette of RS, No. 109/09 and 8/10). The Constitutional Court issued a decision rejecting the proceedings for the assessment of the constitutionality and legality of Article 100 of the Constitution. Article 2, Point 3, Decision on compensation for environmental protection and improvement, and Article 2. Regulation on determining the activity whose performance affects the environment and the requirement for suspension of the execution of an individual act or action undertaken on the basis of the Decision.
[40] Pajvančić 2011a, 50.
[41] However, although the Constitution has established an instrument that serves to protect human rights before the Constitutional Court, it did not explicitly establish the jurisdiction of the Constitutional Court (Article 167) to decide directly on the protection of human and minority

The Law on the Constitutional Court (Article 82) determines against which acts and actions a constitutional appeal is allowed, with the additional stipulation that a constitutional appeal may be filed in case of violation or denial of human or minority rights and freedoms if the right to their judicial protection is excluded by law.[42]

The Constitutional Court has taken the position that a constitutional appeal protects all human and minority rights and freedoms, individual and collective, guaranteed by the Constitution, irrespective of their systematic place in the Constitution and whether they are explicitly incorporated into the Constitution or are implemented in the constitutional legal system by confirmed international treaties.[43]

For a right to be eligible for immediate constitutional judicial protection, it is necessary that this right is inextricably linked to the human person and has a special value and significance for him/her. It is this character that has the right to a healthy environment as a right of solidarity.

A constitutional complaint is an exceptional subsidiary, the supplementary and auxiliary legal remedy for the protection of rights and freedoms, and can be applied only when another remedy is used (or proves ineffective or impossible to use) or if no other form of protection is provided. The Constitutional Court's protection of human rights is aimed at determining the existence of unconstitutionality in a particular case.[44]

We highlight several characteristic decisions of the Constitutional Court regarding the submitted constitutional appeals wherein the applicant is called for a violation of the right to a healthy environment referred to in Article 74 of the Constitution. In addition, the violation of several other rights, among which the most common is the right to a trial within a reasonable time, is referred to in Article 32, Paragraph 1 of the Constitution of the Republic of Serbia. In most cases, the Constitutional Court issued decisions on the adoption of a constitutional appeal, however, only in part related to the violation of the right to a trial within a reasonable time. Nevertheless, we have a modest decision from the Constitutional Court, which adopted a constitutional appeal for violating the right to a healthy environment.

5.2.1. Constitutional appeal Už-1198/2008 of March 3, 2011.

The individual legal acts against which the constitutional appeal was filed are the judgment of the Municipal Court in Čačak P. 179/98 of December 3, 2007, and the verdict of the District Court in Čačak Gž. 741/08 of July 9, 2008.

rights. Pajvančić 2009, 218.

[42] Law on the Constitutional Court (Official Gazette of RS, No. 109/2007, 99/2011, 18/2013-Decision US, 103/2015 and 40/2015 (other law)

[43] Positions of the Constitutional Court in the procedure of examination and decision on constitutional appeal, Su. No. I–8/11/09, of April 2, 2009.

[44] From the individual's perspective, this statement holds no special significance. Therefore, it is important to have the power of the Constitutional Court to directly influence the restoration of a violated or threatened fundamental right. Pejić 2008, 268.

The submitter of the constitutional complaint claims in his allegations that his right to a trial within a reasonable time in the proceedings before the Municipal Court in Čačak was violated. These included the right to a fair trial, equal protection of rights and legal remedies, peaceful enjoyment of property, legal aid, a healthy environment, the principle of equality of all forms of ownership, use of urban construction land, and the principles of judicial decision, as guaranteed by the provisions of Article 32, Paragraphs 1, 36, 58, 67, 74, 86, 88, and 145. The applicant invoked the violation of the rights referred to in Article 6, Paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol 11, Article 1 of the Convention.

When considering the constitutional appeal, the Constitutional Court stated in its explanation that the appeal did not state constitutional legal reasons that would indicate a violation of the right to a healthy environment. The Constitutional Court issued a decision rejecting the constitutional appeal in this part as unfounded; however, the constitutional appeal was adopted only in the part relating to the violated right of the applicant to a fair trial, guaranteed by the provision of Article 32, Paragraph 1 of the Constitution of the Republic of Serbia.[45]

5.2.2. Constitutional complaint Už-1424/2008 of March 31, 2011.

The subject of the constitutional appeal is the judgment of the Municipal Court in Novi Sad P. 7383/96 of April 18, 2006, and the judgment of the District Court in Novi Sad Gž. 3947/06 of October 16, 2008. The applicant of the constitutional appeal stated that her right to a fair trial, referred to in Article 32, Paragraph 1, and the violation of the right to a trial within a reasonable time and the right to a healthy environment, referred to in Article 74 of the Constitution, were violated. The constitutional complaint stated that the complainant filed a lawsuit against 'Elekto Vojvodina' due to the proximity of the substation and electrical cables, which impaired its health.

This constitutional appeal was rejected as unfounded in the part in which the applicant referred to the violation of the right to a healthy environment. The Constitutional Court agreed with the first and second-instance courts that the plaintiff did not prove a sufficient degree of probability of harm to her health and quality of life by non-ionizing radiation as a result of inadequate precautionary measures by the defendant.

The Constitutional Court adopted the appeal in part relating to the violated right of the applicant of the constitutional appeal to the trial within a reasonable time because nine and a half years passed from the filing of the lawsuit to the date of the contested first instance verdict and 20 hearings were scheduled of which 11 were held.[46]

5.2.3. Constitutional appeal Už-2945/2013 of December 12, 2015.

In this case, the applicant lodges a constitutional appeal against the judgment of the First Basic Court in Belgrade in case P. 16/10 of June 18, 2012 (formerly the case of the First Municipal Court in Belgrade P. 2833/97) and the judgment of the Court of

[45] Decision of the Constitutional Court Už-1198/2008 of March 3 2011.
[46] Decision of the Constitutional Court Už-1424/2008 of March 31 2011.

Appeal in Belgrade Gž. 8109/12 of April 17, 2013. The applicant claims that her right to a fair trial, referred to in Article 32, Paragraph 1, the right to property, referred to in Article 58, Paragraph 1, and the right to a healthy environment, referred to in Article 74 of the Constitution of the Republic of Serbia were violated.

The Constitutional Court assessed that the applicant of the constitutional appeal, regarding the violation of the right to a healthy environment, was not satisfied. Article 10 of the Constitution did not state constitutional legal reasons for the claim of violation of the aforementioned constitutional right. The mere existence of a septic tank in someone's yard would not be enough to justify the violation of the right to a healthy environment. However, the constitutional appeal was adopted in part relating to the right to trial within a reasonable time, guaranteed by the provision of Article 32, Paragraph 1 of the Constitution of the Republic of Serbia.

5.2.4. Constitutional complaint Už-7702/2013 of December 7, 2017.

The Decision of the Constitutional Court No. 7702/2013, regarding the declared collective constitutional appeal is a rare decision of the Constitutional Court in which an appeal was adopted and established that Paragraph 2 of the sentence of the judgment of the Appellate Court in Novi Sad, Gž. 3677/12 of June 20, 2013, violated the right of the applicants to a fair trial, guaranteed by Article 32, Paragraph 1 of the Constitution of the Republic of Serbia regarding the right to a healthy environment referred to in Article 74 of the Constitution of the Republic of Serbia.[47]

6. Conclusion

The Constitution, as a legal act of the highest legal force, provides the initial and last protection of the right to a healthy environment in a legal system. Initially, in terms of the constitutional guarantee of this right, the right to a healthy environment was in the document of the greatest legal force. Based on the Constitution, the legislator regulates this right closely. The Constitution established the Constitutional Court as the guardian of the Constitution. It represents the last protection for the assessment of the constitutionality and legality of general legal acts and the protection of human rights – the right to a healthy environment.

The Constitutional Court of Serbia, in the procedure of assessing the constitutionality and legality of general legal acts, in most cases, decides based on the initiative to proceed or reject initiatives for establishing the unconstitutionality of most laws. When it comes to bylaws' general acts, the Constitutional Court more often finds inconsistency with the Constitution and the law.

In the constitutional appeal procedure, the Constitutional Court found, in an extremely small number of cases, a violation of the right to a healthy environment in connection with the right to a fair trial. Legal acts that violated the right to a healthy environment are court rulings because the courts rendered their judgments in disputes that lasted ten years or more, thus, enabling the violation of the right to a healthy environment with their passive behavior. Hence, the practice of the Constitutional Court

[47] Drenovak-Ivanović 2020, 41.

is more than modest. In addition, in several proceedings on constitutional appeals, the Constitutional Court adopted appeals for reasons other than the violation of the right to a healthy environment. Therefore, it is necessary to analyze the reasons for such modest constitutional case law.

In addition to the fact that the appellants did not sufficiently reflect this reason for the Constitutional Court to accept it and several subjective factors on the side of the appellants, including judges of the Constitutional Court (inexperienced judges and judges resorting to safe and proven judicial practices), it is necessary to point out an objective normative reason – the general constitutional formulation of the right to a healthy environment prevents the established factual situation from being safely brought under a constitutional 'environmental' norm. Therefore, the factual situation can be easily and safely subsumed under another constitutional norm, which regulates a specific case more closely.

De Lege Ferenda must enshrine a whole set of environmental rights into the Constitution of Serbia, contributing to legal environmental protection. This brings us back to the beginning of the analysis of environmental values, which must be, theoretically, more clearly defined and formulated in a constitutional text as a more concrete constitutional environmental human right to be more usable in case law. Doctrinally, we must revisit the ecological values, specify them, and retranslate them into clear and concrete constitutional environmental rights. Therefore, we propose a broader approach where environmental values must be reformulated into clear constitutional environmental rights. This reformation aims for efficiency in the constitutional legal protection of environmental rights instead of an abstract right to a healthy environment. The fundamental premise and highest principle is that the environment must be understood, treated as a value for itself, and be provided with the highest protection because by disrupting it, we place our survival at risk.

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Regulation of genetically modified organisms, food and feed in the EU with particular reference to Poland – protection of consumers and the environment or merely a response to public expectations?**

Abstract

This article aims to establish the rationale for its introduction within the European Union and subsequent changes to the legal regulation of its release into the environment, genetically modified organisms (GMOs), and the placement of genetically modified food and feed on the market. Following the presentation of the original regulation, public reactions to GMOs and the resulting changes in the European Union and national regulations are discussed based on cases before the European Court of Justice. The analysis leads to the conclusion that in the case of GMOs and genetically modified food and feed, the legislature has acted mainly based on public expectations, while neglecting a full scientific assessment of the solutions adopted to protect consumers and the environment.

Keywords: genetically modified organisms (GMOs), genetically modified (GM) food and feed, ban on the cultivation of GMOs; GM food labelling, consumer expectations, Polish regulations of GMOs

1. Introduction

The release of genetically modified organisms (GMOs) into the environment and the placing on the market of genetically modified (GM) food and feed has generated controversy and debate for years at the international, European Union (EU), and national levels.[1]

Attention has been drawn to the risks associated with the release of GMOs into the environment and the GM food and feed marketplace, primarily for the environment and biodiversity, but also for human health and the sustainable development of rural areas and communities.[2] In addition, the risk of monopolizing the seed supply by multinational corporations, which are also producers of agricultural chemicals, has been recognized. Conversely, the significant advantages of biotechnology are pointed out, which can increase the efficiency of agricultural production while reducing the number of chemicals used and, in the long term, reduce world hunger, which is becoming an

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[1] On the public discussion and controversy related to GMOs, see Rotkiewicz 2017.

[2] For the Hungarian viewpoint, see Páczay 2017, 101–116.

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increasingly important issue due to ongoing climatic, economic, and demographic changes, resulting in reduced access to agricultural land and increased demand for food. Characteristically, despite the lack of scientific evidence of a real risk from GM products to the environment, health, and life, GM food is viewed negatively by most of the European public.[3]

Concurrently, it should be emphasized that the cornerstone of EU food law, Regulation (EC) No 178/2002,[4] assumes that to achieve the general objective of a high level of protection of human health and life, food law should be based on risk analysis, which is a process consisting of three interconnected components risk assessment, risk management, and risk communication.[5] Furthermore, risk assessment should be based on available scientific evidence and undertaken in an independent, objective, and transparent manner.[6] Moreover, the implementation of environmental objectives should be based on a scientific risk assessment.

This study aimed to establish a rationale for introducing and making subsequent changes to the legal regulation of the environmental release of GM plants and the marketing of food and feed. Assuming that the regulation of GMOs is intended to reduce the risks associated with the genetic modification of plants, it was assumed as an initial hypothesis that EU regulations of genetically modified agricultural products and national regulations, initially based on the precautionary principle, over the years have become a reflection of public expectations rather than the result of science-based risk analysis.

