Acta Universitatis Lodziensis

FOLIA IURIDICA

110

Digitalization: Implications for Tax Law and Practice

edited by
Ziemowit Kukulski

WYDAWNICTWO UNIWERSYTETU ŁÓDZKIEGO

COPE
Member since 2018
JM13714

Acta Universitatis Lodziensis

FOLIA IURIDICA 110

WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

Acta Universitatis Lodziensis

FOLIA IURIDICA 110

Digitalization: Implications for Tax Law and Practice

edited by
Ziemowit Kukulski

WYDAWNICTWO UNIWERSYTETU ŁÓDZKIEGO
Łódź 2025

COPE
Member since 2018
JM13714

ISSN 0208-6069
e-ISSN 2450-2782

Published by Lodz University Press
First Edition. W.11637.24.0.Z

Publisher's sheets 13.0; printing sheets 11.375

Lodz University Press
90-237 Łódź, 34A Matejki St.
www.wydawnictwo.uni.lodz.pl
e-mail: ksiegarnia@uni.lodz.pl
tel. +48 42 635 55 77

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.01

*Roman Wiatrowski**

https://orcid.org/0000-0003-0051-6712

CHALLENGES FACING THE EUROPEAN UNION IN TAXING THE DIGITAL ECONOMY

Abstract. The world of the digital economy is constantly evolving and will be the main vehicle for global trade in the future. The transfer of transactions to the Internet requires appropriate tax regulations that, on the one hand, prevent tax fraud and abuse, and, on the other hand, facilitate e-commerce by removing tax obstacles. International institutions are taking initiatives to regulate these issues on a global basis. The article attempts to examine to what extent global initiatives have been implemented in the European Union and what challenges the European Union faces due to the limited success of these global initiatives. This required a recasting of current EU regulations and the prospects facing the European Union in relation to the need for the effective taxation of the rapidly growing digital economy, in which digital platforms play a particular role.

Keywords: digital economy, digital platforms, DST, value added tax

WYZWANIA STOJĄCE PRZED UNIĄ EUROPEJSKĄ W OPODATKOWANIU GOSPODARKI CYFROWEJ

Streszczenie. Świat gospodarki cyfrowej nieustannie się rozwija i w przyszłości będzie stanowił główne narzędzie światowego handlu. Przeniesienie transakcji do Internetu wymaga odpowiednich regulacji podatkowych, które z jednej strony zapobiegałyby oszustwom i nadużyciom podatkowym, a z drugiej strony ułatwiałyby handel elektroniczny likwidując przeszkody podatkowe. Międzynarodowe instytucje podejmują inicjatywy uregulowania tych zagadnień na gruncie globalnym. W artykule podjęto próbę zbadania w jakim stopniu inicjatywy globalne zostały wdrożone w Unii Europejskiej oraz przed jakimi wyzwaniami Unia Europejska stoi w związku z ograniczonym powodzeniem inicjatyw globalnych. Wymagało to przestawienia obecnych regulacji unijnych oraz perspektyw przed którymi stoi Unia Europejska w związku z potrzebą efektywnego opodatkowania szybko rozwijającej się gospodarki cyfrowej, w której szczególną rolę odgrywają platformy cyfrowe.

Słowa kluczowe: gospodarka cyfrowa, platformy cyfrowe, podatek DST, podatek od towarów i usług

* Judge of the Supreme Administrative Court; romanwiatrowski2008@gmail.com

Received: 14.01.2025. Verified: 16.01.2025. Revised: 12.02.2025. Accepted: 25.02.2025.

1. INTRODUCTION

Rapid technological change and the associated exponentially increasing digitalisation of world trade is raising speedily the importance of global e-commerce. The concept of the digital economy has taken shape in the literature. It is very broad and evolving all the time. It is possible to identify certain characteristics that have been recognised as specific to the digital economy. These include the power of digital technology, the turn to virtual reality, novelty, working online, and the correlation of different areas of the economy (Tapscott 1998, 52–85). The notion of the digital economy is associated with the activities of major bigtechs: e-commerce (H&M, Walmart, eBay), the provision of payment services (PayPal), the sale of mobile applications (Google, Apple), the provision of online advertising services (Facebook, Google), the provision of cloud-related services (Microsoft Azure), high-frequency trading (Two Sigma Securities, Virtu Financial), and social media platforms (Facebook, Instagram) (Morawska 2022, 88–89). The small physical presence of digital companies at the point of delivery or service creates a mismatch between where profits are taxed and where value is created. Digital companies may achieve their business goals in areas where they have no or minimal physical structure. A significant role in the value creation of digital companies is played by the users of digital platforms, who can be either domiciled or based outside the territory of the country in which the digital company physically operates. User data becomes the main value of companies, as it shapes sales and marketing strategies (Wiatrowski 2024a, 2).

This requires new tax solutions for both income and VAT. While the rationale for changes in income taxes is the need to change the place of taxation, in VAT it is important to ensure correct collection.

2. SOURCES OF INSPIRATION FOR EU SOLUTIONS

2.1. The BEPS initiative

The EU's initiatives on the taxation of the digital economy are primarily inspired by the efforts of the G20 and the OECD, which are leading the negotiations on the international taxation of digital activities to build a consensus on a long-term global tax solution. This is done primarily through an initiative called the OECD/G-20 Open Framework on Tax Base Erosion and Profit Shifting (BEPS). Some 140 countries and jurisdictions are already participating in the initiative.

On 8 October 2021, an agreement was reached through the OECD/G-20 Open Framework on BEPS on key aspects of the reform of the international rules on the taxation of profits of multinational enterprises. The agreement is contained in the Statement on a Two-Pillar Solution to the Tax Problems Arising from the

Digitisation of the Economy ("the October 2021 OECD/G-20 Open Framework for BEPS Statement").[1]

The BEPS initiative is related, among other things, to the need to change the place of taxation in connection with transactions that are carried out through digital platforms. The current tax reality – namely that on income tax grounds, taxation is based on the concept of a permanent establishment – is not compatible with the rapidly changing digital economy.

The effects of such a mismatch were to be remedied by Pillar One. Pillar One concerns a new, fairer distribution of taxing rights through new profit attribution rules and new tax presence rules. Indeed, the main premise of Pillar One is to reallocate profit from the home country of the multinational enterprise (MNE) to the countries/markets where the MNE sells its goods and services through digitally-run businesses. Pillar One was intended to result in multinational digital businesses paying taxes in the jurisdictions where their users and customers are located.

2.2. The implementation of global solutions in the European Union

On 21 March 2018, the European Commission presented two draft directives that would introduce the possibility of taxing the digital economy within the European Union. The first directive provided for the taxation of legal persons with a significant presence in the digital market (European Commission Proposal 1).[2] The second directive concerned a common system of tax on digital services, levied on revenues arising from the provision of certain digital services (European Commission Proposal 2).[3] However, the above initiatives were concluded at the meeting of the Economic and Financial Affairs Council (ECOFIN) on 12 March 2019, where it proved impossible to reach a Community agreement due to the opposition of some member states. However, this work was abandoned in favour of common international solutions (Mozgiel-Wiecha 2021, 175).

[1] OECD. *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*. October 2021. https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed: 23.12.2024).

[2] European Commission. Council Directive Laying Down Rules for the Taxation of Legal Persons with a Significant Digital Presence. COM(2018) 147 final. Brussels, March 21, 2018. https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=COM:2018:0147:FIN (accessed: 28.12.2024).

[3] European Commission. Council Directive on a Common System of Digital Services Tax Levied on Revenue Deriving from the Provision of Certain Digital Services. COM(2018) 148 final. Brussels, March 21, 2018. https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52018PC0148 (accessed: 28.12.2024).

The status of Pillar One remains uncertain. The participation of the United States in this endeavour is crucial[4], as it will surpass the "critical mass" necessary for the effectiveness of a multilateral convention on the first action related to the digital economy. The majority of corporations covered by Pillar One are US corporations. Moreover, it is estimated that almost 70% of the total relocated profit comes specifically from US companies.

The OECD is not laying down its arms in 2024 and has published further documents on Pillar One. In particular, on 19 February 2024, the OECD/G20 Inclusive Framework on BEPS (IF) published a report on the B-quota (Pillar One), which outlines a simplified and streamlined approach to applying the arm's length principle to core marketing and distribution activities, with a focus on small jurisdictions (2024 Report).

However, despite the extended deadline of 30 June 2024, the OECD has not reached a consensus on Pillar One, which puts the entire Pillar One journey into question. As a consequence, EU regulations on Pillar One also remain in limbo all the time.

The situation is different with regard to Pillar Two. On 15 December 2022, the European Union adopted Council Directive (EU) 2022/2523.[5] The objective of the global minimum tax is to ensure that large multinational enterprises (MNEs) pay at least 15% tax on income earned in each jurisdiction in which they operate.

The minimum tax is attributed an anti-abusive function. It is intended to prevent a "race to the bottom", i.e. competition by states to grant ever more far-reaching tax breaks in order to attract investment from other jurisdictions (Bammens, Bettens 2023, 256). As a result of the new regulations, large multinationals that fall within the scope of the new rules will set an effective tax rate (ETR) for each jurisdiction in which they operate. The determination of the effective rate will be made at the country level and will be based on a calculation of the proportion of taxes paid by the entities in the jurisdiction to the income of those entities. In this regard, Directive 2022/2523 provides detailed calculation rules for both income and tax. The effective tax rate thus determined will be compared to the 15% minimum rate. However, a company will be able to avoid paying the minimum tax, even if the effective tax rate is lower than 15%, if it has a sufficiently high asset-personality substrate. The determination that the top-up tax is due will be linked to a settlement by the entity to which it is allocated. In line with Directive 2022/2523, member states will be able to opt, in addition to the application of the indicated rules, for the

[4] According to the chairman of the European Parliament's Subcommittee on Taxation, Paul Tang, political polarisation in the USA ahead of the November elections threatens to "derail" the two-pillar solution, which the *Financial Times* reported after discussions on the issue at the G20 summit (Majdowski 2024, 62–63).

[5] Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring the Global Minimum Level of Taxation of Multinational Enterprise Groups and Large Domestic Groups in the Union. OJ EU L 328, December 15, 2022, p. 1, as amended.

introduction of a national top-up tax aimed at ensuring the collection of a minimum tax within the jurisdiction. Companies within the scope of the tax will be required to report regularly (Kondej, Stępień 2023, 31–32).

The premise of Pillar Two is, therefore, that multinationals should pay a minimum effective tax rate of at least 15% in each jurisdiction in which they operate (Kondej, Stępień 2023, 31).

The main objective of Pillar Two and, consequently, of Directive 2022/2523 is to reduce harmful tax competition, although they also aim to reduce corporate tax competition both in cases of harmful (i.e. artificial) profit shifting and actual investment shifting (Liotti, Ndubai, Ruth, Lazarov, Owens 2022; Chen, Chow 2024, 309).

3. THE FUTURE OF THE INCOME TAXATION OF DIGITAL ACTIVITIES IN EUROPE

3.1. The DST return

In terms of income taxes, the failure to implement Pillar One could end in tax chaos, with individual member states seeking individual solutions within their own tax autonomy, and in particular that of DST (Wiatrowski 2024a, 4). Part of the Pillar One agreement is the abolition of DST (Digital Services Tax) in some countries. The abandonment of Pillar One will translate into a return to DST.

Although DST is not an income tax, the rationale for introducing DST taxes in different countries is very similar and is based on the same argument initially made for Pillar One, namely that digital companies were not paying enough income tax while the greatest value is in the users (*The OECD/G20 Pillar 1 and Digital Services Taxes: A Comparison*, Congressional Resarch Service). DSTs are more similar to sales and excise taxes, because they are levied on *revenue* rather than *profits* (income). DSTs are similar to sales taxes – they are in addition to sales and value-added taxes.

DST is already in place in a number of countries. These taxes vary, but can be levied on advertising revenue from digital companies, sales on online marketplaces, data sales, and digital product sales. As an example, India adopted a tax on online advertising by non-residents in 2016 and extended it to a general tax on e-commerce in 2020. "India Has Significantly Expanded Its Equalisation Levy" (RSM). Canada has approved the implementation of DST from 28 June 2024 retroactive to 1 January 2022. Canada's DST is levied on revenue generated from certain digital services that rely on engagement, data, and contents contributed by Canadian users, and also the sale or licensing of Canadian user data (the Government of Canada).

Also in favour of further expansion of DST is the fact that this tax is endorsed in the CJEU case-law. On 3 March 2020, the CJEU in its judgments in Cases

C-75/18 (*Vodafone Magyarország Mobil Távközlési Zrt*, ECLI:EU:C:2020:139) and C-323/18 (*Tesco-Global Áruházak Zrt*, ECLI:EU:C:2020:140) held that EU law does not preclude legislation introducing a strongly progressive turnover tax, the actual burden of which is borne predominantly by foreign companies (by virtue of obtaining the highest turnover in a given market). According to the CJEU, progressive taxation can be based on turnover, as the amount of turnover is a neutral criterion of differentiation and also an important indicator of taxpayers' ability to pay. On the other hand, the fact that the greater part of such tax is borne by foreign entities cannot in itself constitute discrimination. By contrast, in the judgment in the Case C-482/18 (*Google Ireland Limited*), the CJEU held that the obligation for foreign entities to register for advertising tax (while exempting domestic entities from this obligation) is compatible with EU law.

The judgments in question may be relevant to the assessment of digital taxes in individual EU countries. Based on them, there seems to be no obstacle to such digital (turnover-based) taxes in EU member states.

3.2. The implementation of Pillar Two

With regard to Pillar Two, it is essentially the process of the implementation of the Directive 2022/2523 in the European Union countries that is nearing completion.

What is questionable, however, is the actual effectiveness of this tax. A number of loopholes in the minimum tax are pointed to as the main threat to the effectiveness of the global minimum tax, and they diminish its potential value as a regulation that implements tax justice. As a result of these loopholes, the global minimum tax has been drastically weakened with respect to its initial intentions. Indeed, the effect of the identified loopholes is that the global minimum tax would generate, at least in the short term, only a fraction of the tax revenue that could be expected from it based on the principles set out in 2021 (GLOBAL TAX EVASION REPORT 2024). The effectiveness of a minimum tax is also undermined by the fact that not all countries have signed up to the initiative. The United States has not ratified the agreement and may not do so in the foreseeable future, given Congressional opposition to the agreement (GLOBAL TAX EVASION REPORT 2024).

3.3. The UN initiative

Both pillars also undermine initiatives that remain in competition with activities initiated by BEPS. The United Nations has launched an initiative to amend the Model UN Convention.[6] One of the amendments to the UN Model Convention concerns the withholding tax on digital services, Article 12B of the UN Model Convention.

[6] United Nations. Model Double Taxation Convention between Developed and Developing Countries. New York: United Nations, 2017 and 2021. https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf; https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 23.12.2024).

This is effectively a posted tax in tax treaty law, which, unlike the digital services tax, is designed to guarantee eligibility for tax credits in the company's country of residence. This provision is seen as contradictory to the approach agreed in the two-pillar solution, particularly Pillar One (De Goede 2023, 33).

The UN's initiative in the area of international tax policy development, which resulted in the United Nations General Assembly adopting a resolution on the UN Framework Convention on International Tax Cooperation in December 2023, is significant.[7] The main thrust of the convention, which should be relevant in the coming years, is for the United Nations to play a key role in the development of international tax policy, including in the area of international profit taxation. The vote on the resolution, however, drew a dividing line whereby the EU countries and the USA and a number of other most developed countries in the world voted against the resolution, while the rest of the world, from Brazil to India, voted with a significant numerical majority (de Wilde 2024).

4. VALUE ADDED TAX

4.1. The liability of digital platforms to tax certain supplies

More promising is the future of VAT taxation of digital platforms. In response to a legislative initiative by the EC, a package of amendments to the EU VAT rules on e-commerce was adopted (the VAT e-commerce package[8]), which regulates, among other things, the new tax obligations of digital platforms. The new Article 14a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[9] provides explicitly for the liability of electronic platforms for the collection of VAT on certain supplies. It introduces

[7] United Nations General Assembly. Resolution 78/230: Promotion of Inclusive and Effective International Tax Cooperation at the United Nations. Adopted December 22, 2023. https://financing.desa.un.org/sites/default/files/2024-01/A.RES_.78.230_English.pdf (accessed: 23.12.2024).

[8] The pieces of EU legislation that make up the aforementioned package:

1) Council Directive (EU) 2017/2455 of 5 December 2017 Amending Directive 2006/112/EC and Directive 2009/132/EC as Regards Certain Value Added Tax Obligations on the Supply of Services and the Sale of Goods at a Distance. OJ EU L 348, December 5, 2017, p. 7, as amended.

2) Council Directive (EU) 2019/1995 of 21 November 2019 Amending Directive 2006/112/EC as Regards the Provisions on Distance Selling of Goods and on Certain Domestic Supplies of Goods. OJ EU L 310, November 21, 2019, p. 1, as amended.

3) Council Implementing Regulation (EU) No 2019/2026 of 21 November 2019 Amending Implementing Regulation (EU) No 282/2011 as Regards Supplies of Goods or Services Facilitated by Electronic Interfaces and as Regards the Special Schemes for Taxable Persons Supplying Services to Non-Taxable Persons, Distance Selling of Goods and Certain Domestic Supplies of Goods. OJ EU L 313, November 21, 2019, p. 14, as amended.

[9] OJ. EU. L. of 2006. No. 347, p. 1 as amended.

a legal fiction for VAT purposes by recognising that the taxable person operating the electronic platform has received the supply of goods and has made the supply themselves. Indeed, pursuant to Article 5d of Council Implementing Regulation (EU) No. 282/2011, a taxable person who is deemed to have received and made a supply of goods in accordance with Article 14a of Directive 2006/112/EC shall, unless they have information to the contrary, regard the person selling the goods through the electronic interface as a taxable person and the person acquiring the goods as a non-taxable person. According to Article 5b of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax[10], the possibility to overturn this legal fiction exists when the identity of the original supplier is clearly established and the digital platform does not specify the general terms and conditions of the supply of services, does not allow the supply of digital services, and does not allow the customer to be charged.

Thus, there is a presumption in the European Union that platforms buy services from the original supplier and resell them to the final consumer (Wiatrowski 2024, 52).

4.2. The taxation of services provided through platforms

On 8 December 2022, rules on the sharing platform economy were published by the European Commission as part of the VAT in the Digital Age reform package – the so-called "VAT in the Digital Age" (ViDA). The proposed rules[11] provide for the introduction of a new Article 28a into Directive 2006/112. According to this provision, "Notwithstanding Article 28, a taxable person who facilitates, by means of an electronic interface such as a platform, portal or similar means, the supply of short-term accommodation rental as referred to in Article 135(3) or the transport of passengers shall be deemed to have received and supplied those services himself..." Following the entry into force of the ViDA, the model of "entities deemed to be the supplier" is intended to apply also to services provided via digital platforms – short-term accommodation services and passenger transport services – in cases where the supplier is an entity not required to account for VAT on these transactions (i.e., *inter alia*, a natural person or a small business covered by the VAT entity exemption).

In the above cases, the platform will charge and account for VAT on the relevant sales. The inclusion of short-term accommodation and passenger transport services in the deemed-supplier model will, in particular, allow for a level playing field between natural persons (private individuals) and small businesses covered

[10] Recast version – Dz.U. EU. L. of 2011 No. 77, p. 1 as amended.

[11] European Commission. Proposal for a Council Directive Amending Directive 2006/112/EC as Regards VAT Rules in the Digital Era. COM/2022/701 final. December 8, 2022. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0701 (accessed: 23.12.2024).

by the VAT exemption offering the above-mentioned services via platforms, as well as other traditional sellers who are active VAT taxpayers (e.g. hotels or taxi companies). In cases where the relevant service provider is not required to charge VAT, the platform will charge and account for VAT on the relevant sales (Wiatrowski 2024, 56).