Achieving the stated objective requires presenting background information on genetically modified plants, food, and feed; the development of genetic engineering in this field; and the origins and evolution of EU law. An essential aspect of this research is the analysis of The Court of Justice of the European Union (CJEU) case law, which makes it possible to present national regulations determined by social expectations. Special attention is given to Polish regulations, as Polish agricultural land transactions have a significant impact on judicial practice.[7]

2. Origins of GMOs and basic concepts

Creating new crop varieties or animal breeds has accompanied the development of civilization for centuries. The plants used in crops are the result of the classical method of varietal selection based on intraspecific variation, where the human role is to create conditions conducive to variation and select appropriate forms.[8]

A breakthrough came with the discovery that the material carrier of genetic information in every living cell is DNA and the deciphering of the code by which this information is recorded in DNA, which made it possible to develop methods for

[3] Małyska & Twardowski 2011, 96.
[4] Regulation (EC) No 178/2002 of the European Parliament and of the Council of January 28, 2002 establishing the general principles and requirements of food law, establishing the European Food Safety Authority, and procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1–24).
[5] See Article 3(10) and Article 6(1) of Regulation (EC) No 178/2002.
[6] See Article 6(2) of Regulation (EC) No 178/2002.
[7] See more: Zombory 2021, 174–190; Kubaj 2020, 118–132; Blayer 2022, 7–27.
[8] Wrześniwska-Wal 2008, 16.

manipulating DNA fragments containing specific hereditary information, that is, genes, so that it became possible to transfer DNA fragments from one organism to another, that is, transgenesis (e.g., from bacteria or plants to animals).[9] It has become possible to create new organisms (primarily new varieties of plants but also animals) in which the genetic material is altered in a way that does not occur naturally through cross-breeding or natural recombination, but through genetic engineering. The new organisms such as bacteria, plants, and animals that result from such 'manipulation' are called genetically modified organisms (GMOs) or transgenic organisms.[10]

In the 1980s, genetically modified (transgenic) plants were obtained (in Belgium, tomatoes and tobacco contained the Bt gene responsible for synthesizing the insect-repellent Bt protein; in the USA, soybean, maize, cotton, and canola were resistant to harmful insects and certain herbicides; and the *FlavrSavr* tomato retained skin hardness for longer, which was the first transgenic crop to be commercially introduced in the USA in 1994).[11] In 2018, the acreage of transgenic crops grown worldwide reached 191.7 million hectares across 26 countries (transgenic soybeans account for 78% of all crops, maize 30% of all crops, cotton 76% of all crops, canola 29% of all crops).[12]

3. Public reaction to GMOs

Ongoing research into genetic modification in the USA and, in particular, the announcement of the first GM crops on the market, was met with an intense reaction from a group of anti-biotechnology activists who pointed out the enormous risks associated with transgenesis and undertook court battles to ban the cultivation of GM crops, which was unsuccessful.[13] Anti-GMO movements are particularly fertile in Europe. For many years, the opinions of social groups in Poland and other EU countries have been unequivocally unfavorable for biotechnology in agriculture and GMOs.[14]

It is worth noting that while Americans favor GMOs in principle, Europeans are skeptical. This difference is primarily due to the different roles of agriculture and the countryside, tasks of government institutions, and certification systems.[15] In this public attitude, the reasons for adopting a specific regulation of GMOs at the EU level are apparent. Concurrently, however, placing GMOs under special regulation has the feedback effect of reinforcing public fears about GMOs.

[9] Wrześniwska-Wal 2008, 17.
[10] Szalata, Słomski & Twardowski 2020, 15–22.
[11] Ibid. 14–18.
[12] Ibid. 38.
[13] The vital role of Jeremy Rifkin and the think tank he created, the 'Foundation on Economic' Trends (FET), should be pointed out here. See Rotkiewicz 2017, 69. See also an interview with J. Rifki.
[14] Twardowski 2007, 50; Małyska & Twardowski 2011, 96; Szalata, Słomski & Twardowski 2020, 82; Dzwonkowski 2015, 21; Stępień M 2017, 165; Micińska-Bojarek 2013, 264. See also data from the GMO survey conducted by IPSOS on behalf of the Greens EP Group in February and March 2021.
[15] Twardowski 2007, 50.

4. EU regulation on GMOs and GM food and feed

The first European Economic Community regulations on GMOs were issued in the early 1990s. Council Directive 90/220/EEC of 23April 1990 on the deliberate release into the environmentof genetically modified organisms[16] which was subsequently repealed by the Directive 2001/18/EC of the European Parliament and of the Council of 12March 2001on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (Directive 2001/18/EC)[17] and Council Directive of 23April 1990 on the contained use of genetically modified micro-organisms (90/219/EEC),[18] which was subsequently repealed by Directive 2009/41/EC of the European Parliament and of the Council of 6May 6, 2009.[19]

The preamble to Directive 90/220/EEC explains that community action concerning the environment should be based on the principles of preventive action. In contrast, living organisms released into the environment in large or small quantities for experimental purposes or as commercial products may multiply in the environment and cross national borders. The effects of this release on the environment may be irreversible. The protection of human health and the environment requires that due attention be paid to controlling the risks arising from the deliberate release of GMOs into the environment. Environmental risk analyses should always be performed before GMOs are released into the environment. The rule of thumb is that the scale of release increases incrementally (step-by-step) only when an assessment of the previous measures to protect human health and the environment indicates that the next step can be taken. The same principles were also indicated in the preamble to Directive 2001/18/EC, which is still in force, and its issuance was justified by the need to clarify the provisions previously in force and the need for order in connection with earlier amendments to Directive 90/220/EEC.

The explanations of these community normative acts indicate that EU institutions recognized the potential risks of GMO cultivation to the environment and human health. Although no scientific studies have confirmed this, its fundamental importance is attributed to the precautionary principle, which applies in the absence of scientific certainty regarding specific risks. The solution adopted contrasts with that adopted in US law, where action is only taken when there is indisputable scientific evidence of a threat (the science-based approach).[20] However, given the uncertainty regarding the risks to GMOs at the time and the need to protect the environment, the approach taken by the EU was fully justified.

[16] OJ L 117, 8.5.1990, 15–27.
[17] OJ L 106, 17.4.2001, 1–39.
[18] OJ L 117, 8.5.1990, 1–14.
[19] OJ L 125, 21.5.2009, 75–97.
[20] Korzycka & Wojciechowski 2017, 77, 93.

Specific regulations for GM food and feed have been adopted independent of GMO regulations. It is important to emphasize that GM food and feed are not the same as GMOs; while GMOs are organisms with the ability to reproduce (replicate), food and feed may contain GMOs, but may also contain substances that are no longer GMOs but are produced from GMOs (e.g., flour from GM maize). Since 1997, the issue of the placing on the market of GM foods has been covered by Regulation (EC) No 258/97 concerning novel foods and novel food ingredients, which, concerning GM foods, has been replaced since April 18, 2004, by two regulations: Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003, on genetically modified food and feed (Regulation (EC) No 1829/2003), and Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003, concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC.

Regulation (EC) No 1829/2003 on genetically modified food and feed focuses on protecting consumer health. As explained in the Preamble, to protect human and animal health, food and feed containing or produced from genetically modified organisms must undergo a safety assessment through an EU procedure before being placed in the market.[21] Concurrently, it was considered necessary that the authorization procedures for genetically modified food and feed should also include the principles introduced by Directive 2001/18/EC. Consequently, genetically modified food and feed should be authorized to be placed in the EU market after a scientific assessment fulfilling the highest possible requirements regarding any risk that it may pose to human and animal health and, where appropriate, to the environment.[22]

The EU regulation on genetically modified foods was prompted not only by the need to protect the environment and the health of consumers, but also by the desire to provide consumers with complete and reliable information about GMOs and the products, food, and feed made from them to enable consumers to make informed choices around food.

The guiding principle for both GM organisms and GM food and feed in EU legislation is that the possibility of placing such products on the market (or releasing them into the environment, in the case of seeds) is subject to prior authorization after assessing individual potential adverse effects on the environment and human health.[23] The authorization procedure for placing GM foods in the market provided in Regulation (EC) No. 1829/2003 is complex and multi-stage. Only after the European Food Safety Authority (EFSA) has given its opinion, the Member States and the public[24] have had the opportunity to comment, and the Standing Committee on the Food Chain and Animal Health has given its favorable opinion does the European Commission issue a decision, which is published in the Official Journal of the EU. The issued authorization is valid throughout the European Union for ten years. It is renewed based on an application addressed to the Commission by the authorization holder at least one year before the

[21] See Point 3 of Regulation (EC) No 1829/2003.
[22] See Point 9 of Regulation (EC) No 1829/2003.
[23] See Article 4(3) of Directive 2001/18/EC and Point 9 of Regulation (EC) No 1829/2003.
[24] See Articles 5–6 of Regulation (EC) No 1829/2003.

expiration date. Directive 2001/18/EC regulates the procedure for assessing the environmental risks of primary importance. Where an application for authorization to place a product on the market submitted under Regulation (EC) No 1829/2003 concerns food containing or consisting of GMOs, authorization under Directive 2001/18/EC is generally required, in addition to this authorization. However, the EU legislator Regulation (EC) No 1829/2003 introduced a solution allowing for only one procedure, according to the principle of 'one key for one door.' The applicants were free to choose. In marketing authorization proceedings under Regulation (EC) No. 1829/2003, applicants may submit a copy of the marketing authorization decision obtained under Directive 2001/18/EC. However, the applicant may also apply for an environmental risk assessment and a safety assessment carried out as part of a procedure under Regulation (EC) No. 1829/2003 on the same basis as provided for in Directive 2001/18/EC, thus avoiding the need for two procedures.[25]

Based on Regulation (EC) No 1829/2003, the Commission has issued dozens of decisions authorizing food products containing, consisting of, or produced from GMOs. In one case (MON 810 maize), authorization extends not only to the placing on the market of GM food and feed, but also to the cultivation of GMOs[26] (most of the Commission's decisions concern GM maize and soya, and in addition, GM rapeseed, sugar beet, and cotton are included in the register).[27]

However, the European public demanded the possibility of making an informed choice regarding GM food; therefore, the labelling requirements for GM food and feed were regulated.[28] Labelling is regulated by regulation (EC) No. 1829/2003, which defines the labelling requirements for products containing GMOs. Therefore, notwithstanding the need to obtain authorization from the European Commission for the release of a GM organism into the environment or placing GM food and feed on the market, any food or feed containing, consisting of, or produced with 0.9% or more of GMOs must be labelled with the applicable information.[29]

In the EU, one of the strictest regulations on GMOs and GM food has been adopted from the outset. Furthermore, Directive 2001/18/EC and Regulation (EC) No 1829/2003 provide instruments allowing Member States to temporarily restrict or prohibit the use or sale of an EU-approved GMO as or in a product within their territory,

[25] Korzycka & Wojciechowski 2017, 472.

[26] By comparison, it is worth noting that the number of permits and notifications for environmental releases in the USA is enormous. Starting in 1985, when four permits and notifications were granted, the annual number of permits increased, reaching more than 1,100 on 2002. In the following years, it is around 800 permits and notifications per year. See Genetically Engineered Crops in the United States, ERR-162 Economic Research Service/USDA, p. 3.

[27] The Community register of genetically modified food and feed can be found at https://webgate.ec.europa.eu/dyna/gm_register/index_en.cfm. The majority of entries in the register were made at the request of one of only a few entities: Monsanto, BASF, Bayer, Syngenta, Pioneer.

[28] Wrześniewska-Wal 2018, 10.

[29]Appropriate to the case: 'genetically modified', produced from 'genetically modified (name of ingredient)' or with reference to an ingredient in the ingredient list: 'contains genetically modified (name of organism)', 'contains (name of ingredient) produced from genetically modified (name of organism).'

subject to specific circumstances (i.e., Member States obtain additional information affecting the assessment of risks to the environment or human or animal health).

Notwithstanding the Commission's approval under Directive 2001/18/EC or Regulation (EC) No 1829/2003, genetically modified varieties must also comply with the requirements of EU law on the marketing of seeds and plant propagating material, among other things, in Directives 2002/53/EC[30] and 2002/55/EC,[31] which also contain provisions allowing Member States to prohibit, under certain well-defined conditions, the use of a variety in all or part of their territory, or to lay down appropriate conditions for the cultivation of that variety. The possibility of imposing these restrictions was made conditional, among other things, on the demonstration that the variety poses a risk to human health or the environment (Article 16 2002/53/EC).

The solutions adopted are justified by the need to protect the environment from the effects of the uncontrolled release of GMOs and to protect consumer health.

5. CJEU case law on GMOs

Despite adopting stringent regulations at the EU level, practice has shown that these regulations have not been sufficiently rigorous to meet public expectations in some Member States.