On 5 November 2024, the Economic and Financial Affairs Council (ECOFIN) reached a political agreement on the Digital Age VAT package (ViDA), which will be implemented in phases between 2028 and 2035.[12] Regarding the obligations imposed on digital platforms, the new rules are expected to enter into force in January 2030.

The restriction of the impact of the ViDA package to short-term accommodation and passenger transport services only, and the fact that the package will enter into force in the future, has the effect that tax authorities are already attempting to impose broader obligations on digital platforms than those arising directly from the provisions of the directive. The fact that ViDa does not apply to many other services, e.g. household services, raises the question about what service is provided by the platform that mediates the transaction if it will not be covered by both Article 28 and, in the future, Article 28a of Directive 2006/112. This question boils down to an assessment of what role the digital platform assumes in a specific case, and, in particular, whether it is the provider (supplier). These issues have been the subject of judgments of the CJEU: of 20 December 2017 in Case C-434/15 (Asociación Profesional Elite Taxi/Uber Systems Spain SL, ECLI:EU:C:2017:981) and of 19 December 2019 in Case C-390/18 (Airbnb Ireland, ECLI:EU:C:2019:1112). These judgments, although they did not address tax issues, can be used to determine the tax status of tax platforms.

It follows from the above CJEU rulings that entities organising transactions in the sharing economy, such as electronic platforms, depending on the specific activities, may be deemed to provide only "information society services", while at other times they may be deemed to provide a basic service. It can already be pointed out that the effects of these judgments are directly reflected in the practice of the relevant tax authorities. As a result of a dispute with the Italian tax authorities, the website Booking.com agreed to pay approximately 94 million EUR (100.25 million USD) to settle a tax dispute in Italy.[13] The Italian tax police, after checking 896,500 property owners who worked with Booking.com, found that the company had not paid the VAT due. In another case involving the company's responsibility for collecting taxes on behalf of the tax authorities, the Italian judiciary seized 780 million EUR from short-term rental platform Airbnb.[14] As

[12] https://www.consilium.europa.eu/pl/press/press-releases/2024/11/05/taxation-council-agrees-on-vat-in-the-digital-age-package/.

[13] https://www.reuters.com/business/retail-consumer/bookingcom-pay-94-million-euros-settle-italian-taxdispute-2023-11-10/ (accessed: 10.07.2024).

[14] https://www.reuters.com/business/retail-consumer/bookingcom-pay-94-million

another example, a dispute arose between the Italian tax authorities and the Meta conglomerate (the owner of Facebook, Instagram, and WhatsApp). The Italian tax authorities demanded 870 million EUR of outstanding VAT from Meta. The authorities considered that logging users provide the concern with personal data with a quantifiable property value, which constitutes remuneration for the service provided to them.[15]

5. THE FUTURE

5.1. Income taxes

The effectiveness of global solutions to the digital economy, and in particular Pillar One, is at serious risk. This is primarily due to the fact that many countries, especially developing countries, but also emerging economies, feel that the Inclusive Framework does not take their interests into account. The adopted EU minimum tax regulations may also need to be adjusted accordingly in the near future. Tackling tax competition as a Pillar Two objective has the effect of reducing tax incentives. The minimum tax has, therefore, reduced the possibilities for investors to benefit from tax incentives. The disapproval of Pillar Two by the United States and other countries that will not participate in its implementation may result in Europe losing significant investors. A limited range of tax incentives may result in investors being absorbed by other countries. Therefore, it is necessary to coordinate the incentives applied by EU member states so that individual countries do not fall victim to EU rules limiting state subsidisation (Wilde 2024).

The European Union stands at a crossroads. On the one hand, the adaptation of Pillar One is under serious threat, and on the other hand, the European Union does not see the UN initiative as a way to reach a consensus on the taxation of digital platform activities. This is indicated by the lack of support for the UN initiative. On 16 August 2024, the United Nations (UN) Ad Hoc Committee voted to endorse the Terms of Reference (ToR) to develop a UN Framework Convention on International Tax Cooperation. The ToR was supported by 110 UN member jurisdictions, with 44 abstentions, including the European Union and its member states, and eight votes against, including the United States.[16]

In the opinion of the author of this article, the sceptical attitude of the European Union towards the UN initiative is understandable. It can be explained by the fact that the OECD initiative under the Inclusive Framework on BEPS has been ongoing since 2015, which means that it has been ongoing for many years, has been revised many times, and is ready to be used. The UN initiative

[15] https://podatki.gazetaprawna.pl/artykuly/8671048,facebook-google-meta-problem-z-vat-podatek-zalegly.html (accessed: 10.07.2024).

[16] https://financing.desa.un.org/sites/default/files/2024-09/2415701E.pdf (accessed: 23.12.2024).

is only the future. Based on an analysis prepared by the OECD, it is assumed that as a result of the implementation of Pillar One, it can be concluded that low- and middle-income countries are likely to gain the most as a share of existing corporate tax revenues, highlighting the importance of rapid and widespread implementation of reforms (O'Reilly 2023, 66).

Although there are claims in the literature that the European Union in favour of the UN initiative has much to gain not only from the fiscal point of view but, above all, from its special role in a changing world (Fisher, Ury, Patton 2011, 12)[17], there are serious risks associated with the UN initiative. The economic dependence of most developing countries on the developed world and powerful multinational corporations can be used to defeat any real democratisation of international tax law and policy formulation at the UN. There is also the risk of diminishing the quality of international tax law and policy principles, as the OECD may arguably have more expertise on the subject than the UN (Onyeabor 2023, 3).

The most beneficial solution for the EU member states would be the implementation of Pillar One. However, the implementation of this initiative seems increasingly uncertain. However, the European Union has no more time to lose. It should take up an initiative that will allow it to preserve adequate tax revenues while ensuring that it achieves good economic results.

The Commission should consider proposing a common digital tax that takes into account the interests of EU countries. It should also limit the operation of the top-up tax and extend the scope of services and supplies subject to VAT, where the obligations of payers are performed by digital platforms. This need is implicit in a report outlining a vision for the future of European competitiveness, commissioned by the European Commission and prepared by former Central Bank President Mario Draghi. This report concludes that immediate action is necessary to stimulate competition to achieve key strategic policy goals in the areas of, for example, energy transition, transport, or building innovative and technological strength in order to increase the economic power and strategic independence as well as resilience of EU member states. Of course, the key role in achieving these goals in the EU is played by high-tech companies and their investments (Report – The Future of European Competitiveness – A Competitiveness Strategy for Europe 2024).[18]

A major challenge for the European Union will be to avoid protectionism. With China and the United States opting for protectionism, the European Union's advocacy of competitiveness may not have the desired effect. The above report shows that the European Union is also betting on competition through appropriate tax incentives. In this situation, the need arises to reformulate the Directive 2022/2523 implementing Pillar Two, which limits tax incentives for the largest companies.

[17] https://kluwertaxblog.com/2024/09/06/united-nations-tax-framework-convention-terms-of-reference-for-an-inclusive-and-effective-international-tax-cooperation-critical-issues/#_edn20

[18] https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en

The EU must also be mindful that the implementation of national DSTs could lead to a trade war. The USA had already imposed retaliatory tariffs on countries that implemented DST, but these were suspended while Pillar One was being considered (The OECD/G20 Pillar One and Digital Services Taxes: A Comparison, Congressional Resarch Service).

5.2. The future of VAT

The efficiency of digital platforms in tax collection suggests that there will be a growing expectation in imposing a wider range of obligations on platforms to correctly account for VAT as a substitute for actual service providers. The potential exists to impose such obligations on platforms through which many more services than those covered by ViDa are provided. The use of digital platforms to provide services will grow rapidly. Already now, it can be pointed out that digital platforms are being used to provide many services such as, for example, text translation, professional mentoring, arranging remote working, medical advice, legal advice, online teaching, or knowledge-sharing.

6. CONCLUSION

An appropriate taxation of the digital economy is important not only because of the expected tax revenues from this economic activity, but also to ensure the competitive development of this sector in the European Union. The greatest challenges remain for the European Union in the area of income tax because of both the lack of prospects for the rapid implementation of Pillar One and the risks arising from the implementation of Pillar Two. Waiting for the UN initiative to develop is also not a solution. The separate initiatives of the OECD and the UN make it possible to recognise that there is still a lack of common thinking on universal issues concerning global taxation, including the taxation of the digital economy, which does not bode well for the implementation of global initiatives. In this situation, the European Union should not delay further and should show initiative in introducing regulations that keep pace with the changing digital economy. The Commission should consider suggesting a common digital tax that takes into account the interests of EU countries. With regard to a top-up tax, the EU should integrate a system of tax incentives so that member states do not accuse each other of protectionism. The EU should also extend the scope of services and supplies subject to VAT, where the obligations of payers are performed by digital platforms. The Union's priority should be to address the challenges of the digital economy and achieve fairer taxation of corporate profits.

BIBLIOGRAPHY

Alstadsæter, Annette. Sarah Godar. Panayiotis Nicolaides. Gabriel Zucman. 2024. "Global Tax Evasion Report Accessed", *EUTax Observatory*, October 26, 2024. https://www.taxobservatory.eu/publication/global-tax-evasion-report-2024/

Bammens, Niels. Dieter Bettens. 2023. "The Potential Impact of Pillar Two on Tax Incentives." *Intertax* 51: 155–169. https://doi.org/10.54648/TAXI2023018

Chen, Jingxian. Wilson Chow. 2024. "Global Minimum Tax Reform and the Future of Tax Competition." *OECD International*, https://www.ibfd.org/sites/default/files/2024-03/oecd_international-global-minimum-tax-reform-and-the-future-of-tax-competition-ibfd.pdf (accessed: 6.10.2024).

De Goede, Jan J. 2023. "The 2017 and 2021 Updates of the UN Model Tax Convention and Their Impact on National Treaty Practice." *Kwartalnik Prawa Podatkowego* 4: 9–29. https://doi.org/10.18778/1509-877X.2023.04.01

De la Feria, Rita. 2024. "The Perceived (Un)Fairness of the Global Minimum Corporate Tax Rate." In *The 'Pillar Two' Global Minimum Tax*. Edited by Werner Haslehner et al. 58–83. Cheltenham–Northampton: Edward Elgar. https://doi.org/10.4337/9781035308743.00009

De Wilde, Maarten. 2024. "Taxing Digital, What's Next?" *Kluwer International Tax Blog*, https://kluwertaxblog.com/2024/09/24/taxing-digital-whats-next/#_ftn2 (accessed: 22.12.2024).

Fisher, Roger. William Ury. Bruce Patton. 2011. *Getting to Yes: Negotiating Agreement Without Giving In*. New York: Penguin.

Kondej, Mikołaj. Michał Stępień. 2023. "Globalny podatek minimalny. O istocie filaru II międzynarodowej reformy podatkowej z perspektywy UE." *Przegląd Podatkowy* 6: 31–32.

Liotti, Belisa. Ferreira Ndubai. Joy Waruguru Wamuyu. Ruth Lazarov. Ivan Owens. Jeffrey Owens. 2022. "The Treatment of Tax Incentives Under Pillar Two." *Transnational Corporations Journal* 29(2): 25–46. https://doi.org/10.18356/2076099x-29-2-2

Majdowski, Filip. 2024. "Aktualności z Brukseli." *Przegląd Podatkowy* 4: 62–63.

Morawska, Kamila. 2022. "Wpływ rewolucji cyfrowej na międzynarodowe zasady podziału praw do opodatkowania." *Prawo Budżetowe Państwa i Samorządu* 3(10): 87–108. https://doi.org/10.12775/PBPS.2022.018

Mozgiel-Wiecha, Kinga. 2021. "Nowe ramy podatku cyfrowego." *Annales Universitatis Mariae Curie-Skłodowska, Sectio G (Ius)* 68(2): 167–181. https://doi.org/10.17951/g.2021.68.2.167-181

O'Reilly, Pierce. Tibor Hanappi. Samuel Delpeuch. Felix Hugger. David Whyman. 2023. "Pillar One Economic Impact Assessment Update: The OECD/G20 Project on Tax Base Erosion and Profit Shifting." *OECD Taxation Working Papers* 66.

OECD Report. 2024. "Pillar 1 – Amount B." February 19. https://www.oecd.org/en/publications/pillar-one-amount-b_21ea168b-en.html (accessed: 23.12.2024).

Onyeabor, Emmanuel. 2023. "Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies." *Afronomicslaw*, https://www.afronomicslaw.org/category/analysis/towards-united-nations-tax-convention-prospects-and-challenges-developing

Petropoulos, Georgios. 2017. "An Economic Review of the Collaborative Economy." http://bruegel.org/2017/02/an-economic-review-of-the-collaborative-economy (accessed: 23.12.2024).

Report. 2024. "Report – The Future of European Competitiveness – A Competitiveness Strategy for Europe." European Commission. https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en (accessed: 23.12.2024).

Sábo, Jozef. 2020. "Taxation of Digital Services from International Tax Law Perspective." *Financial Raw Review* 20(4): 64–81. https://doi.org/10.4467/22996834FLR.20.021.13093

Sundararajan, Arun. 2014. "Peer-to-Peer Businesses and the Sharing (Collaborative) Economy: Overview, Economic Effects, and Regulatory Issues." http://smallbusiness.house.gov/uploadedfiles/1-15-2014_revised_sundararajan_testimony.pdf (accessed: 23.12.2024).

Tapscott, Don. 1998. *The Digital Economy: Hopes and Anxieties of the Systemic Awareness Era.* Warsaw: Business Press.

The Government. 2024. "The Government of Canada." https://www.canada.ca/en/services/taxes/excise-taxes-duties-and-levies/digital-services-tax.html (accessed: 29.09.2024).

Wiatrowski, Roman. 2024. "Digital Platforms as a Tool to Increase the Efficiency of VAT Collection." In *VAT w erze cyfryzacji*. Edited by Marek Bełdzikowski, Michał Mioduszewski, Artur Mudrecki, Roman Wiatrowski. 49–66. Warszawa: Akademia Leona Koźmińskiego.

Wiatrowski, Roman. 2024a. "The Future of Income Taxation of the Digital Economy." *SGH Centre for Tax Analysis and Studies* 2: 1–8.

Legal Acts

European Commission. 2018. *Council Directive Laying Down Rules for the Taxation of Legal Persons with a Significant Digital Presence*. COM(2018) 147 final. Brussels, March 21. https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=COM:2018:0147:FIN (accessed: 28.12.2024).

European Commission. 2018. *Council Directive on a Common System of Digital Services Tax Levied on Revenue Deriving from the Provision of Certain Digital Services*. COM(2018) 148 final. Brussels, March 21. https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52018PC0148 (accessed: 28.12.2024).

European Commission. 2022. *Proposal for a Council Directive Amending Directive 2006/112/EC as Regards VAT Rules in the Digital Era*. COM/2022/701 final. December 8. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0701 (accessed: 23.12.2024).

Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax.

Council Directive (EU) 2017/2455 of 5 December 2017 Amending Directive 2006/112/EC and Directive 2009/132/EC as Regards Certain Value Added Tax Obligations on the Supply of Services and the Sale of Goods at a Distance. OJ EU L 348, p. 7, as amended.

Council Directive (EU) 2019/1995 of 21 November 2019 Amending Directive 2006/112/EC as Regards the Provisions on Distance Selling of Goods and on Certain Domestic Supplies of Goods. OJ EU L 310, p. 1, as amended.

Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring the Global Minimum Level of Taxation of Multinational Enterprise Groups and Large Domestic Groups in the Union. OJ EU L 328, p. 1, as amended.

Council Implementing Regulation (EU) No 2019/2026 of 21 November 2019 Amending Implementing Regulation (EU) No 282/2011 as Regards Supplies of Goods or Services Facilitated by Electronic Interfaces. OJ EU L 313, p. 14, as amended.

United Nations. 2017 and 2021. *Model Double Taxation Convention between Developed and Developing Countries*. New York: United Nations. https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf; https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 23.12.2024).

United Nations General Assembly. 2023. *Resolution 78/230: Promotion of Inclusive and Effective International Tax Cooperation at the United Nations*. December 22. https://financing.desa.un.org/sites/default/files/2024-01/A.RES_.78.230_English.pdf (accessed: 23.12.2024).

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.12

*Artur Bogucki**
https://orcid.org/0000-0002-9616-3159

ETHICAL, LEGAL, AND SOCIOECONOMIC ASPECTS OF IMPLEMENTING ARTIFICIAL INTELLIGENCE IN TAX ADMINISTRATION[1]

Abstract. This study examines the integration of artificial intelligence (AI) in tax law and administration, underscoring key ethical, legal, and socioeconomic dimensions. It explores how AI can improve tax compliance and foster innovation, yet simultaneously raising concerns regarding fairness, transparency, and accountability. Specific risks, including data bias, breaches of privacy, and over-reliance on automated risk-scoring, illustrate the need for robust legal frameworks such as the GDPR and the AI Act. Socioeconomic implications – notably labour displacement and income inequality – spotlight the necessity for equitable policies and responsible AI governance. Drawing on Ethical, Legal, and Social Aspects (ELSA) as well as Responsible Research and Innovation (RRI) frameworks, this research provides recommendations for a comprehensive approach, emphasising stakeholder engagement, transparency, and continuous oversight. Ultimately, a balanced blend of technological ingenuity and principled governance is essential to ensure that AI's transformative potential truly serves the public interest in tax law and administration.

Keywords: AI governance, Trustworthy AI, bias mitigation, AI Act, algorithmic transparency

ETYCZNE, PRAWNE I SPOŁECZNO-EKONOMICZNE ASPEKTY WDRAŻANIA SZTUCZNEJ INTELIGENCJI W ADMINISTRACJI PODATKOWEJ

Streszczenie. Niniejsze opracowanie dotyczy zastosowania sztucznej inteligencji (AI) w administracji podatkowej, przez pryzmat zagadnień etycznych, prawnych i społeczno-ekonomicznych. Analiza sugeruje, że choć AI może usprawnić pobór podatków i wspierać innowacyjność, to jednocześnie rodzi obawy związane z kwestiami takimi jak rzetelność, przejrzystość i rozliczalność

* Szkoła Główna Handlowa w Warszawie; aboguck@sgh.waw.pl

[1] This article is the result of scientific research carried out as part of the grant from the National Science Centre on "Countering Corporate Income Tax Avoidance and the Administrative Courts Jurisprudence: How Globalization determines Tax Policy" – OPUS 21 (No. 2021/41/B/HS5/00225).

Received: 8.01.2025. Verified: 31.01.2025. Revised: 14.03.2025. Accepted: 4.04.2025.

działań. Szczególne ryzyko wynika między innymi z obecności błędów w danych treningowych, zagrożeń dla prywatności i nadmiernego polegania na automatycznych systemach punktacji ryzyka, co podkreśla znaczenie koherentnych regulacji prawnych, w tym RODO i Aktu o Sztucznej Inteligencji. Społeczno-ekonomiczne skutki AI – zwłaszcza potencjalne wypieranie miejsc pracy oraz wzrost nierówności dochodowych – wskazują na potrzebę odpowiedzialnych regulacji i polityk publicznych. W niniejszym opracowaniu, w oparciu o ramy Etycznych, Prawnych i Społecznych Aspektów (ELSA) oraz Odpowiedzialnych Badań i Innowacji (RRI), proponuje się rekomendacje łączące zaangażowanie interesariuszy, transparentność oraz stały nadzór. Ostatecznie, jedynie połączenie innowacyjności technologicznej z zasadami prawnymi i etycznymi gwarantuje, że zastosowanie AI w operacji administracji podatkowej będzie służyć dobru społecznemu zgodnie z zasadami godnej zaufania sztucznej inteligencji.

Słowa kluczowe: zarządzanie sztuczną inteligencją, godna zaufania sztuczna inteligencja, akt o sztucznej inteligencji, tendencyjności uprzedzeń, przejrzystość algorytmiczna

1. INTRODUCTION

The integration of artificial intelligence (AI) in tax law and administration leads to significant ethical, legal, and socioeconomic challenges that affect effective governance and public trust. As AI technologies increasingly influence tax collection, compliance, and enforcement, there is a growing recognition of the need to ensure that these systems operate within the boundaries of Trustworthy Artificial Intelligence. Ethical principles such as fairness, bias mitigation, and accountability are central to mitigating the risks associated with AI deployment in tax systems (European Commission 2019).

In recent years, numerous governments around the world have turned to AI in order to tackle tax evasion and reduce the tax gap. In July 2024, Turkey announced its plan to use advanced AI in combating tax evasion, following the lead of other countries such as the United States or Canada. Within the European Union (EU), eighteen Member States have been making regular use of machine learning in their tax administrations – some since as early as 2004 – to detect anomalies and streamline compliance processes (Lee 2024). The EU itself has developed specialised machine learning systems to address carousel fraud, demonstrating how AI can effectively analyse large and often complex datasets (Hadwick, Lan 2021, 609–645).

These advances underscore the central role that data – and especially big data – now plays in tax administration. By using machine learning to cluster information and highlight anomalous findings, tax authorities can process a growing volume of data at scale. However, this evolving dynamics also transforms the relationship between authorities and taxpayers, introducing concerns about bias, privacy, and transparency (Hadwick 2022).

A key worry is whether taxpayers flagged by AI-based audits might suffer undue hardship if the training data or algorithmic models themselves are biased. Indeed, social bias can creep in during both data selection and model development.

If a model's training data is skewed – or if the humans fine-tuning the system introduce their own biases – entire segments of society can become unfair targets of increased scrutiny. This risk is not hypothetical: the Dutch childcare benefits scandal (*Toeslagenaffaire*) shows how tens of thousands of lower-income and ethnic minority families were wrongly penalised when the local tax authority had deployed a self-learning fraud-detection tool with insufficient safeguards (Lee 2024). The impact of these errors was devastating, with families forced into poverty and children taken into foster care, underscoring how severe the consequences can be when AI systems are not transparently developed or carefully overseen.

The implementation of AI in tax administration must adhere to the principle of legality, which mandates that AI systems operate under clear statutory frameworks to ensure compliance with constitutional standards (Kuźniacki et al. 2022). Jurisdictional variations in legal approaches, such as those between different EU Member States, illustrate the complexities of aligning AI applications with existing laws while also addressing concerns about transparency and accountability in automated decision-making processes. Cases such as the Dutch *Toeslagenaffaire* and SyRI highlight the dire consequences of inadequate legal oversight, emphasising the necessity for robust legal frameworks to protect individual rights in the face of algorithmic governance (Hadwick, Lan 2021).

Socioeconomically, the impact of AI on labour markets and income distribution is a pressing concern as automation has the potential to displace unskilled workers while enhancing productivity for capital owners (Renda, Balland, Bosoer 2023; Rodrik, Stantcheva 2021; Hadwick 2024). Policymakers are exploring innovative fiscal measures, such as universal basic income and taxation strategies like robot taxes, to address the challenges posed by technological advancements (Hadwick 2024). The purpose of this article is to underscore the need for a balanced approach that promotes innovation while ensuring equitable outcomes for all members of society at the intersection of AI, taxation, and social policy.

Ultimately, the ongoing discourse surrounding the ethical, legal, and socioeconomic aspects of AI in tax law underlines its transformative potential and the necessity for responsible implementation. As jurisdictions navigate the complexities of AI integration, the emphasis on ethical governance, legal accountability, and socioeconomic equity will be vital to shaping the future landscape of tax administration and ensuring public trust in these evolving systems.

2. METHODOLOGY

In this study, I drew on two complementary frameworks – Ethical, Legal, and Social Aspects (ELSA) (Zwart, Landeweerd, van Rooij 2014) as well as Responsible Research and Innovation (RRI) (Owen et al. 2013) – to explore

how artificial intelligence (AI) could be integrated into tax administration in a responsible and context-sensitive manner. ELSA emphasises a strong focus on ethical considerations, encouraging researchers and practitioners to anticipate potential risks, identify vulnerable groups, and align technological developments with moral and legal standards. RRI, meanwhile, broadens this lens to incorporate the social, political, and economic dimensions of innovation. One of its central tenets is the active engagement of multiple stakeholders – policymakers, industry representatives, end users, and civil society – to ensure that emerging technologies reflect diverse needs and values.

By bringing ELSA and RRI together, I sought to create a more holistic framework that combines ethical scrutiny with broad stakeholder involvement (Brownsword 2024). ELSA's ethical focus enriches RRI's concentration on social and political factors, while RRI's stakeholder-driven approach helps to translate ELSA's insights into practical processes and decisions. This synergy not only respects the integrity of each approach but also extends their benefits, fostering more robust and accountable decision-making around AI.

In practice, I adopted a participatory design method that involved assembling a small advisory group of domain experts from the outset. I reached out to a senior tax official who assisted me in recruiting six additional members, including a legal counsel specialising in tax regulation, an IT expert experienced with AI, two senior tax auditors (focusing on corporate and individual filings, respectively), and a compliance officer from a large accounting company. This diverse mix of expertise ensured that we could address ethical concerns, legal requirements, administrative processes, and technological feasibility all at once, reflecting the combined ethos of ELSA and RRI.

A key aspect of this participatory approach was a half-day online workshop, for which I prepared a series of visual materials. Using mind maps generated in the Mindmup2 software, I outlined the critical junctures in tax administration where AI might play a role, from detecting fraud to informing audit selection. These visuals also highlighted where human judgment remains essential and drew attention to potential ethical, legal, and socioeconomic issues such as fairness, privacy, and transparency. During the workshop, the advisory group collectively refined the research questions, focusing on those areas where AI's impact might be most pronounced. Their insights helped me capture the complexity and nuance of AI-driven decision-making in tax setting.

The result is a study grounded in real-world considerations, one that examined both the immediate and broader implications of AI deployment. By weaving ELSA's thorough ethical and legal analysis with RRI's emphasis on inclusive engagement, I arrived at a deeper understanding of how to design, implement, and evaluate AI in tax administration. This combined approach allowed me to address practical concerns – such as technical feasibility and regulatory compliance – while maintaining a commitment to ethical principles, social values, and responsible innovation.

3. ETHICAL ASPECTS

In April 2019, the High-Level Expert Group on Artificial Intelligence published a comprehensive set of recommendations aimed at ensuring the development of Trustworthy AI.[2] Formed in response to the European Commission's "Artificial Intelligence for Europe" communication released on 25 April 2018, this group of 52 independent experts comes from various countries and represents academia, civil society, and the business sector. Their work included drafting guidelines, proposing both technical and non-technical methods for putting these guidelines into practice, and conducting a pilot evaluation to assess their applicability (High-Level Expert Group on Artificial Intelligence (HLEG) 2019, 6).

The European Union's institutions had already shown their commitment to AI policy in 2018, first by publishing "Artificial Intelligence for Europe" on 25 April, which identified key areas of activity necessary to support AI development (European Commission 2018). This was followed on 7 December 2018 by the "Coordinated Plan on Artificial Intelligence," which reinforced the focus on increased investment in AI, preparedness for related socioeconomic changes, and the importance of ensuring AI's ethical and legal evolution (European Commission 2018). Building on these documents, the European Commission established the High-Level Expert Group on Artificial Intelligence to provide both ethical guidelines and regulatory recommendations (European Commission 2018a).

On 8 April 2019, the group released the first instalment of its mandate in the form of "Ethics Guidelines for Trustworthy AI." The document emphasises that AI must be lawful, ethical, and robust. It calls on a broad spectrum of stakeholders – including companies, NGOs, researchers, public services, and citizens – to voluntarily adopt these guidelines, thus collectively ensuring that the development and use of AI remains trustworthy. The recommendations are organised into three main parts: fundamental issues, implementation recommendations, and evaluation.

The first part, focused on fundamental issues, introduces four overarching guidelines to ensure that AI is developed with respect for fundamental rights, democracy, and ethical principles. These guidelines underscore that human autonomy must be protected by preventing manipulative or coercive uses of AI; that AI systems should be designed to avoid causing technical or social harm; that fairness and justice must be upheld through equitable technology distribution; and that AI solutions must be transparent and explainable so that users understand how the system operates and makes decisions.

[2] Despite the enactment of the AI Act, the Trustworthy AI ethical framework still remains one of the main and most relevant standards for ethical AI in the EU.

In the second part, the guidelines highlight seven implementation recommendations for turning these fundamental ideas into practice. They stress the need for AI systems to support human decision-making and respect fundamental rights, democracy, and social justice. Safety and reliability are recognised as critical in preventing risks, whether intended or unintended. Privacy and responsible data management are pivotal to protecting users' personal information, while transparency is underscored at multiple levels, covering data collection, system operations, and communication. Equally significant is ensuring diversity and non-discrimination throughout AI's lifecycle, promoting well-being and environmental sustainability as well as establishing structures for accountability. Organisations are encouraged to adopt various technical and non-technical measures to meet these aims, ranging from ethical system architecture and explainability features to codes of conduct, standardisation, and certification procedures. Education, awareness initiatives, and inclusive stakeholder collaboration further reinforce these objectives, while diverse design teams help reflect society's multitude of perspectives.

Finally, the third part of the recommendations sets out how AI solutions can be evaluated to ensure their aligning with the principles of trustworthiness. The High-Level Expert Group developed a survey-based tool known as the Assessment List for Trustworthy Artificial Intelligence (ALTAI). This tool is intended to gauge adherence to ethical and technical standards by questioning management, human resources, quality assurance teams, IT professionals, and AI system operators.

4. TRUSTWORTHY AI IN TAX ADMINISTRATION

The ethical considerations surrounding the implementation of artificial intelligence (AI) in administration are crucial to making sure that these technologies operate fairly, transparently, and responsibly. AI has increasingly come to influence important decisions in tax collection, compliance, and enforcement, making it essential that safeguards protect individuals' rights and sustain public trust. Although AI in tax administration can produce significant benefits – tracing back as early as the 1970s with systems such as the "Taxman" (McCarty 1977) – it also carries notable risks and limitations (Engstrom et al. 2020; Ranchordas, Scarcella 2021; Citron 2008). Notably, due to limitations of current state of the art, achieving Trustworthy AI is mostly about data governance (Renda 2024).

One central ethical issue concerns fairness and bias mitigation. AI systems must be carefully designed and tested to prevent discrimination, particularly because large datasets often contain historical biases (Mayson 2018; Kleinberg et al. 2018). These challenges arise when correlations are mistaken for causal relationships, causing certain groups to be disproportionately flagged for audits

or investigations. The so-called *Toeslagenaffaire* in the Netherlands illustrates how biases can become entrenched in automated decision-making processes: tens of thousands of families, many from marginalised backgrounds, were penalised following flawed risk-scoring models (Hadwick, Lan 2021). Although well-crafted AI can eliminate some forms of human error, its effect can become regressive if the underlying design or data is skewed (Sunstein 2021; Hacker 2018).

Accompanying the risk of bias is the need for transparency and accountability. Many modern AI tools, such as deep neural networks, function as "black boxes" (Citron 2008). This lack of transparency makes it difficult for taxpayers, or even tax professionals, to understand or challenge decisions that feel incorrect. While the OECD highlights explainability and transparency as key objectives for good AI governance, real-world practice reveals that governments often deploy AI systems without disclosing the precise criteria they use to raise "red flags" (Ranchordas, Scarcella 2021). Citizens may also over-rely on automated judgments or feel too intimidated to push back against machine-driven results.

Inclusion and attention to the digital divide add another dimension to these concerns (Bevacqua, Renolds 2018). If chatbots and e-filing portals become the principal channels for tax administration, individuals with lower digital literacy, reduced Internet access, or language barriers may be left behind (Ranchordás 2022). AI-driven systems that streamline compliance for some might unintentionally create hurdles for others, especially elderly or vulnerable citizens. Encouraging widespread user testing and designing multiple support mechanisms can alleviate these inequities (Okunogbe, Pouliquen 2022).

Furthermore, developing AI in tax administration brings into focus risk mitigation and regulatory alignment. Data misuse or privacy breaches can escalate when real-time analytics monitors billions of transactions, and digital profiling raises questions about infringements on personal freedoms (Scarcella 2019). With its risk-based approach, AI is often seen as a "silver bullet" that compensates for deficient tax laws or outdated enforcement models (de la Feria, Grau Ruiz 2021). However, relying solely on sophisticated tools to patch policy gaps can postpone much-needed legislative reforms (Blank, Osofsky 2021). A coherent legal framework, carefully aligned with AI capabilities, is vital to address the causes of non-compliance and make sure that data-driven tools do not merely paper over deeper structural flaws.

Despite such advancements in AI, human oversight remains pivotal to guide, monitor, and correct algorithmic processes. While well-designed AI can reduce "noise" in decision-making – stemming from varied human biases – it risks eliminating the equitable judgment or empathy that may be warranted in certain taxpayer situations. Furthermore, intelligent systems can increase accountability by requiring thorough documentation of data sources and logic, but meaningful appeal processes are needed to avoid scenarios where no one is ultimately responsible for errors.

Lastly, it is crucial to recognise the symbiotic relationship between tax policy and tax administration. Even the most advanced AI may be stymied by vague or deficient legal rules, leading to inconsistent enforcement and the possibility of "back-door" policymaking by algorithms. Over time, governments could be tempted to delay unpopular yet necessary tax reforms, relying on the sophistication of AI systems to enhance revenue collection in spite of legislative shortcomings (Blank, Osofsky 2021). To realise AI's full potential in tackling fraud, improving compliance, and reducing error, agencies must combine these data-driven innovations with robust, adaptive legislation (Keen, Slemrod 2017).

In sum, the ethical implementation of AI in tax administration calls for careful balancing between technological capabilities and principled governance. Although AI can help detect fraud more efficiently, reduce bureaucratic inefficiencies, and strengthen revenue, it can also cement unintended biases and erode public trust if deployed without due regard for transparency, fairness, and individual rights. By building in inclusive design, fostering strong legal frameworks, and preserving meaningful human oversight, stakeholders can make sure that AI truly serves the public interest in tax law and administration.

5. LEGAL ASPECTS

The principle of legality remains a cornerstone in the context of tax administration utilising AI. As jurisdictions continue to expand their use of advanced technologies, tax authorities must ensure compliance with both national and supranational legal frameworks to protect taxpayer rights and foster public trust. However, these legal frameworks also intersect with broader concerns about AI-related risks, including discrimination, the lack of transparency, and vulnerabilities stemming from large-scale data processing (MIT Future Tech 2024a).

5.1. Legal accountability and the principle of legality

Under the rule of law *sensu largo*, governmental authorities must be able to demonstrate a clear statutory basis when deploying automated decision-making. The fundamental requirement is that an AI system's scope, rationale, and oversight protocols align with constitutional principles and relevant statutory provisions (Kuźniacki et al. 2022). In the realm of tax administration, key questions arise regarding whether legislatures explicitly permit or restrict fully automated audits, risk-scoring algorithms, and other AI-driven processes. In some jurisdictions, like Germany, the *Abgabenordnung* mandates regular reviews of AI models used in tax audits, ensuring both transparency and compliance. This aligns with the understanding that AI, if left unchecked, can amplify existing legal loopholes or even facilitate regulatory overreach (Peeters 2024).

5.2. Emerging risks in the use of AI

A recent survey by the Massachusetts Institute of Technology (MIT) identified around 700 distinct risks associated with AI systems (MIT Future Tech 2024b). These risks fall into categories such as discrimination and toxicity, privacy and security, misinformation, malicious use, human–computer interaction, socioeconomic harms, and failures or limitations of AI itself. In tax administration, the interplay of these risk domains underscores how an algorithm's impact on taxpayers' rights could be grave if not governed by robust legal controls (OECD 2020).

Among the most pressing concerns is "human over-reliance" on AI outputs (Passi and Vorvoreanu 2022). In public administrations, where staffing is often stretched, the convenience of algorithmic "red flags" or risk scores can lead to undue delegation of crucial decision-making authority. The resulting decrease in human oversight raises the spectre of systemic bias or opacity if public officials simply "rubber-stamp" AI recommendations (Alon-Barkat, Busuioc 2023). This risk is especially salient in tax controls, where a single erroneous classification can have outsized consequences on a taxpayer's financial well-being.

5.3. Data protection and security concerns

Increased reliance on AI-driven tax controls entails the collection of vast personal datasets, making data security a core legal issue (MIT Future Tech 2024b). Authorities often combine personal information with commercial or financial data, intending to detect anomalies or potential fraud. Yet these expansive datasets raise two acute vulnerabilities:

1. Data Memorisation and Inference – complex models, including large language models (LLMs), can inadvertently memorise personal details, potentially skewing outcomes against individuals or breaching their privacy (Maat 2022).
2. Unauthorised Access and Leaks – public or private actors may hack, leak, or unlawfully share sensitive tax data, eroding trust. A recent example in the United States involved an IRS contractor who accessed and disclosed taxpayer records, demonstrating how even official channels are not immune to misuse (Internal Revenue Service (IRS) 2024).

Ensuring compliance with data protection requirements is thus indispensable (Commission Nationale de l'Informatique et des Libertés 2022). Under the General Data Protection Regulation (GDPR), tax authorities remain data controllers or processors and must adopt a risk-based approach in their internal governance.[3] In addition, the GDPR mandates transparency, purpose limitation, and data minimisation – principles that, if taken seriously, curtail the potential for

[3] *Regulation (EU) 2016/679 (General Data Protection Regulation), art. 3(7)–(8).*

AI-driven mass surveillance or discriminatory outcomes.[4] Courts at both the EU and ECHR levels have reinforced that tax authorities must handle personal data proportionally, upholding taxpayers' rights to privacy.[5]

5.4. Evolving regulatory responses

As governments worldwide incorporate AI in public administration, regulatory frameworks have begun to adapt. Legislators in the EU are particularly focused on risk-based obligations for public bodies.

In the European Union, the AI Act[6] introduces a risk-tiered approach, placing stricter obligations on "high-risk AI" in areas such as law enforcement, migration, or essential public services. However, Recital 59 of the AI Act excludes many tax or customs AI systems from the high-risk category if they serve purely "administrative" rather than "criminal" enforcement. Critics argue that this exception undermines key safeguards and may create an incoherent risk classification (Rizzo and Hassan 2024), especially when tax authorities use powerful AI-based profiling tools leading to a dangerous precedence (Peeters 2024).

At the same time, the GDPR obligations remain relevant. Where tax authorities rely on algorithmic or automated processes in assessing liability, courts have signalled that individuals should have meaningful recourse and access to explanations.[7] The interplay between the GDPR and the AI Act can create compliance overlaps but can also compel authorities to adopt robust risk-management assessments, encompassing data protection impact assessments (DPIAs)[8] and, where the AI Act applies, fundamental rights impact assessments (FRIAs).[9]

Ultimately, legal frameworks for AI in tax administration face the dual challenge of harnessing automation's potential to enhance compliance while making sure that fundamental rights remain protected. The overarching lesson is that no single tool – whether an algorithmic risk model or a robust statute – can stand alone. Effective governance rests on continuous human scrutiny, clear legal boundaries, and a risk-based regulatory approach that adapts as AI technologies evolve.

---

[4] GDPR, arts. 5, 22.

[5] *European Court of Human Rights (Grand Chamber), L.B. vs. Hungary (Application no. 36345/16).*

[6] The AI Act is the European Union Regulation enacted on 1 August 2024 establishing a harmonised risk-based legal framework for safe, transparent, and accountable development and deployment of artificial intelligence.

[7] Court of Justice of the European Union (CJEU), *Schufa Holding AG* v. *EU*, Case C-634/21, EU:C:2023:957.

[8] Art. 35 GDPR.

[9] Art. 27 *The AI Act*.

6. SOCIOECONOMIC ASPECTS

A holistic understanding of AI's role in tax administration requires going beyond legal and ethical questions to consider socioeconomic dimensions. Far-reaching technological advances can profoundly affect labour markets, income distribution, and social welfare, highlighting the importance of equitable and inclusive policies. As AI-driven solutions become more commonplace, stakeholders must address how automation might displace some types of work while creating new opportunities for others, and how to make sure that the benefits of these innovations are fairly distributed among all segments of society.