Due to concerns about the cultivation of GMOs and related public expectations, some Member States have decided to adopt national regulations aimed at a complete ban on the cultivation of GM plants. To restrict or prohibit the cultivation of GMOs, these countries have chosen not to implement or only partially implement Community legislation or have applied the safeguard clauses and emergency measures provided for in Directive 2001/18/EC and Regulation (EC) No 1829/2003, citing the post-authorization receipt of new or additional information affecting the environmental risk assessment or as a result of a reassessment of the information previously held. Other Member States used the notification procedure of Articles 114 (5) and (6) of the Treaty on the Functioning of the European Union (TFEU), which requires the submission of new scientific evidence concerning environment protection or the working environment.

The introduction of national regulations triggered reactions from the European Commission, which issued a letter of formal notice under Article 226 of the EC to such Member States and subsequently brought action before the CJEU.

In addition, in connection with disputes pending before national courts, the participants of which were often multinational corporations producing genetically modified plant varieties (e.g., Monsanto, BASF, Bayer, Syngenta) and, conversely, social organizations fighting against GMOs (e.g. Greenpeace), national courts have repeatedly made preliminary questions concerning doubts about the direction of interpretation of EU legislation regulating GMOs and GM food and feed.

[30] Council Directive 2002/53/EC of June 13, 2002 on the common catalogue of varieties of agricultural plant species.
[31] Council Directive 2002/55/EC of June 13, 2002 on the marketing of vegetable seed.

France has taken steps to ban GMO cultivation, but this issue has been highly controversial since the beginning of community regulation. References can be made, among others, to Case C-6/99[32] or Case C-296/01,[33] in which the Commission alleged that France had not correctly and fully transposed Directive 90/220/EEC. The explanation provided by France shows that the reason for this was public concern regarding GMOs.[34] Similarly, in Case C-419/03,[35] the Commission alleged, and the CJEU held, that France had incorrectly and incompletely implemented Council Directive 2001/18/EC. Judgment C-419/03 has not been implemented in France. Therefore, in the subsequent case C-121/07,[36] the European Commission requested the CJEU to declare that, by failing to take the measures required to implement the judgment in Case C-419/03, the French Republic had failed to fulfil its obligations under Article 228(1) EC. Explaining the reasons for not enforcing the judgment in Case C-419/03, France explicitly pointed to the fact that GMOs and, in particular, their deliberate release into the environment, have become a significant subject of debate and conflict, sometimes violent, in France, as evidenced by the numerous actions taken to destroy crops in the field.[37]

The importance of regulating GMO cultivation in public perception is also illustrated by another French case (C-552/07[38]), which concerned the clarification of the accuracy with which information on GMO cultivation should be provided, taking into account public order considerations.[39] The issue of the public disclosure of the exact location of a GMO release also surfaced in the Netherlands, as evidenced by a preliminary ruling request from a Dutch court that was subsequently withdrawn (Case C-359/08). Another French case (C-58/10 to C-68/10[40]) concerned the legality of two national interim measures that successively suspended the sale and use of GMO MON 810 maize seeds in France and banned the cultivation of seed varieties derived from this maize line.

GMOs have also been an important issue in the public discourse in Italy, as evidenced by national regulations adopted to ban the cultivation of GMOs. For example, in Case C-236/01[41] Monsanto Agricoltura Italia, the national court asked the CJEU to interpret the legislation providing for precautionary measures to be taken by a Member

[32] Judgment of March 21, 2001, Case C-6/99, Greenpeace, ECLI:EU:C:2000:148.
[33] Judgment of November 20, 2003, Case C-296/01, Commission of the European Communities v. French Republic; ECLI:EU:C:2003:626.
[34] See judgment of November 20, 2003 in Case C-296/01, Points 73, 140.
[35] Judgment of July 15, 2004, Case C-419/03, Commission of the European Communities v. French Republic, ECLI:EU:C:2004:467
[36] Judgment of December 9, 2008, Case C-121/07, Commission of the European Communities v. French Republic, ECLI:EU:C:2008:695.
[37] See judgment of December 9, 2008 in Case C-121/07, Points 6 and 72.
[38] Judgment of February 17, 2009, Case C-552/07, Commune de Sausheim v. Pierre Azelvandre ECLI:EU:C:2009:96.
[39] See judgment of February 17, 2009 in Case C-552/07, Points 49–50.
[40] Judgment of September 8, 2011 in Cases C-58/10 to C-68/10 Monsanto SAS and Others v. Ministre de l'Agriculture et de la Pêche, ECLI:EU:C:2011:553.
[41] Judgment of September 9, 2003, C-236/01 Monsanto Agricoltura Italia SpA and Others v. Presidenza del Consiglio dei Ministri and Others, ECLI:EU:C:2003:431.

State because the national legislation invoking health protection temporarily suspended the trade and use of two varieties of genetically modified maize in Italian territories.[42]

In another Italian case (C-36/11[43]), the question of a preliminary ruling concerned the interpretation of the provisions of Directive 2001/18/EC, governing measures to prevent the unintended presence of GMOs, which was linked to the actions of Italian authorities in delaying the adoption of legislation allowing the coexistence of conventional, organic, and genetically modified crops. A question from an Italian court on one aspect of this issue was submitted in 2021 (Case C-24/21). The issue of precautionary measures was also addressed in Case C-111/16,[44] in which the CJEU interpreted Article 34 of Regulation (EC) No. 1829/2003, which allowed Member States to take emergency measures.

Issues concerning Poland also provide evidence of the importance of GMOs in public perception. In proceedings against Poland (Case C-165/08[45]), the Commission alleged that, by prohibiting the free circulation of genetically modified seed varieties and the inclusion of genetically modified varieties in the national register of varieties,[46] Poland breached Directive 2001/18/EC and Directive 2002/53. In response to the Commission's objections, the Republic of Poland referred to concerns about risks to public health and the environment, explicitly pointing to the strong opposition of a large part of public opinion in Poland to GMOs and the need to respect ethical principles under Point 9 of Directive 2001/18/EC, claiming that it would be unethical to introduce provisions into the Polish legal order with which the majority of Polish society does not agree.[47] The Republic of Poland also invoked the Christian conception of life, which opposes the fact that living organisms created by God are subject to manipulation and transformed into materials that are the subject of industrial property rights, and the Christian and humanist conception of progress and development, which prescribes respect for the plan of creation and the search for harmony between man and nature. Finally, Christian and humanist principles of social order, such as the reduction of living organisms to the status of products with purely commercial purposes, may particularly undermine the foundations of the functioning of society.[48] In another proceeding against

[42] It concerned Zea mays L. line Bt-11 maize – approved by the Commission by Decision 98/292/EC of April 22, 1998 – and Zea mays L. line MON 810 maize – approved by the Commission by Decision 98/294/EC of April 22, 1998.

[43] Judgment of September 6, 2012, C-36/11, Pioneer Hi Bred Italia Srl v. Ministero delle Politiche agricole alimentari e forestali, ECLI:EU:C:2012:534.

[44] Judgment of September 13, 2017, C-111/16, Criminal proceedings against Giorgi Fidenat and others, ECLI:EU:C:2017:676.

[45] Judgment of July 16, 2009, Case C-165/08 Commission of the European Communities v. Republic of Poland, ECLI:EU:C:2009:473.

[46] According to Article 5(4) and Article 57(3) of the Act of June 26, 2003 on Seed Production (Journal of Laws No 137, item 1299) in force until December 27, 2012, genetically modified varieties could not be entered in the national register, and seed material of genetically modified varieties could not be authorised for marketing in the territory of the Republic of Poland.

[47] See judgment of July 16, 2009, Case C- 165/08, Points 17 and 19.

[48] See judgment of July 16, 2009, Case C- 165/08, Point 31.

Poland (Case C-313/11[49]), when replying to the Commission, the Republic of Poland highlighted the framework position adopted by the Polish Council of Ministers as part of the ongoing political and social debate in Poland around genetically modified feed, in which this body spoke out against placing this feed on the market.[50]

6. Changing the EU approach

Ongoing cases and the resulting practice of many Member States directed at *"defending the public against GMOs"* view the GMO issue as an opportunity for national governments to demonstrate to their electorate their willingness to defend the public, and especially consumers, against a group of large multinational corporations with interest in the marketing of GM seed, food, and feed. However, regardless of the cases before the CJEU, the issue of GMOs surfaced in the actions of EU legislators under pressure from Member States.

In March 2009, the Council rejected Commission proposals asking Austria and Hungary to reject their national safeguard measures because, according to the European Food Safety Authority (EFSA), they lacked the scientific justification required under EU legislation. As a result, a group of 13 Member States[51] called on the commission to prepare proposals, giving Member States the freedom to decide on the cultivation of GMOs.[52]

As a result of negotiations between the Commission and the Member States, the Commission prepared a draft amendment to Directive 2001/18/EC, proposing a compromise solution in the form of an opt-out clause.[53] On March 11, 2015, Directive 2015/412 amended Directive 2001/18/EC regarding the possibility for Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory.[54] As explained in the preamble, experience has shown that the cultivation of GMOs is an issue that is dealt with in more detail at the Member State level, which requires more flexibility than EU regulations, as it has precise national, regional, and local dimensions because of its links with land use, local agricultural structures, and the protection or maintenance of habitats, ecosystems, and landscapes.[55] It was noted that, in the past, some countries had used safeguard clauses and emergency measures under Article 23 of Directive 2001/18/EC and Article 34 of Regulation (EC) No 1829/2003 to restrict or prohibit the cultivation of GMOs or have used the notification procedure under Article 114(5) and (6) TFEU, which requires new scientific evidence for the protection of the environment or the working environment. It was also noted that the decision-making process has proven particularly difficult regarding GMO cultivation

[49] Judgment of November 18, 2013. Case C-313/11 European Commission v. Republic of Poland, ECLI:EU:C:2013:481.
[50] See judgment of November 18, 2013 in case C-313/11, Point 15.
[51] Austria, Belgium, Ireland, Greece, Cyprus, Latvia, Lithuania, Hungary, Luxembourg Malta, the Netherlands, Poland, and Slovenia.
[52] Individual discussions took place at Council meetings on March 2, March 23, and June 25, 2009.
[53] Wrześniewska-Wal (2018b), 105.
[54] Journal of Laws 68, 13.03.2015.
[55] See Point 6 of the preamble to Directive 2015/412.

owing to national concerns about the safety of GMOs for health or the environment.[56] In this context, Member States have been given more freedom to decide whether to cultivate GMOs in their territories.

First, during the authorization procedure for a given GMO, any Member State may demand an adjustment of the geographical scope to exclude all or part of its territory from cultivation (Article 26b of Directive 2001/13/EC). The demand is made available to the applicant for approval (notifier), who may either adjust their application to the state's demand or confirm the geographical scope of their initial notification; in the absence of confirmation of the original notification, the request for adjustment of the geographical scope is granted. If the application is granted, the cultivation of a particular GMO will not be allowed in the territory of the concerned country.

Second, if no demand was made, or if the applicant (notifier) has confirmed the geographical scope of its initial application (notification), the concerned Member State, after informing the Commission, may adopt measures restricting the cultivation or prohibiting the cultivation, in all or part of its territory, of a particular GMO or groups of GMOs defined by the type or trait of cultivation already authorized, provided that these measures conform with Union law, are reasoned, proportionate, and non-discriminatory. Furthermore, the measure must have compelling grounds, such as those related to: (a) environmental policy objectives; (b) town and country planning; (c) land use; (d) socio-economic impacts; (e) avoiding the presence of GMOs in other products; (f) agricultural policy objectives; (g) public policy (whereby this basis must only be used in conjunction with another). While the scope of these grounds is broad, experience from proceedings before the CJEU has shown that those with an interest in the approval of a particular GMO can defend their interests actively. Therefore, the introduction of a ban based on one such ground requires robust justification by the concerned Member State.

Third, a transitional measure is provided in connection with the enactment of Directive 2015/412. A Member State may have requested an adaptation of the geographical scope of a given notification submitted or authorization granted under Directive 2001/18/EC or Regulation (EC) No 1829/2003 before April 2, 2015 (Article 26c of Directive 2001/18/EC). As many as 19 Member States made this request[57] for the only plant authorized for cultivation in the EU, MON 810 maize. All applications received by the Commission covered the entire territory of the member states concerned, except for Belgium, which transmitted an application covering only the territory of Wallonia, and the United Kingdom, which transmitted an application covering only the territory of Northern Ireland, Scotland, and Wales. Germany's proposal does not include cultivation for research. The Commission submitted all the requests of the concerned Member States to Monsanto, which did not object and thus did not confirm the geographical scope of the authorization for the cultivation of MON 810 maize. On March 3, 2016, the Commission issued Decision 2016/321 adjusting the geographical scope of the authorisation of GM maize *(Zea mays* L.) MON 810, according to which the cultivation of GM maize *(Zea mays* L.) MON 810 is prohibited in the territories of Latvia;

[56] See Point 7 of the preamble to Directive 2015/412.