7. THE IMPACT OF TECHNOLOGICAL INNOVATIONS ON LABOUR MARKETS

The intersection of AI and fiscal policy is increasingly significant as technology reshapes labour markets and economic structures. Historical patterns indicate that technological advancements have led to both increased productivity and job displacement, making fiscal policy essential in addressing these dual effects (Acemoglu, Johnson 2023). For example, the introduction of automation could reduce job opportunities for unskilled workers while simultaneously enhancing profits for capital owners. To mitigate these adverse effects, governments are exploring measures such as the Finnish Universal Basic Income (UBI) and other social expenditure policies that aim to support individuals impacted by technological changes (Acemoglu, Johnson 2023).

8. TAXATION AND REDISTRIBUTION

Taxation remains a powerful tool for influencing social behaviour and addressing inequalities arising from technological advancements. As new technologies potentially exacerbate income disparities, there is a growing consensus that redistributive policies, funded through taxation, can help balance the gains of automation between skilled and unskilled workers. For instance, introducing a robot tax could slow the rate at which low-skilled jobs are replaced by machines while also generating revenue to fund social programmes aimed at supporting displaced workers (Khogali, Mekid 2023). However, policymakers must navigate the trade-offs between promoting innovation and ensuring equitable outcomes for all workers (Renda, Balland 2023).

9. AI'S ROLE IN TAX ADMINISTRATION

AI's integration into tax administration presents opportunities to improve efficiency and compliance while also posing risks to equity and transparency. Enhanced audit processes and streamlined tax collection systems can reduce costs for both governments and taxpayers. Nevertheless, reliance on AI tools necessitates robust oversight to prevent biases and ensure fairness in tax enforcement. The ethical implications of AI use in taxation are critical, as transparency and accountability are essential to maintain public trust in tax systems (Cumberland 2024).

10. LONG-TERM ECONOMIC CONSIDERATIONS

The long-term implications of AI on economic structures require careful consideration. While fiscal policies can provide short-term benefits by addressing inequality, they may have longer-term consequences on capital accumulation and productivity growth. This presents a challenge for policymakers, who must balance immediate needs with sustainable economic strategies. As AI continues to evolve, its potential to concentrate market power and foster monopolistic practices could necessitate regulatory approaches beyond tax policy alone. The post-COVID environment may accelerate the adoption of automation, intensifying the urgency of these discussions in shaping equitable economic futures.

11. RECOMMENDATIONS AND CONCLUSION

The landscape of AI in tax law and administration is evolving rapidly, with emerging trends suggesting an increased emphasis on foundational models over singular "breakthrough" systems. Rather than relying on isolated innovations, the value will lie in how AI models are adapted to industry-specific workflows, particularly in legal tech and tax administration. Such integration raises critical legal and ethical considerations: as AI systems become more sophisticated, questions about accountability and liability become more pressing, especially when automated decisions affect taxpayer rights and obligations.

Future applications of AI in tax compliance will likely focus on boosting voluntary compliance and operational efficiency, encompassing everything from enhanced tax law cognition and accounting support to predictive analytics for tax disputes. Start-ups and companies offering AI-driven tax solutions will need to remain vigilant about evolving regulations and global legal developments to ensure compliance and fully capitalise on these technological advancements.

Meanwhile, the ongoing integration of AI into the broader economy is generating new market structures, centred on services and digital networks rather than traditional ownership-based systems.

This shift demands proactive risk management and coherent regulatory frameworks to navigate the complexities of AI-driven service provision. As demand for AI-enabled offerings continues to grow, businesses and tax authorities alike must adapt their strategies and operations to harness these innovations effectively while maintaining legal and ethical standards. What follows is a number of recommendations for entities to consider.

Adopt rigorous oversight frameworks

Tax administrations should implement robust oversight protocols to detect and correct biases in AI systems. Government agencies often collect extensive personal data, thus heightening the need to ensure transparency, explainability, and fairness in AI-driven investigations. Human oversight should remain a core element, preventing errors that could escalate into injustices.

Address bias at all stages

Public authorities must recognise that bias can arise not only from flawed training data but also from human decisions surrounding model development and assessment. Making sure that large datasets are representative and carefully vetted for social biases can help mitigate systemic inequities. Likewise, continuous monitoring and auditing is critical to catch bias early.

Enhance transparency and communication

The lack of transparency and opaque algorithms can undermine taxpayer trust. Tax authorities should communicate proactively about how they use AI systems, including the underlying criteria or risk indicators. This openness fosters public confidence and aligns with both EU and OECD AI principles, which advocate transparency and responsible disclosure.

Build trust through service-oriented AI

Beyond fraud detection, AI tools can also be deployed to improve taxpayer services, such as chatbots for frequently asked questions or automated phone guidance. The examples of Ireland's use of natural language processing to address clearance inquiries as well as Spain's VAT chatbot demonstrate how AI can streamline administrative tasks and increase taxpayer satisfaction if done ethically and transparently.

Align with socioeconomic strategies

AI's widespread adoption in tax administration intersects with broader socioeconomic policies, including how to handle labour displacement and income

inequality. Governments might need to consider complementary measures (e.g. the Universal Basic Income, robot taxes) to ensure an equitable distribution of the gains from automation.

Adopt an AI governance policy at the institutional level

Given the systemic impact of AI, it is prudent for tax administrations to formalise their stance by publishing a policy document that explains what AI is, why regulation is essential, and what principles will govern AI deployment. This policy should articulate senior leadership's objectives, ethical values (e.g. fairness and transparency), and oversight mechanisms. By establishing a consistent institution-wide policy, tax administrations can embed AI compliance into day-to-day operations rather than treating it as an isolated IT project.

Build individual duty of care

A formal policy alone does not guarantee responsible AI use. All levels of staff – including senior management – must be explicitly informed about AI's benefits, limitations, and potential risks. Ongoing training programmes should stress each employee's duty of care, emphasising the need to explain AI-driven decisions, watch for algorithmic bias, and identify when human intervention is critical. This cultural shift helps ensure that AI does not become an opaque black box but remains a tool under human oversight.

Integrate AI strategy

While AI can be transformational, it must not overshadow the existing revenue collection, audit effectiveness, and compliance functions. Tax administrations should develop a dedicated AI strategy that is consistent with broader modernisation efforts, strengthening core systems (e.g. data quality, digital filing platforms) while selectively exploring advanced analytics or next-generation AI. This balanced approach ensures that automation enhances rather than replaces fundamental tasks needed for equitable and efficient tax governance.

Maintain a formal inventory of AI use cases

A key step towards transparency and accountability is to catalogue where AI is deployed across the administration. By documenting the nature of each AI use case (e.g. machine learning fraud detection, chatbots for taxpayer inquiries) and its technical attributes (e.g. NLP tools, expert systems), leadership can better align oversight and risk assessments. Crucially, this inventory should capture future plans and should be regularly updated, i.e. not just in response to regulatory pressure but as an ongoing governance practice.

Perform rigorous legal and ethical reviews

Each catalogued use case demands thorough compliance checks under relevant data protection laws (GDPR), sectoral legislation (tax codes), and emerging AI regulations (AI Act). Risk-assessment methodologies can systematically evaluate issues such as bias, simplexity, privacy, and accountability. High-risk AI use cases – whether because they rely on sensitive personal data or significantly impact taxpayers' rights – must be escalated to the highest level of review, with adequate mitigation strategies being put in place.

Retain the "Human-in-the-Loop" approach where necessary

When AI-influenced decisions can impose significant harm on taxpayers (e.g. large penalties, audits with potential reputational damage), human intervention should remain mandatory. This "Human-in-the-Loop" (HITL) approach guards against automated overreach and aligns with the requirement for meaningful oversight under the GDPR Article 22 and various provisions in the AI Act. In scenarios where fully automated systems operate, administrations might also consider "Human-on-the-Loop" (HOTL) models, in which humans continuously monitor for anomalies or red flags.

Conduct pre-introduction risk assessments for new AI cases

Before rolling out new AI-driven processes – be it a predictive model for tax evasion or a generative chatbot for taxpayer guidance – tax administrations should undertake a preliminary risk assessment. This diligence step evaluates not only the financial or operational upside of using AI, but also potential unintended consequences, such as data breaches or biased audits. Beyond compliance costs, the assessment should consider downstream effects on trust, appeals outcomes, and legal liabilities.

Prioritise transparency

In the spirit of openness, administrations can publish a filtered version of their AI inventory, excluding only the sensitive, national security-related, or genuinely trivial use cases. This publication would foster public confidence and invite stakeholder feedback, enabling the administration to spot early signals of risk or misaligned practices. Internally, staff who interact with AI tools should be notified when a recommendation or document is partly AI-generated.

Prominently disclose AI involvement in ongoing operations

Beyond a published inventory, any direct taxpayer-facing service or correspondence that involves AI outputs should carry a clear disclosure (e.g. "This communication was partially generated by AI"). Such labelling enforces ethical commitment to clarity and meets emerging best practices in human–computer interaction design. This measure also lessens confusion, allowing taxpayers or employees to gauge the reliability and context of AI-driven content.

Evaluate use case performance and intent

Finally, effective governance does not end with deployment; AI systems evolve over time and may yield unintended behaviours. Tax administrations should revisit each use case at regular intervals to confirm that it aligns with the original business purpose and does not generate unintended harms, such as misclassifications or discriminatory outcomes. Both technical metrics (e.g. model accuracy) and qualitative feedback (e.g. taxpayer complaints) should inform iterative improvements or, if necessary, system decommissioning.

In conclusion, the increasing reliance on AI in tax administration brings both opportunities – such as efficiency gains and improved accuracy – and risks, ranging from data-driven bias to the erosion of public trust. Balancing innovation with rigorous safeguards is essential to preserve taxpayer rights and promote social welfare. As technology continues to evolve, the principles of fairness, transparency, accountability, and equity must guide policy decisions and practical implementations, ensuring that AI truly serves the public interest in the domain of tax law and administration.

BIBLIOGRAPHY

Acemoglu, Daron. Sara Johnson. 2023. *Power and Progress: Our Thousand-Year Struggle over Technology and Prosperity*. London: Hachette UK.

Alon-Barkat, Sigal. Madalina Busuioc. 2023. "Human–AI Interactions in Public Sector Decision Making: 'Automation Bias' and 'Selective Adherence' to Algorithmic Advice." *Journal of Public Administration Research and Theory* 33(1): 153–169. https://doi.org/10.1093/jopart/muac007

Bevacqua, John. Vanessa Renolds. 2018. "The Digital Divide and Taxpayer Rights – Cautionary Findings from the United States." *eJournal of Tax Research* 16: 714–739.

Blank, Joshua D. Leigh Osofsky. 2021. "The Social Justice of Legal Drafting: Tax Law and Beyond." In *114th Annual Conference on Taxation*. Washington, DC: National Tax Association.

Brownsword, Roger. 2024. "Law, Technology, and Our Governance Dilemma." *Laws* 13(3): 30. https://doi.org/10.3390/laws13030030

Citron, Danielle Keats. 2008. "Open Code Governance." *University of Chicago Legal Forum* 2008: 355–387.

CNIL (Commission Nationale de l'Informatique et des Libertés). 2022. *AI: Ensuring GDPR Compliance*. September 21, 2022. https://www.cnil.fr/en/ai-ensuring-gdprcompliance.

Cumberland, Torsten. 2024. "A Look at the Risks and Opportunities for AI in Tax Administrations." *OECD AI Policy Observatory*. https://oecd.ai/en/wonk/risks-and-opportunities-ai-tax-administrations

de la Feria, Rita. M.A. Grau Ruiz. 2021. "The Robotisation of Tax Administration." In *International Conference on Inclusive Robotics for a Better Society*. Edited by M.A. Grau Ruiz. 115–123. Cham: Springer International Publishing. https://doi.org/10.1007/978-3-031-04305-5_19

Engstrom, David Freeman. Daniel E. Ho. Catherine M. Sharkey. Mariano-Florentino Cuéllar. 2020. "Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies." *NYU School of Law. Public Law Research Paper* No. 20–54. https://doi.org/10.2139/ssrn.3551505

European Commission. 2018a. *Artificial Intelligence for Europe*. COM(2018) 237 final. Brussels: European Commission. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A237%3AFIN

European Commission. 2018b. "Commission Appoints Expert Group on AI and Launches the European AI Alliance." *Digital Strategy*. https://digital-strategy.ec.europa.eu/en/news/commission-appoints-expert-group-ai-and-launches-european-ai-alliance

European Commission. 2018c. *Coordinated Plan on Artificial Intelligence*. COM(2018) 795 final. Brussels: European Commission. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A795%3AFIN

European Court of Human Rights (Grand Chamber). n.d. *L.B. v. Hungary*, Application No. 36345/16. https://hudoc.echr.coe.int/eng?i=001-212208

European Union. 2016. *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*. Official Journal L119/1. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679

Hadwick, David. 2022. "Behind the One-Way Mirror: Reviewing the Legality of EU Tax Algorithmic Governance." *EC Tax Review* 31(4): 184–201. https://doi.org/10.54648/ECTA2022019

Hadwick, David. 2024. "Slipping Through the Cracks: The Carve-outs for AI Tax Enforcement Systems in the EU AI Act." *European Papers* 9(3): 936–955.

Hadwick, David. Shujing Lan. 2021. "Lessons to Be Learned from the Dutch Childcare Allowance Scandal: A Comparative Review of Algorithmic Governance by Tax Administrations in the Netherlands, France and Germany." *World Tax Journal* 13(4): 609–645. https://doi.org/10.59403/27410pa

Internal Revenue Service (IRS). 2024. *IRS Communication on Data Disclosure*. March 10, 2024. https://www.irs.gov/newsroom/irs-communication-on-data-disclosure

Keen, Michael. Joel Slemrod. 2017. "Optimal Tax Administration." *Journal of Public Economics* 152: 133–142. https://doi.org/10.1016/j.jpubeco.2017.04.006

Khogali, H.O.S. Mekid. 2023. "The Blended Future of Automation and AI: Examining Some Long-term Societal and Ethical Impact Features." *Technology in Society* 73: 102–232. https://doi.org/10.1016/j.techsoc.2023.102232

Kleinberg, Jon. Himabindu Lakkaraju. Jure Leskovec. Jens Ludwig. Sendhil Mullainathan. 2018. "Human Decisions and Machine Predictions." *The Quarterly Journal of Economics* 133(1): 237–293. https://doi.org/10.3386/w23180

Kuźniacki, Błażej. Mariana Almada. Krzysztof Tyliński. Łukasz Górski. Barbara Winogradska. Rik Zeldenrust. 2022. "Towards eXplainable Artificial Intelligence (XAI) in Tax Law: The Need for a Minimum Legal Standard." *World Tax Journal* 14: 573–616. https://doi.org/10.59403/2yhh9pa

Maat, E.P. 2022. "Google v. CNIL: A Commentary on the Territorial Scope of the Right to Be Forgotten." *European Review of Private Law* 30(2): 241–252. https://doi.org/10.54648/ERPL2022013

Mayson, Sandra G. 2018. "Bias In, Bias Out." *Yale Law Journal* 128: 2218–2230.

McCarty, L. Thorne. 1977. "Reflections on 'Taxman': An Experiment in Artificial Intelligence and Legal Reasoning." *Harvard Law Review* 90: 837–893. https://doi.org/10.2307/1340132

MIT Future Tech. 2024a. *The AI Risk Repository: A Comprehensive Meta-Review, Database, and Taxonomy of Risks from Artificial Intelligence*. https://airisk.mit.edu/

MIT Future Tech. 2024b. *AI Risk Repository*. https://airisk.mit.edu/

OECD (Organisation for Economic Co-operation and Development). 2020. *Forum on Tax Administration: Tax Administration 3.0 – The Digital Transformation of Tax Administration*. https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/tax-administration-3-0-the-digital-transformation-of-tax-administration.pdf

Okunogbe, Omowunmi. Victor Pouliquen. 2022. "Technology, Taxation, and Corruption: Evidence from the Introduction of Electronic Tax Filing." *American Economic Journal: Economic Policy* 14(1): 341–372. https://doi.org/10.1257/pol.20200123

Passi, Samir. Maria Vorvoreanu. 2022. *Overreliance on AI Literature Review*. Microsoft Research. https://www.microsoft.com/en-us/research/uploads/prod/2022/06/Aether-Overreliance-on-AI-Review-Final-6.21.22.pdf

Peeters, Brigitte. 2024. "European Law Restrictions on Tax Authorities' Use of Artificial Intelligence Systems: Reflections on Some Recent Developments." *EC Tax Review* 33(2). https://doi.org/10.54648/ECTA2024006

Ranchordás, Sofia. 2022. "Connected but Still Excluded? Digital Exclusion Beyond Internet Access." In *The Cambridge Handbook of Life Sciences, Information Technology and Human Rights*. Edited by Marcello Ienca, Oreste Pollicino, Laura Liguori, Portolano Cavallo, Elisa Stefanini, Roberto Andorno. 244–258. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108775038.020

Ranchordas, Sofia. Luisa Scarcella. 2021. "Automated Government for Vulnerable Citizens: Intermediating Rights." *William & Mary Bill of Rights Journal* 30: 373–408. https://doi.org/10.2139/ssrn.3938032

Renda, Andrea. 2024. *Towards a European Large-Scale Initiative on Artificial Intelligence*. Brussels: Centre for European Policy Studies (CEPS). CEPS Deep Dive. https://www.ceps.eu/ceps-publications/towards-a-european-large-scale-initiative-on-artificial-intelligence/

Renda, Andrea. Pierre-Alexandre Balland. 2023. *Forge Ahead or Fall Behind: Why We Need a United Europe of Artificial Intelligence*. CEPS Explainer. https://cdn.ceps.eu/wp-content/uploads/2023/11/CEPS-Explainer-2023-13_United-Europe-of-Artificial-Intelligence.pdf

Rizzo, Alessandro. Gauri Hassan. 2024. *AI Risk Management in Tax Audits: A Comparative Review of the EU and US Regulatory Approaches*. Unpublished manuscript.

Rodrik, Dani. Stefanie Stantcheva. 2021. "Fixing Capitalism's Good Jobs Problem." *Oxford Review of Economic Policy* 37(4): 824–837. https://doi.org/10.1093/oxrep/grab024

Scarcella, Luisa. 2019. "Tax Compliance and Privacy Rights in Profiling and Automated Decision Making." *Internet Policy Review* 8(4). https://doi.org/10.14763/2019.4.1441

Sunstein, Cass R. 2021. "Governing by Algorithm? No Noise and (Potentially) Less Bias." *Duke Law Journal* 71: 1175–1213. https://doi.org/10.2139/ssrn.3925240

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.02

Anna Vartašová[*]
https://orcid.org/0000-0002-1366-0134

Karolína Červená[**]
https://orcid.org/0000-0003-4900-6510

INVOLVEMENT OF DIGITAL PLATFORMS IN THE PROCESS OF PAYMENT OF ACCOMMODATION TAX IN SLOVAKIA – THEORY VS. REALITY[1]

Abstract. Digitization in the field of taxation represents one of the possible ways of improving the quality and increasing the transparency of this process. We can conclude that, in Slovakia, the potential of digitization for streamlining tax processes as well as increasing taxpayers' satisfaction is indicated. One of the elements of the tax system where such an aspect is identified is the accommodation tax, where the recent amendment of the Local Taxes Act of 2021 made digital platforms' operators directly involved in the process of collecting and paying this tax. In this paper, the authors present partial results of their primary research aimed at a critical evaluation of the current state of the transfer of the obligation to collect accommodation tax from the accommodation provider to digital platform operators in the Slovak Republic. The authors came to the conclusion that despite the effort of the legislator to solve a specific aspect of the activity of digital platforms (in relation to the payment of accommodation tax), the amendment of the legislation did not bring about the desired change in application practice and the new legal regulation is not actually applied in practice. In our opinion, the reason for this state of affairs is, on the one hand, the ambiguous wording of the legislative text, from which the actual transfer of the tax collection obligation to the platform operators is questionable, and, on the other hand, only a minimal reduction of the administrative burden of accommodation providers when applying this new regime.