[57] Applications were received from: Latvia; Greece; France; Croatia; Austria; Hungary; the Netherlands, Belgium; Poland; Lithuania, the United Kingdom; Bulgaria, Germany and Cyprus; Denmark, Italy; Luxembourg, Malta and Slovenia.

Greece; France; Croatia; Austria; Hungary; the Netherlands, Belgium; Poland; Lithuania, the United Kingdom; Bulgaria, Germany and Cyprus; Denmark, Italy; Luxembourg, Malta and Slovenia.

In addition, as of April 3, 2017, Member States where GMOs are cultivated are obliged to take appropriate measures in the border areas of their territories to prevent possible transboundary contamination in neighboring Member States, where the cultivation of the GMO in question is prohibited unless such measures are unnecessary due to specific geographical conditions (Article 26a of Directive 2001/18/EC).

Therefore, the action taken owing to public pressure by many Member States has led to a significant change in the EU regulation of GMO cultivation. Instead of a stringent regulation, which was uniform throughout the EU, a solution was adopted whereby each country could, for the most part, decide on its own whether GMO cultivation was allowed in its territory.

7. GM food labelling and regulation of GM feed in Poland

A country's ban on the cultivation of GMOs is not the same as its ban on the marketing of GM food and feed (including GMOs). Meanwhile, in public discourse, the issue of using GMOs as food and feed has been raised independent of GMO cultivation.

For both GM food and GM feed, a compromise has been found at the EU level to the effect that, as a general rule, there is an obligation to indicate on the label of GM products that the food or feed contains or consists of GMOs in its composition or is produced from or contains ingredients produced from GMOs.[58] This obligation does not apply to food or feed containing material that contains, consists of, or is produced from GMOs in a proportion no higher than 0.9%, provided that its presence is adventitious or technically unavoidable.[59] As explained in the preamble to Regulation (EC) No. 1829/2003, the introduction of a requirement for compulsory GMO labelling meets the expectations of a large majority of consumers, as expressed in numerous consumer surveys, enables them to make informed choices, excludes the potential for consumers to be misled about production or manufacturing methods, and enhances the fairness of transactions.[60] It should be emphasized that the labelling obligation applies to GM foods. In contrast, food produced using (with the help of) GMOs (e.g., products of animal origin, such as meat, eggs, and milk, derived from animals fed genetically modified feed) is not considered GM food per EU regulations. Therefore, these products are not subject to the specific regulations applicable to GM foods.[61] This means that there is no obligation to inform consumers that the food comes from animals fed GM feed.

However, responding to consumer demand, many traders have also started to use the voluntary label 'GMO-free', including foods of animal origin. The lack of legislation on this issue at the EU level has been exploited by the many EU Member States, which,

[58] See Articles 13 and 25 of Regulation (EC) No 1829/2003.
[59] See Articles 12 and 24 of Regulation (EC) No 1829/2003.
[60] See Points 17, 20 and 21 of the preamble to Regulation (EC) No 1829/2003.
[61] See Point 16 of Regulation (EC) No 1829/2003.

responding to public expectations, have introduced various national regulations relating to the use of the 'GMO-free' label.[62]

In addition, the Polish legislature enacted a law on June 13, 2019, on the labelling of products produced without the use of genetically modified organisms as free of these organisms,[63] which entered into force on January 1, 2020. According to this regulation, in the case of food of plant origin, it is permissible to use the label 'GMO-free' if the content of genetic modification in this GMO is no more than 0.1% and the presence of GMOs in this food is accidental or technically unavoidable. However, in the case of products of animal origin and food consisting of more than one ingredient which includes a product of animal origin, the indication 'produced without the use of GMOs' may be used if the food was obtained from animals on which no genetically modified feed was used during the withdrawal period preceding its acquisition and the plant ingredients of the food meet the requirement for the use of the indication 'without GMOs.'

In the explanatory memorandum to the draft of this law,[64] it is explicitly indicated that the development of provisions allowing for the labelling of products produced without the use of genetically modified organisms results from requests made by social organizations, consumer organizations, and some producers. Public opinion polls were quoted, showing that 65% of Poles favored a ban on GMO cultivation and that 56.8% of Poles would choose a product derived from animals fed with non-GMO feed. It has also been pointed out that due to continuing uncertainty and concerns about the long-term impact of genetic modifications on human health, public discussions on GMOs continue to arise. In addition to appealing to public expectations, the bill's explanatory memorandum also notes that the introduction of GMO-free labelling regulations should contribute to increasing the domestic production of plant proteins for feed purposes. During the presentation of this bill, there was a discussion on several GMO issues (ultimately, as many as 421 MPs voted in favor and only three against).[65]

Therefore, explanations in the memorandum of the law show that it was primarily the public's expectations of GMOs that underpinned the introduction of this regulation. Simultaneously, it intended to support domestic feed producers, including small Polish farmers (an influential group of voters).

An even more far-reaching solution aimed not only at restricting the use of GMOs in food and feed but also to ban the use of GMOs in feed altogether was provided in the Feed Law passed in 2006.[66] According to this law, it is prohibited to produce, market, or use genetically modified feed in animal nutrition and organisms intended for feed usage.[67]

[62] See European Commission, Directorate General for Health and Consumers, Evaluation of the EU legislative framework in the field of GM food and feed, Final Report submitted by Food Chain Evaluation Consortium (FCEC), July 12, 2010, 130.
[63] i.e., Journal of Laws 2021.763.
[64] Act of June 13, 2019 on labelling products produced without using genetically modified organisms as free of such organisms (i.e., OJ 2021.763).
[65] See the Stenographic report of the 82nd meeting of the Sejm of the Eighth Tenure of the Republic of Poland of June 12, 2019, 43–54.
[66] Act of July 22, 2006 Feed Law (i.e., Journal of Laws 2021.278).
[67] See Article 15(1) Point 4.

However, it should be emphasized that the provision introducing the ban has not yet entered into force. The ban came into force two years after the feed law came into force. However, the moratorium on the ban was postponed several times, from 2008 to 2012,[68] 2017[69] to 2019,[70] 2021,[71] and 2023.[72]

The justifications for successive amendments postponing the entry into force of the ban have invariably pointed out for years that, in Poland, as in the case of many other EU Member States, the issue of the production, marketing, and use of genetically modified feed in animal nutrition raises many controversies, which are reflected in social discussions, polemics, and political debates. Simultaneously, studies conducted in Poland found no negative impacts of feeding GM feed on the quality and safety of animal products, human and animal health, or the environment. It is also stressed that there is no possibility of substituting GM soya for animal feed in Poland, because the world's leading soya producers and exporters have switched almost entirely to growing GM soya.

It is characteristic that, despite the awareness of those in power that the ban on the marketing of GM feed is in breach of Regulation (EC) No 1829/2003,[73] no parliamentary majority in Poland (from 2008 onwards) has decided to repeal the Commission's questioned Article 15(1) Point 4 of the Feed Law, choosing only to postpone the entry into force date of this provision several times. Moreover, with successive amendments amounting to nothing more than a change in the date of entry into force, heated discussions were held during deliberations regarding GMOs.[74]

[68] See the Act of June 26, 2008 amending the Feed Law.
[69] See the Act of July 13, 2012 amending the Feed Law.
[70] See the Act of November 4, 2016 amending the Feed Law.
[71] See the Act of November 22, 2018 amending the Feed Law.
[72] See the Act of November 19, 2020 amending the Feed Law.
[73] This is evidenced, for example, by the words of the Member presenting the bill to amend the Feed Act, who, in presenting the arguments in favor of the bill (print no. 457), explicitly pointed out that *"this Article 15(1) Point 4 is indeed incompatible with EU law."* See the stenographic report of the 17th meeting of the Sejm of the Seventh Tenure of the Republic of Poland of June 27, 2012, p. 116.
[74] The stormy nature of these discussions can be evidenced by the fact that, on the occasion of yet another postponement of the entry into force of this provision during the first reading, as many as 30 MPs signed up to speak, and the representatives of the various parties represented in the Sejm, in presenting their position, referred to arguments of various nature, ranging from health issues, through the destruction of Polish agriculture by the importation of GMO feed, to the citation of various reports and opinions. See the stenographic report of the 17th meeting of the Sejm of the Seventh Tenure of the Republic of Poland of June 27, 2012, pp. 115–135. A heated discussion was also held at the following amendment in 2016 when the parliamentary majority submitted a proposal for another postponement of the effective date, which had so far taken a position opposing further postponement of the effective date. During the discussion, among other things, it was alleged that the PiS party used the fight against GMOs during the election campaign as a trump card to win the elections and changed its stance once in power (p. 125). See Stenographic report of the 29th meeting of the Sejm of the Eighth Legislature of November 29, 2016, 122–133.

8. Summary

The use of non-naturally occurring methods of transgenesis (and, in light of CJEU jurisprudence, mutagenesis through genetic engineering), which makes it possible to obtain expected and planned properties of plants (e.g., resistance to certain herbicides or pest repellence), is seen as a natural, scientifically driven development process that makes food production more efficient. However, potential threats to the environment, human health, and farmers' interests are pointed out. Deciding whether GMOs are beneficial or pose a risk is beyond the scope of legal sciences. Concurrently, there is no doubt that the genetic modification of plants and their use in food and feed have been of interest to both EU and national legislators for many years.

While the US and other countries (mainly from the Americas) relied on the principle of 'listening to science' and considered that since there was no scientific evidence to show beyond doubt that GMOs used for food purposes posed a risk, there was no need for specific regulation of GM food, the European Union, based on the precautionary principle, recognized the need for specific regulation of GM plants, food, and feed. Based on the precautionary principle and appealing to public concerns about GMOs, the EU decided to adopt stringent regulations for GM products. Some Member States have introduced additional national restrictions.

The inclusion of GMOs and GM food and feed in the regulations was undoubtedly linked to the cautious stance of European societies towards GMOs. This position was reinforced by the objections raised by various organizations against GMOs, ranging from environmental, health, and economic. It seems that issuing a regulation at the community level based on the risk principle was not insignificant to the public interest on this issue. Indeed, the introduction of specific procedures for releasing GM plants into the environment and placing GM food and feed in the market confirmed the thesis of the increased risk associated with GMOs. Therefore, a feedback loop has occurred, where regulation responding to the public expectation of protecting against possible GMO risks has further heightened the fear of GMOs. In addition, the arrangements adopted in the EU, whereby an entity interested in introducing a GMO product must provide evidence that it does not pose a risk, have led to the fact that only entities with the necessary capacity to afford to fund research have met these requirements. Therefore, in practice, applications for genetically modified products are submitted by several large multinational corporations, an additional argument raised by opponents of GMOs regarding monopolization, and, in principle, the dependence of agriculture on a few entities with rights over GM varieties.

An analysis of the CJEU's case law on GMOs includes consideration of the number of cases and their spread over time (the first rulings appeared at the end of the 1990s) and the actors involved in the disputes (multinational corporations with interest in the development of GMO crops, e.g. Monsanto, BASF, Bayer, Syngenta, and conversely, farmers' organizations, e.g. the farmers' trade union, and social organizations associated with environmental protection, e.g. Greenpeace). The arguments raised by the Member States (in some judgments, social concerns and the need to take account of them were explicitly referred to) indicate the Member States in which there was a social discussion on GMOs, though there was a public debate on GMOs. It follows from the arguments put forward by the Member States (some

judgments explicitly mention public concerns and the need to take them into account), as well as from those Member States in which there has been a public debate on GMOs, irrespective of the parliamentary majorities currently in power, even in breach of EU law, that they have taken action in response to the 'voice of the people' (i.e., in response to the negative results of public opinion polls and the negative impact of GMOs on the environment). This implies that both the negative view of GMOs held by the public in a given country as a result of opinion polls, consumers' expectations concerning information on GM food, and, finally, the expectations of domestic farmers, who fear the domination of large multinationals. The Polish experience also shows that the issue of 'protection from GMOs' is actively used in political discourse, with those in power (regardless of political party) taking a similar stance on GMO issues (as exemplified by the repeated postponement of the entry into force of the ban on the marketing of GM feed).

The submission of the EU legislator and national legislators to public pressure has led to a situation where, in the European Union (in those countries where no ban has been introduced), only one GM plant variety (MON 810 maize) is authorized for cultivation based on a 1998 authorization that has been renewed several times. Concurrently, in the USA, there has been a massive increase in the production of GM plants over the last few decades (GM soya and cotton account for more than 95% and GM maize for more than 80%). Furthermore, owing to the massive expansion of GM crops, mainly in the USA and South American countries, GM feeds dominate the world market, including the EU, where GM food and feed from third-country crops are allowed. Indeed, the need to ensure the economic stability of food producers of animal origin does not allow individual Member States to ban the marketing of GM feed in their territories. Instead, the protection of the public in this regard is achieved through the labelling of GMO-free food, including food from animals fed GMO-free feed. Only this full scope of GMO labelling regulation is sufficient to protect consumer interests.