Keywords: digital platforms, local taxes, tourist taxes, accommodation tax, Slovak Republic

[*] Pavol Jozef Šafárik University in Košice; anna.romanova@upjs.sk
[**] Pavol Jozef Šafárik University in Košice; karolina.cervena@upjs.sk

[1] The research presented in this paper was supported by the Research and Development Agency under contract No. APVV-19-0124 "Tax law and new phenomena in the economy (digital services, shared economy, virtual currencies)."

Received: 31.10.2024. Verified: 9.11.2024. Revised: 28.12.2024. Accepted: 20.01.2025.

ZAANGAŻOWANIE PLATFORM CYFROWYCH W PROCES PŁATNOŚCI PODATKU NOCLEGOWEGO NA SŁOWACJI – TEORIA VS. RZECZYWISTOŚĆ

Streszczenie. Cyfryzacja w dziedzinie opodatkowania stanowi jeden z możliwych sposobów poprawy jakości i zwiększenia przejrzystości tego procesu. Możemy stwierdzić, że na Słowacji istnieje potencjał cyfryzacji w zakresie usprawnienia procesów podatkowych, a także zwiększenia satysfakcji podatników. Jednym z elementów systemu podatkowego, w którym zidentyfikowano taki aspekt, jest podatek od zakwaterowania, w którym niedawna nowelizacja ustawy o podatkach lokalnych z 2021 roku sprawiła, że operatorzy platform cyfrowych są bezpośrednio zaangażowani w proces pobierania i płacenia tego podatku. W niniejszym artykule autorzy przedstawiają częściowe wyniki swoich badań wstępnych mających na celu krytyczną ocenę obecnego stanu przeniesienia obowiązku zapłaty podatku od zakwaterowania z dostawcy zakwaterowania na operatorów platform cyfrowych w Republice Słowackiej. Autorzy doszli do wniosku, że pomimo wysiłków ustawodawcy zmierzających do uregulowania konkretnego aspektu działalności platform cyfrowych (w odniesieniu do płatności podatku od zakwaterowania), nowelizacja przepisów nie przyniosła pożądanej zmiany w praktyce stosowania, a nowa regulacja prawna nie jest faktycznie stosowana w praktyce. Naszym zdaniem przyczyną takiego stanu rzeczy jest z jednej strony niejednoznaczne brzmienie tekstu legislacyjnego, z którego wynika wątpliwość co do faktycznego przeniesienia obowiązku poboru podatku na operatorów platform, a z drugiej strony jedynie minimalne zmniejszenie obciążeń administracyjnych podmiotów świadczących usługi noclegowe przy stosowaniu nowego reżimu.

Słowa kluczowe: platformy cyfrowe, podatki lokalne, podatki turystyczne, podatek od noclegów, Republika Słowacka

1. INTRODUCTION

Technological progress in tax administration has been observed in the countries of Central and Eastern Europe already earlier (Nykiel, Kukulski 2017, 28), but the digitalisation in the field of taxation in Slovakia can be considered a not-yet-completed transformation process (Vartašová, Treščáková 2025), involving the use of digital technologies to improve the quality of administrative tax procedures and services. It provides benefits that can facilitate and streamline processes for individuals (citizens, entrepreneurs) (Mates, Smejkal 2012), but also for public administration (including municipalities) (Andraško 2022; Šebesta et al. 2020), while the implementation of digitalisation in taxation can be identified in the form of electronic delivery and filing of tax returns; tax collection (e.g. also with the help of digital platforms); transparency, or accessibility of information (e.g. in the form of digital statements; notifications helping taxpayers to ensure that they are informed promptly of their obligations and possible arrears) with impact in terms of eliminating potential errors (e.g. automatic tax calculation tools that take into account current tax rules); integration of tax software with accounting and financial systems (e.g. e-cashier); and fraud protection (the potential to use advanced analytical tools and big data technologies to identify patterns and irregularities that could indicate tax fraud or evasion). This is only one side of

the coin and the consequences of the digitalisation in general are more complex (Štrkolec 2023; Popovič 2019).

With the increased use of information technology, another element of digitalisation (in the form of digital platforms) has also been included in the provision of short-term accommodation (search, intermediation, booking with/without payment, as well as taxation process), where we encounter the constantly developing activities of the so-called OTAs (Online Travel Agencies), i.e. digital platforms intermediating, among others, accommodation (see in more detail Csach, Jurčová 2023, 8 et seq. or Mazúr 2019).

In many states (legal regimes), the problem is the determination of the legal nature of such entities, where the activity of a particular platform determines the possibility of specific legal regulation (Frydrychová 2017, 250; Domurath 2018). Simić (2022, 22) stresses that "the digital platform itself, unlike its operator, does not have legal personality. For this reason, a digital platform can be likened to a permanent establishment in the tax area rather than to a taxable entity", which corresponds with the current legislative definition of a permanent establishment in Slovak legislation (Act No. 595/2003 Coll., Income Tax Act). The agenda for the sharing economy identifies platforms as intermediaries that connect providers with users and facilitate transactions between them. European Commission (2016) characterises online platforms as software facilities offering two- or even multi-sided marketplaces where providers and users of content, goods and services can meet.

The platforms have in many cases outgrown their role as intermediaries, though (Malachovský 2022, 10–12; Vartašová, Červená, Olexová 2022), and even the negative impacts of their activities at the local level of cities can be highlighted. For example, the European Cities Alliance on Short-Term Rentals published an open letter on the need for legislative action to tackle illegal short-term rentals on 13 July 2022 (Eurocities 2022). In addition, the increased use of digital platforms to provide services and sell goods poses a higher risk of tax evasion (Priateľová 2021, 293), not even mention the conduct of digital giants leading to significant tax evasion problems (Štrkolec, Hrabčák 2022, 163).

The impact of digital platforms can be identified at the level of local budgets, as well, especially in the context of so-called tourist taxes. These are usually imposed as local taxes and most frequently applied as the "occupancy taxes", equivalent to a bed tax or tourist tax (Radvan 2020), with different designations: local taxes or fees for accommodation (SK – accommodation tax "daň za ubytovanie"), for stay (CZ – fee for stay "poplatek z pobytu"), spa taxes/fees (PL – spa fee "opłata uzdrowiskowa") or simply tourist taxes (HU – "idegenforgalmi adót") or local fees (PL – "opłata miejscowa") (also Pahl et al. 2024).

The importance of local taxes varies at the national level (Radvan 2020). In the Slovak Republic, the accommodation tax is currently fiscally insignificant, which is documented by its share in the revenues from all local taxes and fees, which has ranged from 1.4% to 2.8% in the last ten years, representing

an average of 0.29% of the current municipal revenues. However, given that not all municipalities impose this local tax, its importance in individual cases is greater than on a national scale. For example in Bratislava, the capital of the Slovak Republic, it amounted to between 1.3% and 1.6% of total municipal revenues before the period of the COVID-19 pandemic (1.03% on average over the last 10 years).[2] Thus, from an individual local perspective, it makes sense to address the issue of local accommodation tax, especially in the context of evasion of local taxes that exist due to the greater anonymity of accommodation providers for whom these services are mediated by digital platforms. Based on the results of our pilot research (survey) conducted in the city of Košice (the second largest city in the Slovak Republic) in 2023, we estimate that less than half of the accommodation facilities that provide accommodation in Košice fulfil their local tax obligation. It was precisely at the elimination of evasion of this tax that the 2021 amendment to the accommodation tax legislation in the Slovak Republic was aimed; the amendment established the status of the digital platform as a representative of the accommodation providers, i.e. as an intermediary in the payment of the accommodation tax to the municipality.

Based on the above, the authors aim to identify the contribution of the new legislation reflecting the activity of digital platforms in the field of accommodation intermediation in the context of the local accommodation tax by answering the research question of whether the adoption of the new accommodation tax legislation focused on digital platforms had a positive effect in the context of transferring the obligation to pay accommodation tax from accommodation providers to digital platform operators in the municipalities and cities of the Slovak Republic. This is because the authors identified a research gap in their previous research (Vartašová, Červená, 2023) on this specific topic – tax aspects of digital platforms' activities in SR in relation to the accommodation tax, as only Simić (2022), Mazúr (2019) and partly Sidor et al. (2019) have so far specifically addressed this topic. Other aspects of the issue, possibly in other countries, have been addressed by several authors, though (with a different geographic or tax focus, e.g. Bonk 2019; Cibuľa et al. 2019; Klučnikov, Krajčík, Vincúrová 2018; Kóňa 2020; Janovec 2023; Radvan, Kolářová 2020; Szakács 2021; Hučková, Bonk, Rózenfeldová 2018; or non-tax aspects, e.g. Rudohradská, Treščáková 2021; Kubovics 2023). The authors used the methods of direct surveying (questionnaire) and analysis of legislative text.

[2] Own calculation based on data from the Ministry of Finance of the Slovak Republic and the City of Bratislava.

2. REFLECTION OF DIGITAL PLATFORMS IN SLOVAK TAX LEGISLATION

Accommodation tax is a facultative local tax regulated by the Act No. 582/2004 Coll. on Local Taxes and Local Fee for Municipal Waste and Small Construction Waste, as amended ("Local Taxes Act"), subject to which is a paid temporary accommodation of up to 60 overnights (i.e. only short stays) in an accommodation facility, which is defined by the law.[3] The character of the stay is not reflected, thus, not only tourists are affected by the tax (Pahl et al. 2024). The rate determination is fully in the competence of a particular municipality with no upper or lower statutory limits. It may be set differently for different parts of the municipality or its cadastral areas, which enables the municipality to take into account recreational or tourist zones and other locations of the municipal area (Vartašová 2021). The accommodated person bears the tax but it is collected and remitted to the municipality by the accommodation provider[4] (designated as "tax remitter"), where an important change occurred by Act No. 470/2021 Coll., with effect from 11 December 2021, to reflect the problem of digital platforms operation. It was the implementation of a new institute – a representative of the tax remitter, who is defined as

> a natural or legal person who arranges for the provision of paid temporary accommodation between the tax remitter and the taxpayer through the operation of a digital platform offering facilities in the territory of the municipality providing paid temporary accommodation.
>
> The municipality may enter into an agreement with the tax remitter's representative on the details of the scope and manner of keeping records (of natural persons to whom remunerated temporary accommodation had been provided) under Art. 41a para. (2) of the Local Taxes Act for the purposes of paying the tax, the manner of collecting the tax, the details of the tax payment certificate, the time limits and the manner of payment of the tax to the municipality.

The tax remitter is obliged to notify that "instead of him, the tax is collected in part or in full by the tax remitter's representative who undertakes the performance of the tax obligation on behalf of the tax remitter"; thus, his "tax base according to Art. 39 is reduced by the tax base which his representative has undertaken on behalf of the tax remitter."

> The tax remitter's representative shall notify the municipality of the tax base pursuant to Art. 39 within the time limit and in the manner prescribed by the generally binding regulation. The tax remitter's representative shall collect the tax from the taxpayer on behalf of the tax remitter and shall pay it into the account of the tax administrator. The payment to the account of the tax administrator shall be deemed to be the tax payment.

[3] These include literally everything, from typical facilities like hotels and guesthouses, through bungalows and campsites to family houses and apartments in apartment/family houses, or any other establishments providing paid temporary accommodation to a natural person.

[4] Or, eventually, the owner of the property if the provider cannot be identified.

The existence and activity of digital platforms were ignored by tax legislation in Slovakia until 2017 when the first change concerning income tax was adopted. It was the amendment by Act No. 344/2017 Coll., which, with effect from 1 January 2018, added the definition of a digital platform ("hardware platform or software platform necessary for the creation of applications and the administration of applications") into Art. 2 of the Income Tax Act, in the context of the extended definition of a permanent establishment, where "the performance of an activity with a permanent establishment in the territory of SR shall be deemed to include the repeated intermediation of transport and accommodation services, including via a digital platform" (Vartašová, Červená, Olexová 2022, 436). The legislative measure, however, was subject to some relevant criticism (Galandová, Kačaljak 2019 or Cibuľa et al. 2019). A PE had to be registered by the end of the calendar month following its creation and if it did not meet this obligation, the tax administrator registered it automatically. At the end of 2022, there were 10 platforms registered (Simić Ballová 2023, 120). Moreover, the income payer (i.e. the accommodation provider) was obliged, under Art. 43 para. 2 of the Income Tax Act, to withhold tax at the rate of 19% or 35%[5] on the payment for the services of using the intermediary platform (Vartašová, Červená, Olexová 2022, 436). Such regulation was criticised because the accommodation providers have no real possibility to withhold the tax and would have to pay the tax from their funds and then, eventually, claim it from the platform operator (Sme.sk 2018). A symbolic legislative amendment reflecting the existence of electronic platforms was also done since January 2018 as regards the VAT regulation.[6]

Other legislative changes in relation to digital platforms have been done to the Local Taxes Act, specifically the Accommodation Tax, by the aforementioned amendment in 2021.

3. RESEARCH

In the context of the above changes in the legal regulation, the authors conducted their own primary research aimed at determining the state of application of the new legal regulation of the accommodation tax in practice. For this purpose, the authors directly queried all municipalities in the Slovak Republic with the city status (141 cities). The survey was conducted between 14 March 2024 and 30 April 2024 (when the last response was received) in two rounds (the cities that initially did not respond were contacted again on 10 April 2024), by direct approach via the officially published contact e-mail addresses of the municipalities (cities) concerned. Four questions were raised: 1. Do you apply the accommodation

[5] In the case of a so-called non-contracting state for tax purposes.

[6] Art 8(7) of the Act No. 222/2004 Coll. on value added tax as amended.

tax? 2. Does any online platform remit accommodation tax to your municipality on behalf of any accommodation tax remitter (accommodation facility)? 3. Has any accommodation tax remitter notified your municipality that a representative of him (i.e. the online platform) will collect the tax instead of the accommodation tax remitter in line with Art. 41a para. 3 of the Local Tax Act? 4. Do you have an agreement with any representative of the tax remitter (platform) on the details of the scope and manner of keeping records for the purposes of payment of the accommodation tax under Art. 41c of the Local Tax Act, or any other similar agreement? The results were processed using graphical and exploratory analysis.

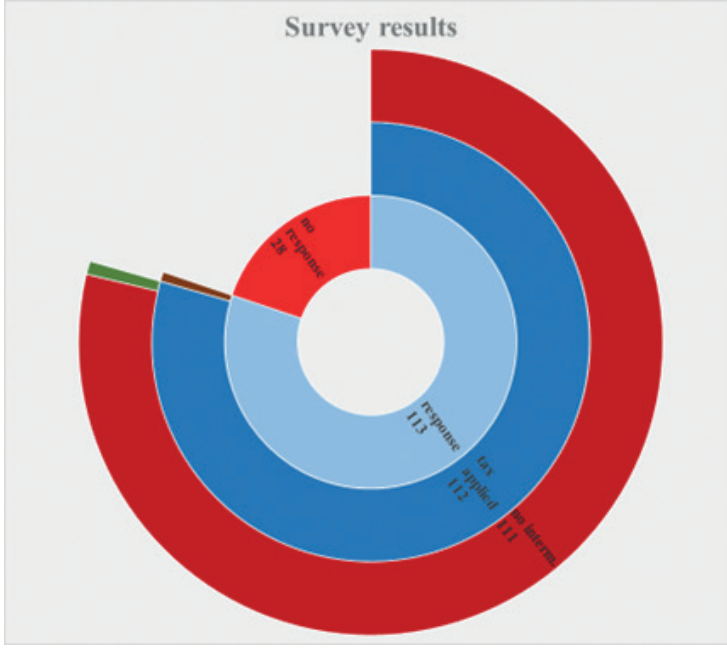

Figure 1. Survey results

As can be seen from Figure 1, we received 113 responses out of a total of 141 cities, representing an 80.14% questionnaire return rate. Of these, 112 municipalities indicated that they have an accommodation tax in place (and only one municipality responded negatively), representing 99.12% of the cities from which a response was received. Of the 112 cities that indicated that they have the tax in place, only one city answered positively to questions 2–4, i.e. that it has an agreement with an online platform for the purpose of paying the tax and that this platform pays the accommodation tax instead of the accommodation establishments for which it arranges accommodation. Specifically, the City of Bratislava has such an agreement with one platform – AirBnB. One other city stated that they had contacted Booking.com but had not yet received any response.

Thus, 99.1% of the responding cities have no agreement with any platform for the purpose of paying tax for accommodation facilities and no platform is actually remitting the tax instead of accommodation facilities in these cities.

This result is surprising, as the amendment to the Local Taxes Act in question became effective on 11 December 2021, i.e. 2024 is the third year since the institute of the tax remitter's representative has been introduced. Nevertheless, almost no city has used it, or perhaps we can conclude that no city has since the only one city with a positive answer (Bratislava) had already concluded such an agreement with the AirBnB platform before the adoption of the amendment in question – in June 2021 (Vartašová, Červená, Olexová 2022), and thus the adoption of the amendment to the Local Tax Act did not have any impact on this case.

4. DISCUSSION AND CONCLUSIONS

Ensuring the payment (or rather the collection and remittance) of the tax instead of the accommodation facility through a digital platform would be mutually beneficial – it would simplify activities for landlords, for whom it would mean a reduction in the administrative burden, as well as for the local tax administrator, who would be assured of proper and timely payment of local tax; e.g. at the time of the conclusion of the agreement on collection of accommodation tax between the city of Bratislava and AirBnB, the city estimated a benefit of EUR 0.6 million per year (bratislava.sme.sk 2021). However, the current reality does not correspond to the intended legislative effect.

The presented results lead us to the need for further investigation to identify the factors/causes for this condition. It is primarily necessary to analyse the legal regulation itself.

One of the possible reasons for not applying the new legislation may be the wording of the normative text. The legislator defined who is the tax remitter's representative (Art. 38 para. 3), the duty of the tax remitter to notify the municipality that the tax is being collected in part or in full by his representative, who takes over the fulfilment of the tax obligation (Art. 41a para. 3), notification and other duties of the tax remitter's representative towards the municipality as a tax administrator and the possibility of the municipality to conclude an agreement with the tax remitter's representative for this purpose (Art. 41c). Yet, what the legislator neglected, is to enshrine the clear obligation of the platform to undertake the collection and remittance of local tax and left this ambiguous, i.e. as if based on an agreement between the platform and the accommodation facility, for which the fulfilment of the tax obligation should be taken over.