This confirms the hypothesis that the negative public perception of GMOs in European society has been reflected in the actions of those in power in many EU countries, including Poland, and that the shape of EU regulation of genetically modified plants and national regulations has become a response to public expectations and fears without considering the scientific knowledge that should form the basis of risk analysis.

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Tatjana JOSIPOVIĆ* – Hano ERNST**
Constitutional protections of property and energy-efficient housing in Croatia***

Abstract

The aim of this article is to present the energy-efficiency building requirements in general and their relationship with the constitutional protections of property afforded by the Croatian Constitution and the European Convention of Human Rights (ECHR), and the reconstructions and energy-efficiency retrofitting of existing buildings and the relationship between these measures and the constitutional protections of property.
Keywords: constitutional protection, energy-efficient buildings, energy-efficiency, Croatia.

1. Introduction

Although the legal system of Croatia, including its constitutional law and property law, is relatively young,[1] numerous factors have made it subject to constant and dramatic changes that have created increasing difficulties in its design and interpretation. On the one hand, Croatian property law developed on the remnants of social ownership and consequently had to both rebuild itself as a modern European system grounded in the institution of private ownership (while dealing with all the peculiarities of transition) and adapt itself to current and changing societal conditions. On the other hand, Croatian constitutional law had to position itself as a stronghold of protections upholding the rule of law and fundamental rights in a new political environment. In particular, this meant developing cogent interpretations of constitutional provisions as well as receiving long-standing doctrines from the European Court of Human Rights (ECtHR) and, more recently, the European Court of Justice.

Furthermore, the development of the entire Croatian legal system in the last fifteen years has been characterized by intensive and comprehensive revamping dominated by EU law. Energy policies are one area of particular concern. This area demonstrates all the complexities that arise when property, constitutional, and EU laws interact.

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[1] The Croatian Constitution, enshrining inviolability of property as one of the fundamental values, was passed in 1990, and entered into force on December 22, 1990. See Constitution of the Republic of Croatia [hereinafter Constitution] art. 3. The Croatian Act on Ownership and Other Property Rights was passed in 1996 and entered into force on January 1, 1997. See Ownership and Other Property Rights Act [hereinafter Ownership Act].

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The role of EU law in energy efficiency has been paramount in the reform of Croatian law in many areas. The fundamental source of EU energy efficiency law is the Energy Efficiency Directive[2] along with supplementary secondary legislation, including the Directive on the Energy Performance of Buildings,[3] the Ecodesign Directive,[4] and the Energy Labelling Directive.[5] Tackling the problem of efficient use of energy, as one of the main tools for fighting climate change under the Kyoto Protocol, is notoriously associated with energy-inefficient buildings. It has been repeatedly reiterated that buildings account for 40% of the total energy consumption in the EU[6] and that targeting the building sector is needed to reduce the EU's energy dependency and greenhouse gas emissions.[7] Residential buildings account for 75% of the total building stock in Europe;[8] hence, they are obviously the most viable choice for implementing energy-efficiency measures.

It makes sense in this context that EU legislation has imposed stringent requirements for new buildings, including nearly zero energy standards. However, for the most part, such legislation has left it to the national legislatures to implement policies, without requiring them to impose a duty to retrofit the very large number of non-compliant existing buildings. National legislators face difficult political and legal choices. The Croatian legislature implemented EU law via the Building Act and the Energy Efficiency Act, which also impose a strict energy-efficiency regime for new buildings but, importantly, make a seemingly small intervention in domestic property law concerning co-owners' voting rights in decision-making about energy-efficiency retrofitting. This intervention, however, raises important constitutional issues involving the conflict between property rights as fundamental rights and environmental protection as a public interest, which we analyze further.

The rest of the paper proceeds as follows: In Part II, we discuss energy-efficiency building requirements in general and their relationship with the constitutional protections of property afforded by the Croatian Constitution and the European Convention of Human Rights (ECHR), to which Croatia is a signatory. In particular, we analyze the construction of energy-efficient buildings and the relationship between novel requirements under the Building Act and the constitutional protections of property. In Part III, we discuss reconstructions and energy-efficiency retrofitting of existing buildings and the relationship between these measures and the constitutional protections of property. Part IV concludes.

[2] Directive 2012/27/EU of the European Parliament and of the Council of October 25, 2012, on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [hereinafter EED].

[3] Directive 2010/31/EU of the European Parliament and of the Council of May 19, 2010, on the energy performance of buildings (recast) [hereinafter EPBD].

[4] Directive 2009/125/EC of the European Parliament and of the Council of October 21, 2009, establishing a framework for the setting of ecodesign requirements for energy-related products (recast).

[5] Regulation (EU) 2017/1369 of the European Parliament and of the Council of July 4, 2017, setting a framework for energy labelling and repealing Directive 2010/30/EU.

[6] EPBD rec. 3.

[7] Ibid.

[8] See European Commission 2022.

2. Energy-efficiency building requirements and the constitutional protections of property

2.1. Construction of energy-efficient buildings

The Croatian Building Act[9] contains numerous provisions on energy efficiency, not least because it explicitly implements the EPBD.[10] One of the fundamental rules under this act is a requirement that each structure be constructed such that during its lifetime it meets the basic structural requirements provided by legislation and regulation.[11] Traditionally, these include strength and stability, fire resistance, and sound insulation, among others. BA Article 8 specifically includes energy management and heat conservation, as well as the sustainable use of natural resources. Energy management and heat conservation requirements include ensuring that the amount of energy *"remains at a low level, considering the users and climate conditions of the location of the structure"*[12] and that *"structures must also be energy-efficient such that they use as little energy as possible during construction and degradation."*[13] The requirement of sustainable use of natural resources means that structures must ensure (1) the reuse or recycling of structures, their materials, and parts after removal; (2) durability; and (3) the use of environmentally acceptable raw and secondary materials.[14]

The BA further contains detailed rules on the energy performance of buildings, applicable to buildings with roofs and walls for which energy is used to achieve certain indoor climate conditions.[15] All buildings must be designed, constructed, and maintained such that during their use they meet the energy efficiency requirements provided by law,[16] and that it is possible, without significant costs, to ensure individual metering of the consumption of energy, energy products, and water, with remote reading ability for specific building units.[17] Most importantly, energy efficiency requirements include (1) nearly zero energy, (2) electromobility, (3) regular inspection of heating and air-conditioning systems, and (4) energy performance certification.

The principal goal of energy-efficient construction is to achieve the prevalence of nearly zero energy buildings – hence, all new buildings must be nearly zero energy.[18] These buildings have very high energy performance, and nearly zero or very low amounts of energy are covered to a significant extent by energy from renewable sources, including

[9] Building Act [hereinafter BA].
[10] See BA art. 1(2)–(3).
[11] See BA art. 7(1).
[12] BA art. 14(1).
[13] Ibid.
[14] See BA art. 15.
[15] See BA art. 19a; cf. EPBD art. 2(1)(1) (defining a building as a roofed construction having walls, for which energy is used to condition the indoor climate). The EPBD contains minimum requirements and does not prevent member states from maintaining or introducing more stringent measures (art. 1(3)).
[16] See BA art. 20(1).
[17] See BA art. 20(2).
[18] See BA art. 21(1); cf. EPBD art. 6 and 9.

energy from renewable sources produced on-site or nearby.[19] The specifications for achieving a nearly zero energy status are prescribed by technical regulations,[20] and they include a comprehensive set of measures for regulating space heating, domestic hot water supply systems, insulation and ventilation, condensation control, lighting, and building automation and control, as well as the mandatory use of renewable energy sources.[21]

Electromobility is achieved by implementing the requirements for the installation of infrastructure for recharging electric vehicles in buildings.[22] These include installing a minimum number of recharging points and ducting infrastructure (conduits) for a certain number of parking spaces, depending on the type and size of the building and the size and location of its car park.[23] Regular inspections of heating and air-conditioning systems include the obligation of the owner of the building or its unit to ensure inspections for heating systems or systems for combined space heating and ventilation with an effective rated output of over 70 kW, such as heat generators, control systems, and circulation pumps, once every 10 years, and inspections for air-conditioning systems or systems for combined air-conditioning and ventilation, with said effective rated output every 10 years.[24]

Energy performance certification is important not only to guarantee that energy-efficiency requirements have been met[25] but also to guarantee transparency in the housing market. The EPBD emphasizes providing correct information about the energy performance of the building to prospective buyers and tenants,[26] not only to properly assess the value of the property but also to encourage awareness of energy efficiency and possible improvements.[27] The BA contains a detailed set of provisions on energy certification, including those on the licensing and training of energy certification experts and the review of the energy certificates.[28] The fundamental requirement is that developers or owners have an energy performance certificate issued prior to the issuance of an occupancy permit.[29] In addition, owners have the obligation to have an energy

[19] See BA art. 3(1)(39); cf. EPBD art. 2(1)(2).
[20] See Technical Regulation on Rational Energy Use and Heat Protection in Buildings [hereinafter Tech. reg.]
[21] See ibid.
[22] See BA art. 21a; cf. Directive 2014/94/EU on the deployment of alternative fuels infrastructure. See Farkas-Csamangó 2020 (discussing the Hungarian context).
[23] See BA art. 21b–21d; cf. EPBD art. 8(2)–(7).
[24] See BA art. 22a (1)–(2) and 22b(1)–(2); cf. EPBD art. 14(1) and 15(1). These include an assessment of the efficiency and sizing of the heat generator compared with the heating requirements of the building and, where relevant, a consideration of the capabilities of the heating system of the system for combined space heating and ventilation to optimize its performance under typical or average operating conditions. Further, these also include an assessment of the efficiency and sizing of the air-conditioning system compared with the cooling requirements of the building and, where relevant, a consideration of the capabilities of the air-conditioning system or of the system for combined air-conditioning and ventilation to optimize its performance under typical or average operating conditions.
[25] Energy certificates are issued after an energy certification inspection. See BA art. 26.
[26] See EPBD rec. 22.
[27] See ibid.
[28] See BA arts. 27–45; cf. EPBD, art. 11–13.
[29] See BA, art. 24(1); cf. EPBD, art. 12(1)(a)

performance certificate issued for all buildings prior to the sale or leasing of the building or its unit and to deliver such certificates to the (prospective) buyer or lessee,[30] as well as to explicitly state the energy performance indicator in the advertisement for sale or lease of the building or building unit published in the media.[31]

The obligations of landowners described above clearly represent regulatory restrictions on land use. Such restrictions are extremely common and comparable to other restrictions set out in the BA, which prescribes basic structural requirements intended to guarantee safety. The Constitution does not guarantee unlimited ownership. It contains four separate sets of provisions covering the constitutional protection of property rights.[32] Article 48(1) of the Constitution stipulates that *"ownership is guaranteed"*[33]; however, this guarantee is immediately qualified in section (2), which stipulates that 'ownership obliges' and that *"property owners and users have a duty to contribute to the common good."*[34] This language, mirroring the German Constitution,[35] sets out the doctrine of social obligations of property ownership, which is typical of modern constitutional property design.[36]

The Croatian Constitutional Court has interpreted the above provision in the context of other provisions relating to property—namely, Articles 50(1), 50(2), and 52 of the Constitution. Article 50(1) allows both expropriation (taking) and limitations on ownership, but only by law, in the interest of the Republic of Croatia, and against market-value compensation.[37] Under Article 50(2), limitations on ownership are constitutionally acceptable only if they are prescribed by law and have the purpose of protecting the interests and security of the Republic of Croatia, nature, the human environment, and human health.[38]

Finally, Article 52 contains specific rules for *"goods of interest to the Republic of Croatia"* that are grouped into two categories. The first comprises the sea, the coast and islands, water, airspace, minerals, and other natural resources, all of which are directly designated by the Constitution as goods of interest to the republic. The second category includes land, forests, plant and animal life, other parts of nature, real property and property having significant cultural, historical, economic, and ecological value, which are designated by law as being of interest to the republic. The use and exploitation of these categories of property by rights holders, as well as compensation for the restrictions they are subject to, must be prescribed by law.