In our opinion, the wording "who undertakes the fulfilment of the tax obligation on behalf of the tax remitter" is very unfortunate, since the grammatical meaning of the connection "to undertake an obligation" presupposes one's own

action, i.e. the will of the operator to undertake this obligation and other clear legal wording, e.g. that the fulfilment of the tax obligation is transferred to the platform operator by virtue of law or on the basis of conditions set by municipality in the generally binding regulation, would be more appropriate. Another possible interpretation of the current legislation could be that the platform operator takes over the fulfilment of the tax obligation by the notification of the tax remitter to the municipality. The same opinion on the voluntary decision of the platform operator and only the facultative nature of the new institute hold Kubincová and Jamrichová (2022, 285). Simić (2022, 25) holds an opinion about the mandatory collection of tax by the platform operator, which she derives from the provision of Art. 41c, where it is stated that "the representative of the tax remitter collects tax from the taxpayer on behalf of the tax remitter, which he transfers to the account of the tax administrator." Nevertheless, this sentence, in our opinion, can also be interpreted in the context of the fact that it might be applied only to cases where the representative of the tax remitter actually had taken over the fulfilment of the tax obligation. Another part of legislation supporting the ambiguity of the transfer is the second sentence of Art. 41a para. 4 ("If part or all of the tax liability is fulfilled on behalf of the tax remitter by his representative, the tax base according to Art. 39 is reduced by the tax base that was taken over by the tax remitter's representative"), which does not make it clear whether the transfer of the duty to the platform is present in all cases when accommodation is intermediated through a platform or only in case when the platform undertook the duty. Račková (2021) even states that without the agreement between the platform operator and the municipality on the terms of fulfilling this duty, there is no option to use this special regime and the same interpretation is provided by the Financial Directorate of SR (2023). However, we do not agree since such an interpretation cannot be followed from the legislative text; moreover, the deadline and manner of this notification duties shall result from the generally binding regulation (Art. 41c). Thus, it is even more important to have these issues regulated by the local law than by this special agreement. Methodological instruction of the Financial Directorate of SR (2023) operates with the *ex lege* emergence of the platform operator's obligation, should it intermediate the accommodation, and, in such a case, the accommodation provider is always obliged to report this to the municipality. On the other hand, it states that this regime will be applicable if the agreement between the municipality and the platform operator[7] is concluded, which, altogether, makes no sense to us. A very similar interpretation is anchored in the Explanatory Report to Act No. 470/2021 Coll., Art. 38, stating that "the role of the tax remitter's representative

[7] "If an agreement is reached between the municipality and the tax remitter's representative, and at the same time the duties of the tax remitter's representative are established in the agreement, a special regime for tax collection for accommodation will be applied." (Financial Directorate of SR 2023).

is conditioned by the decision of municipality" referring to Art. 41c, where, however, not only the possibility to make an agreement between the platform operator and municipality, but also stating the details of payment in the generally binding regulation are set. We believe that from the wording "municipality may conclude an agreement…" it cannot be deduced that this agreement is decisive for the activation of the special regime, but it has to be the generally binding regulation that is decisive. We assume that the current wording of the law does not clearly compel digital platforms to fulfil these obligations, and at the same time, it does not in any way compel the accommodation providers (besides the standard rules) to fulfil their tax obligation. Given that the duties of collecting and remittance of the local tax were (tried to be) shifted from accommodation facilities to digital platforms, in our opinion, mainly to eliminate tax evasion in this area, this measure is obviously ineffective, as there is no change in practice, which is finally confirmed by our research in this paper. Finding no case where the current new regime would be applied may impose the general unawareness what to do and how to interpret the regulation on all the sides (accommodation providers, municipalities, platforms).

Nevertheless, the very fact of non-fulfilment of tax obligations by accommodation providers regarding the accommodation tax is, in its essence, difficult for us to understand, as the tax remitters do not bear this tax, they only collect it from the accommodated guests and remit it to the municipality – for them it is a transaction cost. Thus, it can be considered that the primary factor influencing the cases of non-fulfilment of tax obligations may be the reluctance of accommodation facilities operators to increase their administrative burden by fulfilling registration and record-keeping obligations towards the municipality; Mazúr (2019, 233) is thinking similarly. The tax remitter is obliged to fulfil several administrative obligations for the purposes of this tax. First of all, he must notify the creation and termination of tax liability, the details of which are established by the municipality in a generally binding regulation. Furthermore, he is obliged to keep detailed records of natural persons to whom temporary accommodation was provided for a fee, in the form of a record book (either in paper form or in electronic form). It contains the name and surname of the accommodated natural person, address of permanent residence, date of birth, number and type of identity card (citizen card, passport or other document proving the identity of the taxpayer), length of stay (number of overnight stays) and other records necessary for the correct determination of tax. Should the platform operator undertake the duty of collecting and remitting the tax, it is only part of the burden, however, the current legislative text cannot directly result in the accommodation provider being relieved from other administrative burdens connected with reporting to the municipality (as confirmed by the Financial Directorate of SR 2023). Thus, the new legislation might not be the best motivation for those accommodation providers who have not declared their activities

to municipalities before this change as their administrative burden would not be substantially lowered should they "cooperate" with the municipality now. Moreover, the accommodation provider is obliged to notify the municipality of the payment of tax by the platform operator instead of him, nevertheless, we assume that most of the providers are not even aware of such a duty or may not interpret it as a duty (but rather a possibility to use the platform as their representative).

This analysis leads us to the conclusion on the need for a more precise wording of the legislation and general reduction of administrative burden in cases with a high probability of non-compliance from the tax remitters' (or more generally any taxpayers') side, should the state want to truly incorporate the digital platforms into the tax collection process.

The potential to contribute to the solution of the problem of non-fulfilment of tax obligations surely has also the Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC7), obliging the operators of digital platforms to disclose information about their registered sellers' transactions to the European tax authorities. In SR, the directive was transposed by Act No. 250/2022 Coll., amending especially the Act No. 442/2012 Coll., effective from 1 January 2023. It introduces the obligation of notifying platform operators to collect and provide the competent authority of the SR with information on notifiable sellers who actively sell goods and provide services (including real estate rentals and accommodation provision).

For the first time in 2024 (until the end of January – for the year 2023), the platform operators were obliged to fulfil the notification obligation regarding the required data, and for these purposes, the necessary forms were assigned to the platform operators established in the Slovak Republic in their personal internet zone on the financial administration portal, while platform operators who are not established in the Slovak Republic had to register in the Slovak Republic or in one of the EU member states (if the conditions defined by law were met). The data that are reported by the platform operators include, for each reportable seller who performed a selected activity involving the rental of real estate, both general information (name, surname, address, date of birth and all assigned identification numbers) and also a financial account identifier (if available to platform operator), the name of the holder of the financial account to which the remuneration is paid or credited (if different from the name of the seller subject to notification), as well as all other available financial identification information relating to this holder of the financial account, further, each Member State in which the notifiable seller is resident; the fees, commissions or taxes withheld or claimed by the reporting platform operator during each quarter of the reporting period; the address of each item on the property list and the relevant cadastral number or its equivalent under the national law of the Member State in which it is located, if assigned; the total remuneration paid or credited during each quarter of the reporting period; and finally, the number of selected activities provided for each property listing

and the number of rental days for each property listing during the reporting period and the type of each property listing, if this information is available. This information is provided electronically to the Financial Administration of the Slovak Republic (the competent authority of the Slovak Republic is the Ministry of Finance of the Slovak Republic), so it is crucial how the processes of sharing this information between the financial administration and municipalities, as local tax administrators, will be set up so that the municipalities can also benefit from the new procedural arrangement. Monitoring the application practice and evaluating the benefits of the new regulation by the DAC 7 Directive will be the subject of future follow-up research.

One of the authors' conclusions is that the current absence of direct involvement of digital platforms providing short-term accommodation in the tax collection process contributes to the failure to use the full potential of this tax or to reduce the potential gap on this tax. For this reason, legislation has already been adopted in many countries, according to which digital platforms participate in the collection of local tax (Airbnb 2024a), even though, positive examples are some platforms such as AirBnB, which participates in this process voluntarily in many cities around the world (Mazúr 2019; Vartašová, Červená, Olexová 2022). Thereby it participates in fulfilling the tax obligations of accommodation providers (Airbnb 2024a) and thus contribute to relieving the burden laid upon the operators of accommodation facilities, especially natural persons renting out their free accommodation capacity, who, as non-entrepreneurs, are often not sufficiently informed about their (tax) obligations or their fulfilment causes them an excessive administrative burden. Perhaps the possible future legislative limitation of the administrative burden laid upon accommodation providers and the raise of awareness about the possibility of involving the online platform in the fulfilment of tax obligations in the Slovak Republic would contribute to the improvement of tax discipline in the area of accommodation tax.

BIBLIOGRAPHY

AirBnB. 2024a. "Ve kterých oblastech se o výběr a odvod daně z obsazenosti stará Airbnb?" https://www.airbnb.cz/help/article/2509 (accessed: 29.05.2024).

AirBnB. 2024b. "Airbnb delivers more than $10B in tourism taxes on behalf of Hosts." March–April 21. https://news.airbnb.com/airbnb-delivers-more-than-10b-in-tourism-taxes-on-behalf-of-hosts/ (accessed: 29.05.2024).

Andraško, Jozef. Martin Daňko. Matej Horvát. Matúš Mesarčík. Soňa Sompúchová. Ján Škrobák. 2022. *Regulačné výzvy e-governmentu v Slovenskej republike v kontexte práva Európskej únie.* Praha: Wolters Kluwer ČR.

Bonk, František. 2019. "Zdaňovanie ubytovacích služieb v zdieľanej ekonomike (príklad daňovej regulácie internetovej platformy Airbnb)." In *Dny práva 2018 – Days of law 2018.* Edited by Eva Tomášková, Damian Czudek, Jiří Valdhans. 60–71. Brno: Masarykova 1univerzita. http://dnyprava.law.muni.cz/dokumenty/48928

Bratislava.sme.sk. 2021. "Airbnb podpisuje s Bratislavou dohodu o výbere dane za ubytovanie." June 24. https://bratislava.sme.sk/c/22689185/airbnb-podpisuje-s-bratislavou-dohodu-o-vybere-dane-za-ubytovanie.html (accessed: 30.05.2024).

Cibuľa, Tomáš. Tibor Hlinka. Andrej Choma. Matej Kačaljak. 2019. "Digitálna platforma ako stála prevádzkareň." *Právny obzor: teoretický časopis pre otázky štátu a práva* 102(2): 155–167. https://www.pravnyobzor.sk/index.php?id=po22019

Csach, Kristián. Monika Jurčová. 2023. "Digitálne platformy a právo, doterajší vývoj a výzvy do budúcnosti." In *Digitálne platform.* Edited by Monika Jurčová. 8–15. Bratislava: Slovenská akadémia vied. Veda, vydavateľstvo Slovenskej akadémie vied.

Domurath, Irina. 2018. "Platforms as contract partners: Uber and beyond." *Maastricht Journal of European and Comparative Law* 25(5): 565–581. https://doi.org/10.1177/1023263X18806485

Eurocities. 2022. "Short term rentals: cities ask Europe's help." July 13. https://eurocities.eu/latest/short-term-rentals-cities-ask-europes-help/ (accessed: 29.05.2024).

European Commission. 2016. Commission staff working document SWD(2016) 172 final. Online Platforms. Accompanying the document Communication on Online Platforms and the Digital Single Market, COM(2016) 288 final.

Financial Directorate of the Slovak Republic. 2023. "Methodological instruction on accommodation tax according to Arts. 41a to 41d and 104l para. 1 of Act No. 582/2004 Coll. on local taxes and a local fee for municipal waste and small building fees waste as amended." No. 1/MD/2023/MP. March 7. https://www.financnasprava.sk//_img/pfsedit/Dokumenty_PFS/Zverejnovanie_dok/Dane/Metodicke_pokyny/Miestne_dane/2023/2023.03.07_001_MD_2023_MP.pdf (accessed: 20.05.2024).

Frydrychová, Michaela. 2017. "Uber, Airbnb, Zonky a další, co jsou vlastně zač? Aneb právní povaha subjektů vystupujících v rámci sdílené ekonomiky." In *Sdílená ekonomika – sdílený právní problém?* Edited by Jan Pichrt, Radim Boháč, Jakub Morávek. 248–258. Praha: Wolters Kluwer ČR.

Hučková, Regina. František Bonk. Laura Rózenfeldová. 2018. "Collaborative Economy – Open Problems and Discussion (With Regard to Commercial and Tax Issues)." *Studia Iuridica Cassoviensia* 6(2): 125–140.

Janovec, Michal. 2023. "Airbnb as an accommodation platform and tax aspects." *Studia Iuridica Lublinensia* 32(5): 163–180. http://dx.doi.org/10.17951/sil.2023.32.5.163-180

Ključnikov, Aleksandr. Vladimír Krajčík. Zuzana Vincúrová. 2018. "International Sharing Economy: the Case of AirBnB in the Czech Republic." *Economics and Sociology* 11(2): 126–137. https://www.economics-sociology.eu/?581,en_international-sharing-economy-the-case-of-airbnb-in-czech-republic

Kóňa, Jakub. 2020. "Sociálno-ekonomické predispozície vybraných európskych krajín pre podnikanie v oblasti ubytovacích služieb prostredníctvom Airbnb." In *Merkúr 2020: proceedings of the international scientific conference for PhD. students and young scientists*. Edited by Peter Červenka, Ivan Hlavatý. 119–131. Bratislava: EUBA vydavateľstvo EKONÓM.

Kubincová, Soňa. Tatiana Jamrichová. 2022. *Zákon o miestnych daniach a miestnom poplatku za komunálne odpady a drobné stavebné odpady. Komentár*. Prague: C.H.Beck.

Kubovics, Michal. 2023. *Digitálne marketingové platformy a systémy I.* Brno: Tribun EU.

Malachovský, Andrej. 2022. "Možnosti regulácie ekonomiky spoločného využívania." In *Ekonomika spoločného využívania – príležitosť pre udržateľný a konkurencieschopný rozvoj cestovného ruchu v cieľových miestach na Slovensku.* Edited by Kristína Pompurová. 8–22. Banská Bystrica: Belianum.

Mates, Pavel. Vladimír Smejkal. 2012. *E-government v České republice: Právní a technologické aspekty*. Prague: Leges.

Mazúr, Ján. 2019. "Daň za ubytovanie a digitálne platformy." In *Míľniky práva v stredoeurópskom priestore 2019*. Edited by Andrea Koronczioví, Tomáš Hlinka. 228–237. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta.

Nykiel, Włodzimierz. Ziemowit Kukulski. 2017. "Raport generalny – Transformacja systemów podatkowych w państwach Europy Środkowo-Wschodniej – 25 lat doświadczeń oraz wyzwania na przyszłość – cz. II." *Kwartalnik Prawa Podatkowego* 3: 9–37. https://doi.org/10.18778/1509-877X.03.01

Pahl, Bogumił. Mariusz Popławski. Michal Radvan. Anna Vartašová. 2024. "Legal construction and legislative issues concerning the tourist tax. Comparative law case study." *Białostockie Studia Prawnicze* 29(1): 113–128. https://doi.org/10.15290/bsp.2024.29.01.07

Parakala, Kumar. 2008. "We can't afford to fluff digital economy chance." *The Australian.* https://www.theaustralian.com.au/business/technology/kumar-parakala/news-story/01f18696bb827224d759de60a7875d27 (accessed: 10.11.2018).

Popovič, Adrián. 2019. "Digitalizácia v oblasti daňového práva a vybrané aspekty jej realizácie v Slovenskej republike." In *Vplyv moderných technológií na právo*. Edited by Michaela Sangretová. 209–220. Košice: Pavol Jozef Šafárik University in Košice.

Priateľová, Natália. 2021. "The Directive DAC7 as a tool for fair taxation in the digital field." In *IV Slovak-Czech Days of Tax Law: Taxation of Virtual Currency and Digital Services – COVID-19 and other Current Challenges for Tax Law*. Edited by Miroslav Štrkolec, Anna Vartašová, Minika Stojáková, Soňa Simić. 290–304. Košice: ŠafárikPress. https://doi.org/10.33542/SCD21-0043-1-22

Račková, Elena. Lia Košalová. Radka Hečková. Lýdia Pagáčová. Maria Vargova. 2021. "§41c." In *Komentár zákona č. 582/2004 Z. z. Zákon o miestnych daniach a poplatku za komunálne odpady*. December 11, 2021. https://www.epi.sk/epi-komentar/Komentar-zakona-c-582-2004-Z-z.htm?fid=19766535&znenie=2021-12-11#content (accessed: 28.05.2024).

Radvan, Michal. 2020. "New Tourist Tax as a Tool for Municipalities in the Czech Republic." *Lex Localis – Journal of Local Self-Government* 18(4): 1095–1108. https://doi.org/10.4335/18.3.1095-1108(2020)

Radvan, Michal. Zdenka Kolářová. 2020. "Airbnb Taxation." In *The financial law towards challenges of the XXI century.* Edited by Petr Mrkývka, Jolanta Gliniecka, Eva Tomášková, Edward Juchniewicz, Tomas Sowiński, Michal Radvan. 481–494. Brno: Masaryk university.

Rudohradská, Simona. Diana Treščáková. 2021. "Proposals for the digital markets act and digital services act – broader considerations in context of online platforms." In *EU 2021 – the future of the eu in and after the pandemic*. Edited by Dunja Duić, Tunjica Petrašević. 485–500. Osijek: Sveučilište Josipa Jurja Strossmayera u Osijeku.

Sidor, Csaba. Branislav Kršák. Ľubomír Štrba. Michal Cehlár. Samer Khouri. Michal Stričík. Jaroslav Dugas. Ján Gajdoš. Barbara Bolechová. 2019. "Can Location-Based Social Media and Online Reservation Services Tell More about Local Accommodation Industries than Open Governmental Data?" *Sustainability* 11(21): 5926. https://doi.org/10.3390/su11215926

Simić, Soňa. 2022. "Prevádzkovateľ digitálnej platformy ako zástupca platiteľa dane za ubytovanie v kontexte rozhodovacej činnosti súdneho dvora." *Bratislavské právnické fórum* (2022)22–31.

Simić Ballová, Soňa. 2023. *Zdaňovanie digitálnych služieb – inciatívy, problémy a možnosti smerovania ich daňovo-právnej regulácie*. Prague: Leges.

Sme.sk. 2018. "Slovensko sa medzi prvými snaží zdaniť firmy ako AirBnB či Booking." June 30. https://ekonomika.sme.sk/c/20881357/slovensko-sa-medzi-prvymi-snazi-zdanit-firmy-ako-airbnb-ci-booking.html (accessed: 30.10.2021).

Szakács, Andrea. 2021a. "Výmena informácií v súvislosti so zdaňovaním digitálnych platforiem." In *Bratislavské právnické fórum 2021: Aktuálne výzvy pre finančné právo*. Edited by Andrea Szakács, Tibor Hlinka, Magdaléna Mydliarová, Silvia Senková, Michaela Durec Kahounová.

53–59. Bratislava: Univerzita Komenského v Bratislave. https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF/2021/Zbornik_BPF_2021_Sekcia_8_Financne_pravo.pdf

Šebesta, Matej. Timotej Braxator. Roman Láni. Simona Kopčaková. 2020. *eGovernment a jeho vplyv na podnikateľský sector*. Bratislava: Implementation agency of the Ministry of Labour, Social Affairs and Family of the Slovak Republic. https://www.ia.gov.sk/data/files/np_PKSD/Analyzy/AZZZ/eGovernment_a_jeho_vplyv_na_podnikatelsky_sektor.pdf

Štrkolec, Miroslav. 2023. "Tax Law in Slovakia under the Influence of Pandemic, Digital Transformation and Inflation." *Public Governance, Administration and Finances Law Review* 8(1): 91–103. https://doi.org/10.53116/pgaflr.6496

Štrkolec, Miroslav. Ladislav Hrabčák. 2022. "Tax Fairness in the Context of the Digital (Industrial) Revolution 4.0." *Studia Iuridica Lublinensia* 31(4): 155–174. http://dx.doi.org/10.17951/sil.2022.31.4.155-174

Vartašová, Anna. Karolína Červená. 2023. "Digitálne platformy v segmente krátkodobého ubytovania na Slovensku – prehľad literatúry." In *5. slovensko-české dni daňového práva: daňové právo a nové javy v ekonomike=5. Slovak-Czech days of tax law*. Edited by Miroslav Štrkolec, Filip Baláži, Natália Priateľová, Anna Vartašová. 275–286. Košice: Vydavateľstvo ŠafárikPress UPJŠ. https://doi.org/10.33542/VSCD-0269-5-20

Vartašová, Anna. Diana Treščáková. 2025. "Legal basis of e-government Slovakia." In *E-Government in the Visegrad countries*. Lex Localis [in print].

Vartašová, Anna. Karolína Červená. Cecília Olexová. 2022. "Taxation of Accommodation Services Provided in the Framework of the Collaborative Economy in the Slovak Republic." *Proceedings of the 5th International Conference on Tourism Research* 15(1): 433–440. https://doi.org/10.34190/ictr.15.1.108

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.03

*Natalia Jarzębowska**
https://orcid.org/0000-0002-0365-8233

WORK FROM ANYWHERE: TREATY SHOPPING IN DISGUISE?

Abstract. The popularisation of remote work – as a result of which the concept of 'digital nomads' increasingly extends to office workers – makes it necessary to analyse the situation of 'digital nomads' from the perspective of their taxation. The cross-border situation of remote workers is analysed in this paper in the light of the provisions of double tax treaties and tax avoidance measures. The paper attempts to answer the question of what tax consequences are associated with performing work from abroad and whether the current state of international tax law allows for work to be performed from anywhere.