[30] See BA, art. 24(2); cf. EPBD, art. 12(1)–(2)
[31] See BA, art. 24(2); cf. EPBD, art. 12(4). The duty to state the energy performance indicator equally applies to licensed real estate agents. See BA art. 24(4)
[32] See generally Marković et al. 2011, 618–623; Radolović 2010; Gavella 2002.
[33] Constitution art. 48(1).
[34] Constitution art 48(2).
[35] See Grundgesetz für die Bundesrepublik Deutschland art. 14(2).
[36] See Thiel 2011; Lubens 2007; Gavella et al. 2008, 354–357. See also Lähteenmäki-Uutela et al. 2021, Walsh 2021; Degens 2021; Mautner 2020.
[37] See Constitution, art. 50(1).
[38] See Constitution, art. 50(2).

The two leading constitutional cases that interpret the constitutional protections of property are U-IIIB-1373/2009[39] and U-I-763/2009.[40] They discuss the scope of property rights,[41] 'the three rules test', and the application of the principle of proportionality to property rights. The Croatian Constitutional Court was obviously inspired by the opinions of the European Court of Human Rights in its application of Article 1 of Protocol 1 to the ECHR. In fact, it seems to have tried to interpret the provisions of the Constitution as if they had essentially the same structure and meaning as the comparable provisions in the ECHR.[42] This was principally attempted by applying 'the three rules test' to assess a potential violation of the constitutional protections of property. The 'first rule' is the general rule guaranteeing the substance of ownership (including the freedom of disposal and private use).[43] The 'second rule' prohibits unlawful expropriation and expropriation unsupported by a general interest, or market-value compensation.[44] The 'third rule' empowers the legislature with traditional police powers to impose limitations on ownership in order to protect the interests and security of the republic, nature, the human environment, and human health – without compensation.[45]

Under this interpretation, it appears that the Croatian Constitutional Court views the 'first rule' as corresponding to ECHR Protocol 1, Article 1(1), Clause 1 (stating that everyone *"is entitled to the peaceful enjoyment of his possessions"*). The 'second rule' corresponds to ECHR Protocol 1, Article 1(1), Clause 2 (stating that *"no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"*). This congruence is obvious because the ECtHR interprets

[39] Constitutional Court of the Republic of Croatia [CCRC], U-IIIB-1373/2000, July 7, 2009. See Marković et al. 2011, 618–623.

[40] CCRC, U-I-763/2009, March 30, 2011.

[41] The scope of Article 48 includes 'all patrimonial rights' (assets). See CCRC, U-IIIB-1373/2009 (citing earlier opinions U-III-661/1999, March 13, 2000; U-III-72/1995, April 11, 2000; U-III-551/1999, May 25, 2000; and U-III-476/2000, June 14, 2000. This aligns with ECtHR case law. See, e.g., ECtHR, Depalle v. France [GC], para. 62; Anheuser-Busch Inc. v. Portugal [GC], para. 63; Öneryıldız v. Turkey [GC], para. 123. See Schabas 2015, 970.

[42] See Bagić 2016, 254–255, 263. See CCRC, U-III-3491/2006, July 7, 2010, para. 19.3 (noting that the ECHR is a constitutional instrument of European public order, citing to Loizidou v. Turkey [GC]); CCRC U-I-763/2009, para 17.1 (citing to Kopecký v. Slovakia [GC]). This approach was taken despite the fact that the ECHR was designed as an instrument guaranteeing the bare minimum of rights, particularly so for property, which failed to be included in the original document (hence its inclusion in the protocol). See generally, Praduroux 2013.

[43] See CCRC, U-IIIB-1373/2009, para. 8. See CCRC, U-I-763/2009, para 17. (noting that the guarantee in Article 48(1) is qualified by the common good stipulated in Article 48(2), such that limitations on ownership must not 'go farther than necessary' to achieve a legitimate goal).

[44] See CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1

[45] See CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1 (emphasizing the exceptional nature of such restrictions and the protective function of ownership). The literature has warned, however, that constitutional case law after this opinion has essentially failed to implement its principles and has not managed to build a recognizable approach to their application. See Bagić 2016, 265–266. See also Lengyel 2020 (discussing similar issues in Hungary).

the anti-deprivation clause of the ECHR as including various types of expropriatory measures.[46]

The 'third rule' appears to correspond to ECHR Protocol 1, Article 1(2), which provides that a state has the right *"to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."* There is also a fourth rule in the Croatian Constitution: Article 52. The Constitutional Court has plainly stated that this rule "explicitly constitutes a presumed interest of the Republic of Croatia (general interest) that may affect the way the owners of such goods and things may use and exploit them"[47] and that this entails 'control of use' that *"may on a general level be compared to [this] part of Article 1(2) of ECHR Protocol 1."*[48]

In addition to the 'three rules' test, violations of constitutional protections of property are always assessed under Article 16(2) of the Constitution on proportionality. Under this provision any restriction on ownership must be proportionate to the need for such a restriction in each particular case, meaning that *"in any particular case there must be a reasonable relationship of proportionality between the means used in taking or restricting ownership and the goals thereby intended to achieve [i.e.] interference with property must be proportionate to the nature of the need."*[49]

Suspected violations are assessed using a method received from the ECtHR, which includes discussing the following questions: (1) Has there been an interference with ownership? (2) Was the interference lawful? and (3) Was the interference proportional to the intended legitimate aim?[50] If we analyze the restrictions imposed on landowners using the energy-efficiency provisions of the BA, violations would most likely be assessed under Article 50(2) of the Constitution and Article 1(2) of ECHR Protocol 1 as valid regulatory restrictions on use. These restrictions are backed by a clear energy policy, both domestic and supranational, and environmental protection is specifically listed as a protected interest under Article 50(2) of the Constitution. Further to that, Article 32 of the Ownership Act provides, echoing Article 50(2) of the Constitution, that an owner cannot exercise ownership beyond the limits set out by law for all owners to protect national interests and security, the human environment, and human health. Such restrictions are not subject to any compensation because they are simply a function of the social obligations of property owners enshrined in Article 48(1) of the Constitution. Therefore, although energy-efficiency measures under the BA do represent interferences with ownership, they are most likely to be assessed as both lawful and proportionate to the legitimate aim they seek to achieve (environmental protection).

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[46] See, e.g. The Holy Monasteries v. Greece, paras. 60–61, Sporrong and Lönnroth v. Sweden, para 63, Depalle v. France [GC], para. 7.

[47] CCRC, U-IIIB-1373/2009, para 18.

[48] Id. It goes on to explain that the restrictions under Article 52(2) *"are within the scope of restrictions under Article 50(1) ("the second property rule"), because both cases concern statutory restrictions of private ownership in the interest of the Republic of Croatia."* Id. para 19. This is, of course, problematic, because Article 50(1) corresponds to the anti-deprivation clause of the ECHR, not its control of use clause.

[49] CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1 (noting that there must be a *"fair balance and an equalized relationship between private property and general or public interests"*). See also U-I-1156/1999, January 26, 2000.

[50] See Bagić 2016, 271–290.

A similar argument can be made regarding the owners' duty to conserve the building, including its energy-efficiency features, by maintaining it.[51] Unlike previous requirements that prohibited owners from building unless they complied with energy-efficiency requirements, maintenance requires them to further invest in the property. The Constitution does not distinguish between negative and positive restrictions, but the Ownership Act specifically recognizes the availability of prescribing statutory restrictions that require owners to 'take some action' with respect to their property.[52]

2.2. Reconstruction and certification of existing buildings

Thus far, we have discussed ownership restrictions for owners of undeveloped land. Current building owners are, however, also subject to novel rules regarding energy efficiency. These individuals have already built on their land and own a structure that does not meet the energy-efficiency requirements prescribed for new structures. The BA generally applies to all new structures on Croatian territory (with certain exceptions).[53] New buildings that must meet nearly zero-energy requirements are buildings for which applications for building permits were filed on or after December 31, 2019 (December 31, 2017, for buildings whose owners are public entities).[54] This means that buildings that fall outside the scope of the 'new buildings' definition do not have to meet energy-efficiency requirements, excluding certification. However, the BA does apply energy-efficiency requirements to reconstructions[55] and partially to major renovations.[56]

Owners who wish to reconstruct their buildings are in a position similar to owners of undeveloped land; hence, the arguments presented above on regulatory restrictions on use would most likely apply to such owners as well. For owners who engage in major renovations, the BA only applies the electromobility requirements.[57] This measure is certainly weaker than the nearly zero-energy requirements and would most likely be assessed as a valid restriction on use for the same reasons.

Finally, certification requirements apply to almost all buildings[58] and therefore represent the restriction that has the broadest impact. It is also special compared to others because it includes a restriction on disposal. As explained earlier, owners must obtain certification prior to any sale or leasing of a building or its units.[59] If they do not do so,

[51] See Tech. reg. art. 2.
[52] See Ownership Act art. 32(3).
[53] See BA art. 2(1).
[54] See Tech. reg. art. 4(1)(21).
[55] See BA art. 2(2). Reconstruction is defined as the performance of construction and other work on an existing structure that affects the satisfaction of the basic requirements for such structure or that modifies the compliance of such structure with the zoning conditions it was built under (extension, addition, removal of external part of structure, construction work for change of use of a structure or a technological process or similar), or the performance of construction or other work on an existing dilapidated structure. See BA art. 2(1)(8).
[56] Major renovations are defined as building renovations in which more than 25% of the building envelope area is subject to renovation. See BA art. 2(1)(41).
[57] See BA art. 21c(1).
[58] See BA art. 23(1)(1) (listing exceptions).
[59] See BA art. 24(2).

they are criminally liable and subject to a fine[60] (albeit the contract itself remains valid). This restriction may also be classified under regulatory restrictions on use and may be justified for the same reasons as other energy-efficiency measures. Certification may look different because it does not directly improve the energy efficiency of the building but only provides information about it. This is also why it may seem difficult to find a strong link to the legitimate public interest that it seeks to support. However, certification, although it does not directly improve energy efficiency, enables energy-efficiency renovation of existing noncompliant buildings because such information is necessary for the project design. It also facilitates energy-efficiency renovation because it raises awareness about energy efficiency and calibrates the real estate market to reflect the value of energy-efficiency features.

2.3. Energy-efficiency retrofitting and the constitutional protections of property

As mentioned in the previous section, the BA does not impose a duty on current or future owners of multi-unit or other privately owned buildings to comply with new energy-efficiency requirements, such that they would be obligated to retrofit them. The BA required the government to pass a Long-Term Strategy for National Building Stock Renovation by 2050 (adopted in 2020)[61] and national programs for the energy renovation of buildings for 2021–2030.[62] The National Program for Energy Renovations of Multi-Unit Buildings for the Period 2021–2030 (adopted in 2021)[63] envisages various types of renovations (integral, deep, and comprehensive) that would affect approximately 6.2 million square meters within MUBs[64] and several models (for MUBs undamaged in the 2020 earthquake, MUBs damaged in the 2020 earthquake, and financial assistance for individuals at risk of energy poverty).[65]

There are two principal tools relevant for our analysis set out in the National Program and legislation: (1) public co-financing (grants for up to 60% for integral energy renovations and up to 80% for deep and comprehensive renovations, and 100% for individuals at risk of energy poverty)[66] and (2) reduction of the majority requirements for co-owners' decisions involving energy retrofitting.[67] The principal issue we further discuss is the second, legal tool.

Under the general provisions of the Ownership Act, co-ownership represents the fundamental legal doctrine of shared ownership, wherein co-owners participate in the ownership of a single property.[68] A subtype of co-ownership is condominium,[69] wherein co-ownership is modified such that condominium owners have the right to manage a unit in lieu of all co-owners, as if the unit were owned solely by the condominium

[60] See BA art. 171(1)(4)–(7).
[61] See BA art. 47a. See Long-Term Strategy for National Building Stock Renovation by 2050.
[62] See BA art. 47b.
[63] See National Program for Energy Renovation of Multi-Unit Buildings.
[64] See ibid., 6.
[65] See ibid., 8–9.
[66] See ibid., 6.
[67] See Energy Efficiency Act art. 29(1) and 30(2).
[68] See Ownership Act arts. 36–56.
[69] See Ownership Act art. 66–99. See generally, Josipović & Ernst 2015.

owner.[70] Co-owners (including condominium owners) have the right to participate in decision-making about all issues concerning the property[71]; however, the Ownership Act distinguishes between decisions involving 'ordinary' and 'extraordinary' management, wherein the former requires a simple majority of votes (calculated by reference to the size of a co-ownership share), while the latter requires unanimity.[72] The Ownership Act contains provisions classifying specific decisions into each category; however, in case of doubt, a decision is always presumed to fall into the 'extraordinary' category, thus requiring unanimity.[73]

Decisions on energy renovations were not specifically covered by the Ownership Act, and the Energy Efficiency Act[74] covered them by prescribing a majoritarian vote for a decision to enter into an energy renovation contract for an MUB.[75] Contracts may include both construction work and services for implementing energy-efficiency measures.[76] The majority required for this decision is the absolute majority of owners, calculated with reference to co-ownership shares,[77] which is the same voting regime as for ordinary management under the Ownership Act. The original version of the EEA contained a similar provision but used slightly different language, requiring a majority vote of all co-owners *"calculated by co-ownership shares and the number of co-owners."*[78] A similar provision containing identical language was also passed for entering into energy performance contracts (EPCs) between an energy service company (ESCo) and MUB co-owners.[79] This is important because, last year, the Constitutional Court struck down both of these provisions,[80] and they were subsequently replaced with their current versions, which no longer reference the number of co-owners.

The main issue presented before the Constitutional Court was one of ambiguity of the language used, because, as explained by the court: *"it is considered undisputed that addressees of a legal provision cannot truly and concretely know their rights and obligations, nor foresee the consequences of their behavior unless the legal provision is sufficiently certain and precise. The requirement of certainty and precision of a legal provision represents "one of the fundamental elements of the principle of the rule of law" (…) and is key for the establishment and sustainability of the legitimacy of the legal system."*[81] The court concluded that the use of double criteria for determining the majority of votes (i.e., referencing both co-ownership shares and the number of co-

[70] See Ownership Act art. 66(2).
[71] See Ownership Act art. 39.
[72] See Ownership Act art. 41(1). Note that even under ordinary management, the decision is binding for all co-owners, which means that the outvoted co-owners may be burdened with financial obligations supporting such a decision.
[73] See Ownership Act art. 41(2).
[74] See Energy Efficiency Act [hereinafter EEA].
[75] See EEA art 30(2).
[76] See EEA art. 30(4).
[77] See id. The contracting parties are the co-owners of the building and the contractor. The contract is signed by the person designated in the decision, or by the building manager. See BA art. 30(3).
[78] See EEA art. 30(1).
[79] See EEA art. 30(2) (invalidated).
[80] See EEA arts. 29(1) and 30(1) (invalidated by CCRC, U-I/663/2020, March 23, 2021).
[81] CCRC, U-I/663/2020, para 5.1. (citing to CCRC, U-I-722/2009).

owners) was inadequate because the two criteria were mutually exclusive, or at least subject to various interpretations, and therefore unacceptable under the rule of law requirement of the Constitution.[82]

The court did not – nor was it asked to – engage in constitutional review of these provisions on grounds of constitutional property violations. However, such an analysis deserves attention, because the majority requirements under the EEA are an exception to the default unanimity rule under the Ownership Act. The principal constitutional issue with the introduction of the majoritarian model is its potential violation of the provisions of the Constitution and the ECHR that protect property. The first question in this analysis is whether the EEA introduced a novel restriction on ownership. Here we distinguish between the introduction of the majoritarian model for decisions involving energy-efficiency renovation on the one hand, and for those involving EPCs, on the other. We first deal with energy-efficiency renovation.

Energy-efficiency renovation, as explained earlier, involves significant construction work on buildings as a whole. *Prima facie*, decisions on such renovation would fall into the 'extraordinary' category, requiring unanimity. This is both because 'larger repairs' and 'refurbishments' are specifically listed as examples of extraordinary management,[83] and because extraordinary management is the default rule.[84] For condominiums, the Ownership Act provides an additional rule stipulating that 'improvements of common areas' fall under extraordinary management.[85] The fact that the EEA included a provision defining a simple majority also implies an intention to derogate from unanimity required by the Ownership Act.[86]

An alternative interpretation, wherein the EEA did not introduce a novel restriction on ownership, is, however, possible. It would entail that the EEA did not, in fact, derogate from the general provisions of the Ownership Act because energy-efficiency renovation falls under ordinary management. The Ownership Act does not provide a general definition of ordinary management. It does, however, define ordinary management in the condominium context such that it includes *"regular maintenance of common areas, including construction modifications necessary for maintenance,"*[87] and this could well apply by analogy to simple co-ownership. Therefore, 'regular maintenance' may include construction modifications if they are necessary for maintenance, so if energy efficiency renovation were to be classified as 'regular maintenance' then a simple majority would have sufficed under the Ownership Act, irrespective of Article 30 of the EEA. This article would then be interpreted as simply being inserted for clarification, confirming the existing position under the Ownership Act. The crucial issue here would of course be the one of classifying energy efficiency renovation as regular maintenance.

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[82] Ibid.

[83] See Ownership Act art. 41(1).

[84] See Ownership Act art. 41(2). Further to that, mortgaging the entire property is specifically listed under extraordinary management. See Ownership Act art. 41(1). This may be relevant if energy-efficient financing is secured, requiring a mortgage.

[85] See Ownership Act art. 87(1).

[86] The Energy Efficiency Bill does state this explicitly for the simple majority prescribed in Art. 29 concerning EPCs. Although this explanation is omitted for Art. 30, which concerns energy efficiency renovation, it seems the same logic was applied for both provisions.

[87] Ownership Act art. 86(1)(1).

In support of such an interpretation, it could be argued that energy efficiency has become a standard practice under current societal conditions that recognize the importance of energy efficiency as one of the principal tools in fighting climate change. Therefore, the argument proceeds, renovating buildings to become energy-efficient is simply a function of maintaining that building because maintenance does not just include maintaining the state of the building as it was when it was originally built but also includes maintaining it in a state that meets current societal conditions – including energy efficiency.

Conversely, it could be argued that achieving energy efficiency is not maintenance because it does not maintain the status quo but involves an improvement. Regular maintenance is a defined term under the Maintenance of Structures Regulation[88] and includes *"such construction that prevents the loss of features of the building and its functionality as defined in the project, as well as construction for replacement or replenishment of parts of the building in the intervals and scope as designated in the project or due to impaired features or functionality of such parts that are not caused by an extraordinary event."*[89] Hence, the preceding argument is difficult because it requires an expanded understanding of maintenance to include fixing inadequacies outside the scope of the original project.

Furthermore, the Ownership Act, at least in the condominium context, provides a derogation from unanimity for common area improvements, where a simple majority is sufficient for such improvements if the majority decides to fully finance the costs thereof, or such costs may be covered from common funds without risking the coverage of regular maintenance expenses and if such improvements do not excessively harm the outvoted co-owners.[90] Therefore, just because the Ownership Act legislates the power of the majority to outvote the minority, it does not give the majority the power to impose any financial or other excessive burdens on that minority.

If we were to accept that the EEA did impose a novel restriction on ownership, its substance would be the loss of voting power because, under unanimity, each co-owner had to consent to energy-efficient renovation, essentially holding veto power against all other co-owners. Therefore, each co-owner's freedom was curtailed by removing such power and redistributing it among co-owners in proportion to their co-ownership shares.[91]

What, then, is the nature of the restriction in terms of its classification under the Constitution and the ECHR, and, consequently, does it represent a permissible restriction? It is obvious that the restriction did not destroy co-ownership (total taking),[92] impose an easement or lease (incomplete taking),[93] or impose a restriction amounting to

[88] Maintenance of Structures Regulation, OG no. 122/2014, 98/2019.
[89] See ibid. art. 2(1)(2).
[90] See Ownership Act art. 87(2).
[91] Note that this could most likely be avoided if the measure only applied to future owners. This could be achieved by requiring renovation only after an ownership transfer. Practically, this would probably mean that owners would retain veto power for the duration of their ownership, while future owners would, when purchasing a co-ownership share, implicitly agree to the new voting rules.
[92] See Ownership Act art. 33(1).
[93] See Ownership Act art. 33(1).

expropriation (regulatory taking);[94] hence, it may be classified as a restriction on use (control of use) under Article 1(2) of ECHR Protocol 1, Article 50(2) of the Constitution, and Article 32(1) of the Ownership Act. As previously noted, these restrictions are common because they allow for the proper functioning of society. The constitutionality and compatibility with the ECHR of such restrictions are assessed by applying a justification test that includes lawfulness and proportionality, the latter inquiring both whether the restriction aims to achieve a legitimate public interest and whether a fair balance was struck between the general interest of the community and the individual's property rights.[95]

Lawfulness requires that a measure be prescribed by law and that such law meets certain standards associated with the rule of law – most importantly, such precision and certainty that is sufficient for foreseeability.[96] The EEA simply prescribed voting requirements in decision-making about concluding an energy-renovation contract, without reference to the Ownership Act. This raises questions about how this rule fits the general framework. The Ownership Act distinguishes between ordinary and extraordinary management but also contains additional provisions that afford certain rights to outvoted co-owners, which depend on the classification of the decision under its nomenclature. As mentioned previously, in the condominium context, the Ownership Act provides that improvements of common areas, classified as extraordinary management, may be approved by a majority vote if the majority fully finances them or their costs may be covered from common funds without excessively reducing them.[97] The EEA, however, did not classify the decision on concluding an energy-efficiency contract as either ordinary or extraordinary management. If it were classified as extraordinary management, then the financial burden would fall exclusively on the majority, unless common funds were sufficiently large to cover both energy renovation and regular maintenance. Conversely, if it were classified as ordinary management, the financial burden would be distributed pro rata among the co-owners.[98] Outvoted co-owners have the right to request declaratory relief from a court in non-contentious proceedings[99] if they believe that the distribution of costs does not comply with these rules. Hence, the jurisdiction of a court also depends on such a classification.[100] Furthermore, it is unclear what the scope of the decision made by the majority actually is in the context of energy-efficiency renovation. Most importantly, it is not clear whether a majority vote is sufficient for taking out loans to (partially) finance energy-efficiency renovations because loans (particularly secured loans) are considered extraordinary management by default under the Ownership Act, whereas the EEA requires a majority for concluding an energy renovation contract that includes provisions on financing (but

[94] See Ownership Act art. 33(3).
[95] See generally, Christoffersen, 2009.
[96] See CCRC U-I-659/1994 (discussing legal certainty and legitimate expectations); U-I-3843/2007 (discussing certainty and precision). Cf. ECtHR Lekić v. Slovenia [GC]; Beyeler v. Italy [GC]; Hentrich v. France; Imeri v. Croatia.
[97] See Ownership Act art. 87(2).
[98] See Ownership Act art. 89(1).
[99] See Ownership Act art. 89(4).
[100] See Varaždin County Court, Gž-2708/2016 (dismissing a petition for declaratory relief in non-contentious proceedings for lack of jurisdiction).

is not a loan agreement itself).[101] These objections, if taken seriously, could lead to a court concluding that the (revised) provision of the EEA is still insufficiently precise because of its unforeseeable consequences for the affected co-owners, so as to violate the requirement of lawfulness, making the measure stand in violation of property protection afforded by the Constitution and the ECHR.

The existence of a public interest (environmental protection) does not seem problematic because it is fairly obvious.[102] The issues of adequacy and fair balance, however, present themselves as much more vexing. The problem of decision-making in a simple co-ownership or condominium scheme is notoriously difficult because it manifests most incidents of the collective action problem. Co-owners who must consent to a decision (on energy-efficiency renovation) hold an extremely powerful grip over the collective[103] and may be prone to use it for various reasons, including bargaining over other issues, lack of interest, and even exercising a personal vendetta. The literature has noted that this problem is pervasive in most European countries and has called for progressive review of property law.[104] The European Commission was aware of this issue, and the EED specifically requires in Article 19(1)(a) that member states take appropriate measures to remove regulatory and non-regulatory barriers to energy efficiency, without prejudice to the basic principles of property law of the member states, particularly with regard to the split of incentives among owners, with a view to ensuring that these parties are not deterred from making efficiency-improving investments that they would otherwise have made by the fact that they will not individually obtain the full benefits or by the absence of rules for dividing the costs and benefits between them, including national rules and measures regulating decision-making processes in multi-owner properties. The model adopted in the Croatian EEA can therefore be viewed as a simple tool for facilitating decision-making. By introducing the majority rule, it redistributes power between co-owners in favor of an environmentally friendly majority who may outvote the environmentally unfriendly minority.

The problem with the above argument lies in the relationship between restrictions and the aims it seeks to achieve. The majority rule does not guarantee that renovation will in fact be sought or achieved. The rule still requires a majority vote. Hence, if the majority are environmentally unfriendly, there is no rule mandating a retrofit.

The Constitutional Court has consistently held that proportionality demands that both measures are appropriate to achieve a legitimate aim and strike a fair balance between public and private interests.[105] Similarly, the ECtHR has consistently held that a

[101] See EEA art. 30(5).

[102] See U-I-763/2009 (discussing the notions of general interests and public interests); See Staničič 2018. Cf. ECtHR, Béláné Nagy v. Hungary [GC] para. 113, James and Others v. the United Kingdom para.45; Grozdanić and Gršković-Grozdanić v. Croatia paras. 102-103 and 113; G.I.E.M. S.R.L. and Others v. Italy [GC] para. 295; Hamer v. Belgium para. 79, Strezovski and Others v. North Macedonia para. 75.

[103] See generally Heller 1998.