Keywords: double tax treaties, tax residency, employment income, digital nomads

PRACA Z DOWOLNEGO MIEJSCA – „TREATY SHOPPING" W PRZEBRANIU?

Streszczenie. Popularyzacja pracy zdalnej, w wyniku której pojęcie „cyfrowych nomadów" coraz częściej obejmuje pracowników biurowych, sprawia, że konieczne staje się przeanalizowanie ich sytuacji z perspektywy ich opodatkowania. W artykule analizowana jest transgraniczna sytuacja pracowników zdalnych w świetle postanowień umów o unikaniu podwójnego opodatkowania i środków zapobiegających unikaniu opodatkowania. W artykule podjęto próbę odpowiedzi na pytanie, jakie konsekwencje podatkowe wiążą się z wykonywaniem pracy za granicą oraz czy obecny stan międzynarodowego prawa podatkowego pozwala na wykonywanie pracy z dowolnego miejsca.

Słowa kluczowe: umowy o unikaniu podwójnego opodatkowania, rezydencja podatkowa, opodatkowanie pracy, cyfrowi nomadzi

1. INTRODUCTION

Thinking back to early 2020 when the global pandemic first hit, one can think of that time as a moment when the world stopped for a while. One could not be more wrong. The world is constantly evolving and each slowdown fuels major shifts in the direction of the evolution. The same thing happened in the area

* PhD candidate at the University of Lodz; n_jarzebowska@o2.pl

Received: 3.10.2024. Verified: 16.10.2024. Revised: 20.08.2024. Accepted: 10.10.2024.

of work due to COVID-19. People were immediately forced to work from home and those surprised by the pandemic while abroad needed to extend their stays due to travel restrictions. Remote work meant that some employees, unlimited by the location of the employer's office, decided to work from any place, not necessarily from their place of residence, thus joining the group of the so-called 'digital nomads'. This is how the 'work from anywhere' concept was born.

The number of digital nomads, i.e. people working remotely from any location – mainly because of the wide access to the Internet – is constantly growing (Makimoto, Manners 1997, 14). The term 'digital nomads' describes people with a strong need to travel who are not attached to a specific location and work remotely, away from offices (Sutherland, Jarrahi 2017, 6). Until recently, this phenomenon had not been very popular and was most often identified with freelancers or entrepreneurs as groups characterised by autonomy in managing their professional activity, including the place where it is performed. The popularisation of remote work, as a result of which the concept of 'digital nomads' increasingly extends to office workers, makes it necessary to analyse the situation of digital nomads from the perspective of their taxation.

Work from anywhere is a concept which means that white collar workers can perform work from a destination of their choice instead of from an office in a fixed location. The idea, while implemented within a country, does not entail legal consequences. When it moves cross-border, it is a whole different story with tax, social security, and potentially also immigration consequences.

Apart from being a great way to explore the world, work from anywhere encourages something that in the past was associated mostly with high net individuals, namely treaty shopping.

Individuals are becoming more aware of the tax consequences of working abroad. Rather than thinking about this as of an unnecessary burden, they use local tax regulations and tax treaties to their advantage. In the past, people had moved to a different country for a better job. Nowadays, people move to a different country for a better tax system, without changing the *status quo* of their professional situation.

There are some voices saying that work from anywhere and digital nomadism brings nothing new to the table in terms of the taxation of individuals, as global mobility has been on the rise for years and there are ready solutions in place. Work from anywhere is certainly a part of the phenomenon known widely as global mobility, but the way it emerged and developed in 2020 must be seen as a completely new additive to this phenomenon. Work from anywhere must be differentiated from business trips or secondments, and the main differentiator should be the lack of a business need for the employee to work in a given location. The move, when it happens, is initiated at the employee's will, driven by their own needs and reasons, which do not need to be shared with the employer.

The aim of this paper is to examine how remote working from foreign locations can impact the taxation of individuals; it is also to decide whether it is

safe for companies to allow unlimited working from anywhere. The paper focuses mainly on the taxation of individuals with some elements of social security law, as in some legislations social security contributions can be treated as taxes or similar.

2. WORK FROM ANYWHERE: A CATCHY SLOGAN OR A NEW TREND HERE TO STAY?

One company after another informs the world about their newly implemented work from anywhere policies allowing their employees to work from an individually chosen place (within or outside the country of employment). Their decision is said to be driven by their concern for the employees and the willingness to offer them unlimited flexibility. The question is whether employers can, in fact, offer unlimited work from anywhere, or is it rather just an employer branding campaign – shiny only on the outside? The answer to this question is tax compliance or, to be more precise, whether an employer decides to be tax compliant or to accept the risk of tax non-compliance.

In order to understand the reason why taxation is at the heart of the work from anywhere dispute, it is necessary to go through the basics of cross-border taxation of individuals and their employment income. The basics circle around three Articles from the OECD and UN model conventions and include:

– tax residence (Art. 4);
– the taxation of employment income (Art. 15);
– the avoidance of double taxation (Art. 23).

3. TAX RESIDENCE

In every cross-border situation, the first issue to be settled is tax residence. Despite the importance of tax residence in the field of international taxation, there is no universally agreed upon definition of the term (Elkins 2017, 2). It can be argued that the lack of this definition is intentional, as the decision on how to understand tax residency should be at each state's discretion to ensure tax sovereignty. Moreover, if the definition of tax residency would be written in the tax treaty, there might have been multiple understandings of the term applicable at the same time depending on the treaty in use, which may significantly diminish tax certainty. Deciding on the definition in each tax treaty in certainly not a desired solution. In my view, there is room to explore the possibility of introducing a common definition of tax residency as a multilateral measure.

As of now, the main determinants of tax residency include physical presence, domicile, immigration status, permanent home, ordinary residence, habitual abode, connections, and ties. States use different criteria to define the residence

of individuals, and they tend to use a set of alternative connecting factors based on factual circumstances (Pitrone 2016, 361). There are three types of such factors:

1) personal criteria (habitual abode, physical presence, permanent home);
2) economic criteria (the centre of economic interests);
3) professional criteria (where an individual performs their professional activity).

As a result, individuals who do not reside in a country in the common sense of the term may be considered residents for tax purposes. Furthermore, it is possible for an individual to be classified as a resident by the domestic law of more than one country, each claiming the right to impose tax on the individual's worldwide income (Elkins 2021). Such disputes can be solved by proper application of tie-breaker rules implemented in the double tax treaties, but these are still subject to domestic assessment.

Having in mind the lack of unified criteria among states and increased mobility of individuals, dual or even multiple residences become more common, even though they are not always instantly recognised either by individuals or by authorities. Double taxation may occur in case of conflicting definitions of tax residence in different countries, by timing mismatches within the application of domestic legislation and by the fact that the split of tax residence during a calendar year is not accepted by some states, causing different interpretations of tax residence within the same year (Pitrone 2016, 361). On the other hand, it is also possible that a mobile individual may not have tax residence in any state. Such situation is possible especially in states which allow individuals to opt out of their tax resident status.

The theory of tax residence, although praised as the core of international taxation, is often criticised as inadequate and outdated, making international tax policy unsatisfactory (Graetz 2001, 269). It is questioned whether the criteria used to determine tax residence truly reflect individuals' strong ties with a particular jurisdiction (Kostic 2019, 196). In the contemporary world, individuals are less attached to place and they drift away from the traditional model of living where having a permanent home and a family is a priority. Therefore, it is becoming difficult to differentiate between residence and source, which leads to the erosion of these well-known concepts (Mossner 2006, 501). Such erosion is inevitable, as the concepts were introduced in times when the mobility of individuals was almost non-existent, which is opposite to what we experience nowadays. Although there is a lot of criticism towards tax residence as a link to a given jurisdiction, there are no specific ideas about how to replace it with a better, more progressive link (Schön 2015, 292; Wattel 2000, 218). It leads to a conclusion that it is not about the tax residence as much as about the link itself. The concept of tax residence guarantees the countries their right to tax an individual's income, and they are not willing to give up that right. In a cross-border reality, there must be some distributive rules, easy to apply by both the states and the individuals.

The situation of digital nomads working from anywhere is a great example of why tax residence as a distributive factor may not meet expectations. An employer who allows their workforce to perform work from abroad cannot simply continue with standard payroll withholding in the country of employment in the case of every employee. Each employee's move to perform work from abroad should be analysed from the perspective of their residence, which, in practice, may prove difficult, especially considering that there is no business need to facilitate such move. As tax residence sets the employer's payroll obligations, it is not possible to ignore this factor and maintain full tax compliance. Employers who are aware of the importance of tax residence often require their employees to declare their tax residence for the purposes of working from anywhere and take full responsibility for any tax and legal consequences of such declaration. It is worth noting that employers cannot just simply transfer their withholding obligations to their employees in exchange for permission to work from abroad.[1] What is interesting is that the full employee responsibility clause does not come up in the case of foreign secondments, initiated because of the employer's business need. In the case of secondments, employers engage tax advisors to determine the employee's tax residence and tax obligations in both home and host countries. Such tax advice is often followed by funding additional tax compliance services, if necessary. This shows that there is an already well-established practice of administering mobile workforce in terms of tax compliance, as the tax risks are known and serious enough for the employers to protect themselves by engaging tax advisors and seeking support with global tax compliance. When it comes to work from anywhere, the pressure to allow working from abroad comes from the employees and from the job market, where everyone seems to be offering it. As a result, pressured companies try to offer work from anywhere, but they shield themselves with work-from-anywhere policies whose main aim seems to be scaring off the employees. Only the strong-willed employees may wade victoriously through the policies, often by seeking external tax advice. By doing so, they find out about the effective ways of using their tax residence for their benefit.[2]

[1] There might be some countries where the transfer of withholding obligations to the employee is possible to some extent – e.g. the transfer of social security withholding obligations in Poland, but such solutions cannot be treated as a general rule, available whenever the employers does not want to fulfil their obligations.

[2] The thread will be followed later in this paper.

4. THE TAXATION OF EMPLOYMENT INCOME: THE GENERAL RULE AND EXCEPTIONS

Once tax residence is settled, in order to properly determine tax obligations in cross-border situations, it is necessary to analyse the rules of taxing employment income.[3] Article 15 of the OECD Model Convention sets out the general rule of the taxation of income from employment as well as exceptions to this rule. The general rule is the taxation of work in the employee's country of residence. If the work was performed in another state, the remuneration for that work may be taxed in that other state (source state). As a rule, the place of work determines the place where the tax is paid. The general rule of the taxation of work raises doubts as to the extent to which it introduces the right of the source state to tax income from work in its territory.

Work is taxable in the source state if it is performed there for more than 183 days[4] in a calendar year or 12 consecutive months, if the remuneration is borne by or recharged to the company being a resident of the source state, or if there is a permanent establishment. Only one of these criteria must be met for the source state to gain the right to tax the individual.

The 183 days rule is probably the most well-known rule of international taxation. Even people who know next to nothing about taxes have heard of it. Unfortunately, it has its downsides, as for many, this is the only applicable rule. As a result, the common understanding is that as long as one stays in another country for less than 183 days, there are no tax consequences, which is, obviously, not always true. The purpose of the 183 days rule is to facilitate the movement of people and business activities of companies, especially in international trade (Dziurdź 2013, 124). This facilitation is understood as the lack of administrative burden on the employer and the employee in the host country, and is deemed reasonable as long as the remuneration for work in the host country is not borne by the resident entity or a permanent establishment (PE). In the case of remote employees working from abroad, many employers expect to take advantage of this facilitation.

Work-from-anywhere policies introduced by various companies often limit the employee's stay in one country to 183 days in a year, hoping that this is enough to avoid any tax consequences in the other state. Though this may work in plenty of scenarios, there are some which rule out such solution as a general safeguard rule. Examples of such scenarios are as follows:

1) An employee spent some time in the destination country before they decided to work from there, and an employer has no knowledge of it.

[3] This paper does not elaborate on the definition of employment and its differences among states, although this can also impact the taxation of individuals and deserves a separate analysis.

[4] There are some treaties where the threshold is different than 183 days of stay in a country.

2) An employee spends less than 183 days in the destination country in a calendar year, but they spent some time there in the previous year and the double tax treaty refers to 12 consecutive months period instead of a calendar year.

3) An employee spends less than 183 days in the destination country in a calendar year, but the double tax treaty refers to a different threshold.

4) An employee is a resident of the destination country.

The second exception from Article 15(2) should not generally be an issue when it comes to digital nomads or remote workers, as work from anywhere – being an employee-initiated move – should mean that the cost of remuneration stays with the employing entity. Remuneration costs are often borne by or recharged to host entities in the case of secondments, as in those cases the particular business need is the underlying reason behind the relocation.[5]

The third exception from Article 15(2) is often the reason why companies decide not to implement the work-from-anywhere programme in their organisation. They are afraid that by allowing their employees to work in another country, these employees may constitute the personal establishment (PE) of their company abroad, which can lead to them paying corporate taxes on income attributable to this PE.

In the case of digital nomads, there are two scenarios where work from anywhere may lead to the creation of a PE. The first one is the presence of a foreign entity's employee in the host country, and the second one is an employee's home office in the host country. It must be stressed that the understanding of the concept of a PE differs among states and it is difficult to introduce universal rules for employees working from different countries. During the pandemic, the OECD issued guidelines on the tax implications of government restrictions limiting the mobility of individuals, including the PE issue, where the recommendation was not to consider a forced stay in a foreign country as a reason for the creation of a PE (OECD, 2021). In the post-pandemic world, the situation is not that clear anymore and, ideally, each case should be analysed separately to verify whether the employee's move abroad would result in a fixed place of business for a company in that country due to a certain level of permanency. The analysis must also include a detail review of the employee's tasks. In the case when the employee's tasks are of auxiliary nature to the company's core business, their stay abroad would not constitute a PE. The complexity of the PE issue and the diverse approaches to it among jurisdictions make it impossible for companies to analyse this matter case by case.

[5] There might, however, be some exceptions, especially in the case of full remote companies which operate in the office-free model. Such companies employ people worldwide by using services of external providers offering to employ individuals for the remote company. This is a new business model, operating in a grey area. Employees are recruited by the remote company and provide word under the supervision of the remote company, but their employment is formally administered by a third party provider so that the actual employer does not need to register in any of the countries where the employees perform work.

Common views are that the exceptions to the general rule of Article 15 aim to ensure that the source state keeps its taxation right in the case when the remuneration is deductible from profits taxable in this state (Dziurdź 2013, 124). Taxation on individuals in such case is sort of a compensation for the reduced tax revenue. In the opinion of Kasper Dziurdź, this theory is questionable and the more probable one is that it is the sufficient presence of the employer in the source state rather than the compensation for the reduced profits that justifies the impositions of additional administrative burdens on the employer and the employee. In my view, regardless of which of the above was the underlining reason behind introducing the exceptions to Article 15, both are equally flawed. The OECD's and the UN's model conventions and commentaries make it clear that double tax treaties are aimed at legal entities, not individuals. An average individual is not able to understand and apply the regulations. An average individual has no way of knowing what it means that their remuneration is recharged to another company or what is a PE risk and how to assess it. They also may not know how the approaches to certain issues differ between countries. If work from anywhere is to become part of the new reality, international tax rules and their domestic understanding must change.

The rules under which employment income is sourced at the place where employment is exercised were designed with a different vision of how work is exercised, particularly in the service sector, which has experienced the greatest rise of global mobility (Kostic 2019, 205). It is not only more difficult to connect an individual to a specific jurisdiction; also, modern technology enforces a reconsideration of the connection between work and a particular place. A great step forward would be for the model conventions to recognise different types of work performed abroad, such as business trips, short-term and long-term assignments, and self-initiated moves. The taxation of employment should depend not only on the place where work is performed, but also on the reason why it is performed there.

5. THE AVOIDANCE OF DOUBLE TAXATION

Once taxation is settled and taxation rights are distributed between states, it is time to discuss the methods of the avoidance of double taxation. This is where the employees – i.e. those lucky enough to become digital nomads – may seek a chance to benefit from double tax treaties.

There are two double taxation avoidance methods – the exemption with progression method and the credit method. The exemption with progression method allows for the income taxed in the source state to be exempted from taxation in the residence country, but the income is included in the calculation of the effective tax rate applicable to income taxable in the residence state. The credit method allows for the tax paid in the source state to be deducted from

the worldwide income taxable in the residence state. The exemption with progression method is more favourable for taxpayers, as in case there is no income taxable in the residence state, there is no tax obligation or reporting obligation in that state. In the case of the credit method, the worldwide income is taxable in the residence state even if none of it was derived from that state. In case the tax paid abroad on that income is lower than the tax due in the residence state, the difference must be paid in the residence state.

The implementation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS[6] resulted in the exemption with progression method to be changed to the credit method in many treaties. There are, however, still treaties where the favourable method remains. It leaves a wicket for employees to significantly lower their worldwide tax burden. The easiest way is to choose where to work based on the residence status and double tax treaties in place between the residence state and the destination state. The destination state should have a low tax regime, or at least lower than the residence state. Changing location every six months allows an individual to claim domestic benefits such as tax-free amounts or personal allowances, but taxing only part of the individual's income in one country protects them – depending on the level of earnings – from reaching higher tax brackets (where progressive taxation applies). The resident state in such a case reserves the right to have the worldwide income reported, with the minimum of no tax paid by such tax resident.

The alternative way of how individuals use double tax treaties to structure their personal tax situation is by obtaining foreign tax residence. There are countries that welcome foreign individuals and offer their residency in exchange for some kind of investment, a promise of stay for a given period, or renting or purchasing an immovable property (Beretta 2018, 440). In such a case, there are often special expatriate regimes available for individuals who decided to gain tax residency of a particular country, which significantly reduce income tax paid by such individuals.

The OECD Model commentary recognises that a tax treaty may be used by individuals to achieve unintended tax benefits in the form of double non-taxation or reduced taxation, stating that there is a treaty abuse if there is a case of treaty abuse where:

> an individual who has in a Contracting State both their permanent home and all their economic interests, including a substantial shareholding in a company of that State, and who, essentially in order to sell the shares and escape taxation in that State on the capital gains from the alienation (by virtue of paragraph 5 of Article 13), transfers their permanent home to the other Contracting State, where such gains are subject to little or no tax. (OECD 2017)

Relocation to another country can be not only abusive, but also supported by the destination country despite the distributive rules agreed in the treaties.

[6] Hereinafter: the MLI convention.

Exit taxes are commonly mentioned as a specific anti-abuse measure to fight against this kind of abuse. It is, however, doubtful if exit tax is the right measure in the case of a digital nomad, for whom treaty shopping is just a nice addition to a chosen lifestyle rather than the main purpose of moving.

6. IS IT NOT ALL ABOUT TAX

The complexities of remote work, particularly in relation to taxation and social security, present significant challenges for individuals considering employment in different jurisdictions. Remote workers must navigate various obligations, including the continuation of social contributions to pension schemes, which are often dictated by their employer's jurisdiction. This situation can lead to confusion and potential financial strain, especially when considering the implications of personal income tax in the destination country. When an individual opts to work in a jurisdiction with lower living costs, they may be attracted by the prospect of reduced expenses. However, this can be misleading, as lower living costs often correlate with higher personal income tax rates or fewer deductions available, which can negate the financial benefits of a lower cost of living (Charalampous et al. 2018). Moreover, the short-term nature of work visas also needs to be considered, as it can complicate the decision-making process for remote workers. The process to obtain visas and/or work permits can be costly and time-consuming. The necessity to maintain compliance with tax obligations in the destination country is critical, as failure to do so can jeopardise visa renewals and future employment opportunities (Soroui 2023). This highlights the importance of thorough tax planning and understanding the local tax landscape before making a move. In the European context, the question of whether to work for a foreign employer while residing in a country with lower cost of living is particularly pertinent. For instance, while Poland offers a lower cost of living, the progressive tax system means that higher salaries may be subjected to significant tax rates, potentially diminishing the financial advantages of living in a lower-cost country. It points to the need for remote workers to conduct comprehensive cost-benefit analyses which consider not only tax implications but also living expenses, educational costs for children, and other associated expenses of relocating (Emanuel, Harrington 2023).