[104] See Weatherall et al. 2018 (concluding that an individualistic approach to property ownership underlies most governance barriers); See also Bright and Weatherall 2017; Anda et al. 2015; Lujanen, 2010.

[105] Disproportionality exists even when *"there is obviously no reasonable relationship between the method and scope of the restriction … and the aims sought in the public interest. Proportionality may only exist in case the*

measure must strike a fair balance between the demands of the general interest of the community and the requirements for the protection of the individual's fundamental right to the peaceful enjoyment of possessions.[106] It stressed that an assessment of proportionality includes whether other less intrusive measures could reasonably be resorted to in the pursuit of the public interest.[107] The court has not, however, specifically examined whether the measure can fail because it is too weak. It could be argued that a fair balance entails that the measure should be appropriate to achieve the aim sought and that the strength of the measure should be sufficient to establish the link between the measure and the intended aim. If the measure does not achieve its aim, then even a weak restriction could be assessed as overly intrusive because a sufficient connection between the restriction and legitimate public interest is missing. In this sense, proportionality depends on the strength of the measure relative to its actual protection of the public interest.

In the case presented, the legislature obviously chose a weak measure, even though other models were available. For example, a slightly stronger version of the majority rule would have been to require a relative majority. This would have required all co-owners to be present at meetings to cast their votes. Under such a scenario, even an (absolute) minority could make a binding decision on energy-efficiency renovations, whereas under the current rule, a majority cannot be formed with absentees or abstainers.[108]

Another, much stronger model would have been to not only introduce the majority rule but to also prescribe a duty for all co-owners of energy-efficiency non-compliant MUBs to renovate their buildings within a certain period after legislation was passed.[109] Such a duty would require its own constitutional analysis, but supposing it was constitutionally acceptable, it would have provided a strong link between the public interest and restrictions. This was the situation in France, where the Energy Transition

applied measures are not more restrictive than it is necessary to secure a valid (legitimate) interest." CCRC U-I-3610/2010, December 15, 2010, para 14.2 See also CCRC, U-I-763/2009 para. 53.1 (preference for less intrusive measures that achieve the same goal). See CCRC U-III-36100/2009; U-III-2709/2010; U-III-5501/2013; U-III-5208/2013; U-III-7203/2014 (discussing fair balance).

[106] See Beyeler v. Italy [GC] para. 107; Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia [GC] para. 108).

[107] See James and Others v. United Kingdom para. 51; Koufaki and Adedy v. Greece (dec.) para. 48.

[108] See Weatherall et al. 2018 (noting that one of the most profound barriers to energy-efficiency decision-making in apartment blocks is the need to reach and engage apartment owners who may have no interest or who are difficult to contact).

[109] The co-owners would still need to vote, particularly on issues of when and how to proceed with a particular renovation project (or choose among several proposals), even though they would be under a statutory duty to renovate. This model would, however, require, sanctions against co-owners or collectives who fail to perform their renovation duty within the prescribed time frame.

Act of 2015[110] introduced both a renovation duty[111] and a relative majority in voting.[112] Although the renovation duty was applied only to the most energy-inefficient buildings, while the voting requirements were applied to all buildings, the existence of the renovation duty can be said to have been fully supportive of the voting measure, at least in the case of such energy-inefficient buildings. The French set of measures can also be viewed as a gradual scheme, wherein for the most energy-inefficient buildings, ownership is more severely restricted by imposing a renovation duty, whereas for others that present a lower degree of social harm, the weaker measure suffices. Under Croatian law, however, such arguments are unavailable, because no renovation duty is prescribed. Hence, it could be argued that by leaving the decision to renovate to co-owners, the government has delegated the power to assess whether the public interest needs protection to private actors – the majority of co-owners in each individual case (who might not even be aware of exercising this prerogative). By doing so, it failed to prioritize the public interest it has a constitutional mandate to protect and relied on the environmentally friendly majority of co-owners, even though it not only had no guarantee of existence but also deferred to the environmentally friendly minority when it did not. Therefore, the argument proceeds, because the restriction remains disconnected from the public interest it seeks to achieve, it stands in violation of the Constitution and the ECHR.

These arguments may be criticized in a number of ways. First, it could be argued that the measure is sufficiently strong to justify the existence of a link with the public interest. Although the measure does not go so far as to require renovation, it does remove a barrier in the decision-making process to achieve it. By making the decision-making process easier for the environmentally friendly majority, the measure makes energy-efficiency renovation much more probable. Removing veto power from any single co-owner is sufficiently strong to break arbitrary holdouts that are statistically much more probable than situations in which the majority oppose the retrofit.

[110] See Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte.

[111] See id., art. 5 (requiring that all privately owned buildings classified as energy efficient categories F or G undergo energy renovation before 2025). Interestingly, the same act contained an even stronger restriction, providing in its Art. 6 that *"from 2030 all privately owned residential buildings must undergo an energy renovation when they are transferred … subject to the availability of adequate financial tools."* The French Conseil Constiutionnel struck down the article imposing the renovation duty, as in violation of art. 34 of the French Constitution that protects property, because *"the legislature has pursued an objective of general interest … however, by defining neither the scope of the obligation which it has set, nor the financial conditions of its implementation, nor those of its application in time, the legislature has not sufficiently defined the conditions and the modalities of this infringement of the right to dispose of one's property."* Décision du Conseil constitutionnel n° 2015-718 DC.

[112] See id. art. 14 (modifying art. 24 of Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis). The majority was later modified, and current French law requires an absolute majority of votes for energy-efficiency renovations under Article 25 of said statute. However, under Article 25-1 of said statute, if such a majority is not reached, and the project received at least a third of the votes of all co-owners, then a second vote is immediately taken, wherein a relative majority suffices.

Second, it could be argued that the measure is not in fact weak at all but exactly represents a fair balance between the need to protect ownership and the need to protect the environment. Under this view, the government did not fail to prioritize the environment but performed an ex-ante proportionality test, resulting in a weaker measure because it took existing property rights into account. By prescribing reduced majority requirements, the government did not delegate its environmental protection power to co-owners but simply recognized their property rights relative to the public interest, striking a fair balance between them.

Finally, recall that the measure is supported by public assistance, which not only makes energy-efficiency renovation attractive but also significantly reduces the financial obligations for the outvoted co-owners. If we assess the measure as an integral part of a larger scheme that includes public financing, which it is,[113] then the measure is even weaker in terms of restricting ownership because the harmful consequences of being outvoted are financially disproportionate to the benefit received by energy renovation, particularly in the case of individuals who are at risk of energy poverty, where projects are fully backed by public financing. The link between the measure and public interest is, however, much stronger because the measure impacts the decision involving energy-efficiency renovation co-financed by public funds.

Another way to look at the issue could also be to imply a duty to renovate. Although the EEA did not prescribe such a duty, it could be implicit in the substance of ownership of an energy-inefficient building.[114] Ownership is defined under Article 33 of the Ownership Act as a property right inherently limited by statute and third-party rights. General statutory restrictions on ownership are also defined and include prohibiting (1) the exclusive use of property to cause harm, (2) exclusion under necessity, and (3) reach into useless airspace and underground space.[115] A corollary of these restrictions is further elaborated in the law of neighbors, particularly nuisance law.[116] If energy-inefficient use of a building is viewed as use that is exclusively harmful to others (in that particular aspect), then it could be argued that no owner or co-owner has the right to use their building in an energy-inefficient manner, and hence the duty to renovate. It could then be argued that there was no interference with or restriction of ownership because there was nothing to restrict; that is, the restriction was already implied in the very substance of ownership.

Similarly, necessity prevents an owner from prohibiting such interference with the property, which is necessary to remove the threat of imminent harm if such harm is disproportionately greater than the harm caused to the owner.[117] If energy-inefficient buildings are viewed as an imminent threat to the environment, then prohibiting energy-efficiency renovation would be prohibited itself, if the harm from energy-inefficient use was assessed as disproportionate to the harm (principally financial) to the renovating

[113] The BA explicitly states in art. 30(1) that energy renovation of MUBs is carried out in accordance with national programs of energy renovation of MUBs and that the users of public funds provided by these programs are MUB co-owners.
[114] See generally, Guimont 2022; Klein 2007.
[115] See Ownership Act art. 31.
[116] See Ownership Act art. 110.
[117] See Ownership Act art. 31(1)(2)

owners. The balancing of harms, as well as the fact that necessity gives owners the right to damages,[118] would require a separate analysis of the value of harm for co-owners, particularly because renovation involves both expenses (partially publicly funded) and benefits (in terms of property valuation); however, such an analysis is beyond the scope of this paper.

The problem with this line of argumentation, however, remains in that it implies that individual property rights belonging to all co-owners as a collective are still more valuable than the collective right to a healthy environment belonging to everyone, including the co-owners themselves, because even with public funding and a majority vote, an opposing majority prevails. In other words, the measure itself could be criticized as being overprotective of property rights, even though it does not violate any constitutional protection of property.

This may lead to attacking the measure on other grounds. If we accept that energy-inefficient buildings cause harm to the environment, then it could also be argued that the right to a healthy environment of the outvoted minority, guaranteed implicitly by the Constitution and the ECHR in the right to respect private and family life,[119] is violated by the EEA, which fails to impose a duty to renovate and force the minority to live in an energy-inefficient building. This would require a test be conducted under ECHR Article 8, but a violation would, however, be far less likely unless energy-inefficient housing was considered a sufficiently severe nuisance or threat to prevent co-owners from enjoying their homes so as to affect their private and family life adversely and the state had a positive duty to take reasonable and appropriate measures to secure the co-owner's rights.[120]

Finally, recall that the EEA also includes a majority vote provision for EPCs. This measure, unlike the previous one, does not in our opinion require as much attention in the context of a discussion on property rights violations. Even though this measure and its link to the public interest could also be regarded as weak, the degree of interference with property rights is so low that it would be difficult to justify finding a violation. This is a logical consequence of EPC design. The BA defines an EPC such that the energy efficiency investment is repaid relative to the level of energy-efficiency improvement or other criteria, such as financial savings.[121] Energy savings are guaranteed;

[118] See Ownership Act art. 31(1)(3).

[119] See Constitution art. 35. and ECHR art. 8. See Mihelčić & Zrinski 2018; Miščević & Dudaš 2021.

[120] See e.g. López Ostra v. Spain; Çiçek and Others v. Turkey (dec.); Ivan Atanasov v. Bulgaria; Kyrtatos v. Greece; Fadeyeva v. Russia; Cordella and Others v. Italy; Hatton and Others v. United Kingdom [GC]. Note, however, that in Hamer v. Belgium the ECtHR observed in relation to property rights that *"while no provision of the Convention is specifically designed to provide general protection of the environment as such … in today's society the protection of the environment is an increasingly important consideration … [and that] financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective."* Hamer v. Belgium para. 79.

[121] EEA art. art 4 (2)(67).

that is, the ESCo bears the risk of achieving such savings,[122] the value of such savings must be greater than or equal to the ESCo's remuneration,[123] and the remuneration is only paid once savings have actually occurred.[124] The investment is entirely funded by the ESCo,[125] and the ESCo must maintain parts of the building improved as a result of such investments.[126] Furthermore, every co-owner can contest the savings individually.[127] This design is obviously beneficial, or at least neutral, for all co-owners; therefore, it is difficult to see interference as being disproportionate.

3. Conclusion

Contextualizing property rights in the age of fighting climate change is challenging. Traditional views of property law emphasize the individual as standing in opposition to the world because property is exclusionary. Environmental protection, on the other hand, requires collective endeavors to save the world. There is little doubt that individual property rights today must defer to environmentally friendly goals and that the EU's –and consequently Croatia's – energy efficiency policy targeted at MUBs is but another legitimate public interest that weakens individual property rights for the benefit of the community. The particular issues we discussed in this paper, however, demonstrate that the method for achieving that public interest is as important as good intentions that motivate governmental action.

Croatia's relatively minor intervention in domestic property law, modifying the co-ownership voting model, is a good example. Although there are many arguments that speak to the lawfulness and proportionality of the intervention, there remains at least a suggestion of a doubt that the measure is too weak to support its relationship with the proclaimed public interest, both from the ownership and community perspectives, indicating that perhaps a bottom threshold for proportionality has been breached. It also demonstrates that implementing EU policies into national property law, even when designed with an idea of balancing property rights against public interests, may miss the mark under constitutional review if national law is modified haphazardly and without serious systemic considerations. This may particularly be the case when the center of balance is not identical at the national and supranational levels due to differences in both legal and political factors involved in policy design and lawmaking.

[122] EEA art. 29(3)(2).
[123] EEA art. 29(3)(1).
[124] EEA art. 29(3)(5).
[125] EEA art. 29(3)(3).
[126] EEA art. 29(3)(1).
[127] EEA art. 29(5).

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