7. CONCLUSIONS

The answer to the questions set in the title on this paper is: "no" – work from anywhere **is not** a treaty shopping is disguise. The fact that someone – a remote worker or a digital nomad – starts thinking about taking advantage of double tax

treaties shows that the provisions of double tax treaties do not live up to the modern reality. The outdated concept of tax residence, which is still officially the decisive factor when distributing taxation rights between states, must be reviewed so that individuals can seize the opportunities that the modern world has to offer. Work from anywhere is a great idea, but it will remain just an idea as long as employers are forced to discourage their employees from it for tax reasons; the employees would need to seek professional advice and worry about worldwide tax compliance (only because they want to travel the world and work at the same time for their current employer). The reality is that people do move to another country, as global mobility cannot be stopped, but the work-from-anywhere concept – which should be least burdensome – leads to more complications that leaving a job in a home country and finding a new one in the destination country or going on secondment. For remote workers and digital nomads, a citizen-based taxation system might be a solution worth considering, as it is easy to implement and excludes temptation to change residence for tax benefits, or to offer tax residence to lure new individuals to a country. Citizenships are not that easily handed out as tax residencies.

The decision to work remotely in a different jurisdiction is not solely based on tax savings. It requires a nuanced understanding of the interplay between income, living costs, and personal circumstances. Remote work in a new destination becomes a viable option only when the net benefits of relocating, after accounting for all potential costs, are favourable. Tax is not – and is unlikely to ever be – the decisive factor for moving to another country for workers. Sometimes, however, it is a decisive factor against the move. Instead of focusing on potential treaty abuse, double tax treaties should be used as a tool to remove or at least reduce tax obstacles, especially for short-term cross-border moves.

BIBLIOGRAPHY

Beretta, Giorgio. 2018. "Mobility of Individuals after BEPS: The Persistent Conflict between Jurisdictions." *Bulletin for International Taxation. IBFD* 72(7): 439–449. https://doi.org/10.59403/2er71kt

Charalampous, Maria. Christine Grant. Carlo Tramontano. Evie Michailidis. 2018. "Systematically reviewing remote e-workers' well-being at work: a multidimensional approach." *European Journal of Work and Organizational Psychology* 28(1): 51–73. https://doi.org/10.1080/1359432x.2018.1541886

Dziurdź, Kasper. 2013. "Article 15 of the OECD Model: The 183-Day Rule and the Meaning of 'Borne by a Permanent Establishment'." *Bulletin for International Taxation. IBFD* 67(3): 122–127. https://doi.org/10.59403/ww776n

Elkins, David. 2017. "The Elusive Definition of Corporate Tax Residence." *Saint Louis University Law Journal* 62(1): 219–236.

Elkins, David. 2021. "A Scalar Conception of Tax Residence for Individuals." *Virginia Tax Review* 41: 149–201. http://dx.doi.org/10.2139/ssrn.3889245

Emanuel, Natalia. Emma Harrington. 2023. "Working remotely? selection, treatment, and the market for remote work." *Federal Reserve Bank of New York Staff Reports* 1061. https://doi.org/10.2139/ssrn.4466130

Graetz, Michael J. 2001. "Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies." *Brooklyn Journal of International Law* 26(4): 1357–1448.

Kostic, Svetislav. 2019. "In Search of the Digital Nomad – Rethinking the Taxation of Employment Income under Tax Treaties." *World Tax Journal. IBFD* 11(2): 189–225.

Makimoto, Tsugio. David Manners. 1997. *Digital Nomad*. Chichester–New York–Weinheim–Brisbane–Singapore–Toronto: Wiley & Sons.

Mössner, Manfred. 2006. "Source versus Residence – An EU Perspective." *Bulletin of International Taxation. IBFD* 60(12): 501–506.

OECD. 2017. OECD Model: Commentary on Article 1 para. 56.

OECD. 2020. "OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis", OECD Policy Responses to Coronavirus (COVID-19), OECD Publishing, Paris, https://doi.org/10.1787/947dcb01-en

Pitrone, Federica. 2016. "Tax Residence of Individuals within the European Union: Finding New Solutions to Old Problems." *World Tax Journal. IBFD* 8(3): 357–377.

Prati, Gabriele. 2024. "Remote work's impact on well-being: longitudinal analysis and the influence of gender, household size and childcare." *International Journal of Workplace Health Management* 17(1): 72–84. https://doi.org/10.1108/ijwhm-09-2023-0140

Raad, Kees van. 2001. "Fractional Taxation of Multi-State Income of EU Resident Individuals – A Proposal." In *Liber Amicorum Sven-Olof Lodin*. Edited by Krister Andersson, Peter Melz, Christer Silfverberg. 211–222. Stockholm: Wolters Kluwer.

Schön, Wolfgang. 2015. "Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?" *Bulletin for International Taxation. IBFD* 69(4–5): 271–293. https://doi.org/10.59403/28ef6by

Soroui, Sarah Taghavi. 2023. "Encountering weak signals: economic development practitioners' perceptions of remote work arrangements. Local Economy." *The Journal of the Local Economy Policy Unit* 38(1): 3–21. https://doi.org/10.1177/02690942231180283

Sutherland, Will. Mohammad Hossein Jarrahi. 2017. "The Gig Economy and Information Infrastructure: The Case of the Digital Nomad Community." *Proceedings of the ACM on Human-Computer Interaction* 1(CSCW): 1–24. https://doi.org/10.1145/3134732

Wattel, Petter. 2000. "Progressive Taxation of Non-Residents and Intra-EC Allocation of Personal Tax Allowances: Why Schumacker, Asscher, Gilly and Gschwind Do Not Suffice." *European Taxation* 40(6): 210–223.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.04

*Ziemowit Kukulski**
https://orcid.org/0000-0003-2843-8170

ELIMINATING DOUBLE TAXATION OF INCOME FROM CROSS-BORDER SERVICES IN THE DIGITAL ERA FROM THE UN MODEL PERSPECTIVE

Abstract. Digitalization challenges international tax law provisions dealing with eliminating double taxation of income from cross-border services. In the paper the following issues are discussed: rules elimination double taxation of income from cross-border services in the pre-digital era from the UN Model perspective as well as the UN Model's response to challenges related to eliminating double taxation of income from cross-border services in the digital era as well as its possible impact on countries' tax treaty practice. Rules governing taxation of income from cross-border services adopted by the UN Model in pre-digital era are outdated. This raises a question whether recently adopted provisions dealing with fees for technical services and automated digital services change the reality in that area.

Keywords: cross-border services, fees for technical services, automated digital services, UN Model

ELIMINACJA PODWÓJNEGO OPODATKOWANIA DOCHODÓW Z TYTUŁU TRANSGRANICZNYCH USŁUG W ERZE CYFROWEJ Z PERSPEKTYWY MODELU KONWENCJI ONZ

Streszczenie. Cyfryzacja rzuca wyzwanie normom międzynarodowego prawa podatkowego w służącym eliminacji podwójnego opodatkowania dochodów z tytułu transgranicznych usług. W artykule omówiono następujące zagadnienia: zasady eliminowania podwójnego opodatkowania dochodów z tytułu usług transgranicznych w erze przed-cyfrowej z perspektywy Modelu Konwencji ONZ oraz odpowiedź Modelu Konwencji ONZ na wyzwania związane z eliminacją podwójnego opodatkowania dochodów z tytułu transgranicznych usług w erze cyfrowej oraz jej możliwy wpływ na praktykę traktatową państw. Przepisy regulujące opodatkowanie dochodów z tytułu transgranicznych usług przyjęte przez Model Konwencji ONZ w erze przed-cyfrowej są przestarzałe. Nasuwa się pytanie, czy nowe uregulowania dotyczące opłat za usługi techniczne i zautomatyzowanych usług cyfrowych zmienią ten stan rzeczy.

Słowa kluczowe: transgraniczne usługi, opłaty za usług techniczne, zautomatyzowane usługi cyfrowe, Model Konwencji ONZ

* University of Lodz; zkukulski@wpia.uni.lodz.pl

Received: 31.01.2025. Verified: 4.02.2025. Revised: 2.03.2025. Accepted: 7.03.2025.

1. INTRODUCTION

Expansion of digital business models in the modern world creates new opportunities for all businesses, including furnishing of services. Simultaneously it poses a challenge to international taxation by causing difficulties for applying the existing allocation of taxing rights rules in cross-border income taxation (see also: Litwińczuk 2020, 53–58).[1] Traditional institutions of international tax law based on the concept of a permanent establishment or a fixed base in the case of income from independent personal services (liberal professions) fail to protect tax revenues in the source state against base erosion and profit shifting practices. In parallel, the imposition of withholding tax on certain categories of income from cross-border digital businesses is widely observed. These phenomena apply particularly to the taxation of income from cross-border services (Lipniewicz 2018, 360–369. See also: Kukulski 2022, 80–81).

In the recent years, the OECD/ G20 and the EU are not the only and global norm-setting players with respect to the taxation of digital service providers (Borders, Ballandares, Barake, Baseliga 2023. See also: Becker, Englisch 2018).[2] Also, the UN Committee of Experts on International Cooperation in Tax Matters (hereinafter: UN Committee of Experts) began to be an important actor creating international tax law recommendations in that area. In 2017 and 2021 the two major updates to the UN Model Double Taxation Convention between Developed and Developing Countries (hereafter: the UN Model) were adopted triggering the two new provisions which can be used in bilateral tax treaties to eliminate double taxation of certain types of income from cross-border services (hereafter: DTC/ or DTCs). These are: Art. 12A establishing the pattern for avoiding of double taxation of fees for technical services, added in 2017 to the UN Model[3] (see also: Martin 2018) and Art. 12B dealing with a completely new category of income from automated digital services, added to the UN Model in 2021.[4] Similar changes were

[1] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (accessed: 25.01.2025).

[2] See also: Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence COM/2018/0147 final – 2018/072 (CNS), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0147 (accessed: 26.01.2025).

[3] United Nations Model Double Taxation Convention between Developed and Developing Countries 2017 Update (2017). Department of Economic and Social Affairs, United Nations, New York, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (accessed: 4.12.2024).

[4] United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 Update (2021). Department of Economic and Social Affairs, United Nations, New York, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 4.12.2025).

not introduced by the OECD Model Convention on Tax on Income and Capital (hereinafter: OECD Model) on the in the occasion of its latest update in 2017.[5]

This paper is designed to examine the importance of the UN Committee of Experts efforts to create new allocation rules, which might also be applicable as a tool for eliminating of double taxation of income from cross-border services in the digital era. Special attention is focused on their potential future impact on countries' tax treaty policy and practice, especially when countries importing new technologies and therefore become source-states of this type of income.

The thesis put forward here is that the UN Model's recommendations adopted in Art. 12A and Art. 12B due to their legal construction and therefore a limited scope of application may only to certain extend solve problems related to the elimination of double taxation of income from cross-border services caused by the expansion of digital economy. Therefore, the objective of this paper is to examine the UN Model's recommendations aimed at elimination double taxation of income from cross-border services both in the pre-digital era as well as in the present days.

2. ELIMINATION OF DOUBLE TAXING INCOME FROM CROSS-BORDER SERVICES IN THE PRE-DIGITAL ERA FROM THE UN MODEL PERSPECTIVE

According to the OECD and UN Models taxation of income from cross-border services in the source state required a certain degree of physical presence of a service provider in that state. The diverse nature of cross-border services meant that income obtained by a non-resident service provider might under a bilateral tax treaty primarily be treated for taxation purposes in the country of its source as: 1) business income or income from independent personal services (liberal profession), 2) royalty payments, 3) fees for technical services, and finally 4) income from automated digital services (Kukulski 2022, 81). The last two are present in the UN Model only. Moreover, some services may be performed outside a person's business activities and/or liberal profession, e.g. as a part of employment relationship or any other type of dependent personal service such as independently performed artistic or sports activities, public service, or educational (research) services provided outside the employment relationship by teachers, professors and researchers (Kukulski 2022, 81; Orzechowski-Zöller 2024, 187–195. See also: Sęk 2023, 87 et. seq.). The non-business-related nature of such services means that when they are carried out cross-border, the elimination of double taxation

[5] *OECD Council approves the 2017 update to the OECD Model Tax Convention*, https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (accessed: 26.01.2025). See also: *OECD and UN updated income and capital Model Tax Conventions provide guidance on BEPS and other issues*, https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-un-updated-income-capital-model-tax-conventions.pdf (accessed: 26.01.2025).

of income derived from such activities entails the application of different tax treaty provisions than those relating to broadly understood income from business activities. The variety of norms allocating taxing rights between the contracting states under a bilateral tax treaty that may apply to income from cross-border services, whether or not provided as part of a business activity, leads to confusion that may result in a classification conflict. This, in turn, may translate into double taxation contrary to the purpose and object of a given DTC (Kukulski 2022, 81).

Taxation of income from cross-border services in the *situs* state requires the existence of a permanent establishment (hereafter: P.E.) located in that state. The definition of a P.E. is contained in Art. 5(1) of the OECD and the UN Models. It is a basic form of a P.E. and therefore is also referred as the *actual P.E.* (Litwińczuk 2020, 189). The concept of P.E. is found in the early model conventions including the 1928 model conventions of the League of Nations. Both the OECD and UN Models reaffirm this concept, the core of which has basically not been changed since then (Lipniewicz 2017, 26–27).

Besides the *actual P.E.,* several other types or sub-types of a P.E. in the OECD and in the UN Models might be distinguished (Litwińczuk 2020, 187). For example, the *construction P.E.* as defined in Art. 5(3) of the OECD Model and with modifications accordingly in Art. 5(3)(a) UN Model. Moreover, both models contain the *agency P.E.* provision (Art. 5(5) OECD and UN Model). What is common to all these types/sub-types of P.Es., regardless of their form, is that the concept of the P.E., as it stands up to now, is based on the physical presence of a foreign enterprise in the other Contracting State (source jurisdiction) as a *sine qua non* condition for the existence of the P.E. (Lipniewicz 2018, 328–332). This inherent feature of the P.E. makes this concept obsolete in the digital era and makes it impossible to apply – in its recent shape – to income from cross-border digital services (Jamroży, Majdowski 2022, 9–35).

The UN Model, contrary to the OECD Model contains a special provision in Art. 5(3)(b) dealing with yet another type of a P.E. – also known as *service P.E.* (Litwińczuk 2020, 210–211. See also: Lipniewicz 2017, 165–184). This typical UN Model recommendation allows the *situs* state taxation of income from cross-border furnishing of services, the performance of which does not, of itself, create a P.E. in the OECD Model. The *service P.E.* is deemed to exist only if the conditions referred to in Art. 5(3)(b) of the UN Model are met. According to Art. 5(3)(b), the term "permanent establishment" also encompasses the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.[6] No doubts that the UN

[6] Commenatry on Article 5 para. 23, p. 200 et seq. in United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 Update (2021). Department of

Model's furnishing of services provision makes it easier for a *situs* state to tax income generated through a *service P.E.* However, due to the fact that the *service P.E.* is *de facto* a sub-type of an *actual P.E.* and it is still based on the 183-days threshold of physical presence of the foreign enterprise's employees or other personnel in the source state, it is difficult to expect that this concept will be useful for furnishing digital services. Therefore, it still will be used in countries' tax treaty practice rather with respect to traditional business models for which it was originally designed.

Contrary to the OECD Model, the UN Committee of Experts decided to retain Art. 14 as a separate allocation rule dealing with independent personal services or other activities of an independent character (liberal professions). The UN Model's Art. 14(1)(a) and (2) reproduce the essential provisions of Art. 14 of the 1997 OECD Model, and they are similar to those for business profits and basically rest in fact on the same principles as those of Article 7 of the OECD/ UN Models.[7] Therefore, as a rule, the source state is entitled to levy a tax on such income only if a person – a sole entrepreneur – performing such services has a fixed base regularly available to them for the purpose of performing their activities located there. Contrary to the 1997 OECD Model, the UN Model, however, allows the source state to tax income from independent personal services in one additional situation that does not require a fixed base located there needed to exist. According to Art. 14(1)(b) of the UN Model, the source-state taxation is allowed if the taxpayer is present in that country for more than 183 days in any 12-month period commencing or ending in the fiscal year concerned (the 183-days threshold). Although this unique UN Model provision is quite popular in countries' tax treaty practice, including the OECD Member States, e.g. Poland, the requirement to fulfill a condition of more than 183 days of physical presence in the source state makes the application of Art. 14(1)(b) of the UN Model meaningless to income from independent personal services performed on-line.

Countries that follow the OECD approach towards the Art. 14 and decide not to include a separate allocation rule dealing with this type of income into their tax treaties may adopt an optional solution proposed in the Commentary to Art. 5(3)(b) of the UN Model.[8] The UN Committee of Experts suggest the two following options: 1) not to include Art. 14 into the tax treaty and to modify the wording of the furnishing of services provision of Art. 5(3)(b) by deleting also the reference to *including consultancy services*; and 2) to insert a new letter (c) to the furnishing of the services provision of Art. 5(3) which would read as follows: "for an individual, the performing of services in a Contracting State by that individual,

Economic and Social Affairs, United Nations, New York, https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 26.01.2025).

[7] Art. 14 was deleted from the 1997 OECD Model on 29 April 2000. See: Commentary on Article 14, p. 502.

[8] Commentary on Article 14, pkt 39–44, pp. 210–212.

but only if the individual's stay in that State is for a period or periods aggregating more than 183 days within any twelve-month period commencing or ending in the fiscal year concerned."[9] According to the Commentary to the UN Model, the only reason why the notion *including consultancy services* is present in current wording of Art. 5(3)(b) is to avoid unnecessary confusion that such services are included into the furnishing of the services provision.[10] Arguments raised for the second option mainly aim to maintain the coherence of the UN Model by ensuring that any situation previously covered by Art. 14, namely the threshold of more than 183-days of physical presence in the source state, would be addressed by Art. 5 and 7 of the UN Model. Despite such an option being chosen by the contracting states in their tax treaty, its impact on taxation of income from cross-border digital services still remains limited and will have no influence on countries' tax treaty policy and practice in that area.

In the context of the approaches to taxing income from the digital economy envisaged by the OECD and the EU revolving, *inter alia*, around revenue thresholds of digital companies, the UN decision taken in 1999, to delete the third criterion contained in letter (c) of Art. 14(1) allowing the source state to tax income from independent personal services, namely the amount of remuneration received by the services provider, may today seem a bit premature (Jamroży, Majdowski 2022, 9–35).[11] Under that criterion, remuneration for independent personal services could be taxed by the source country if it exceeded a specified amount, regardless of the existence of a fixed base or the length of stay in that country (the amount was to be established through bilateral negotiations).[12] Art. 14(1)(c) was often not present in countries' tax treaty practice (Wijnen, Goede 2014, 135 et. seq.). The advantage of this solution was not only simplicity (classic withholding tax), but above all no requirement for physical presence in the country where services were provided. Of course, in its wording at the time, this provision only applied to natural persons, solo entrepreneurs, so therefore it would have to be changed to meet the challenges raised by the digital economy. And it would not be the first time in history when the UN Model influences the OECD Model (Kukulski 2017, 146–147).[13]

[9] Ibidem, pp. 210–212.

[10] Ibidem, p. 211.

[11] https://www.un.org/esa/ffd/wp-content/uploads/2014/09/DoubleTaxation.pdf (accessed: 26.01.2025).

[12] Commentary on Article 14, paras. 3–4, op. cit., pp. 502–503.

[13] E.g. the immovable property clause in Art. 13(4) of the OECD Model.

3. UN MODEL'S RESPONSE TO CHALLENGES RELATED TO ELIMINATION OF DOUBLE TAXATION OF INCOME FROM CROSS-BORDER SERVICES IN THE DIGITAL ERA AND ITS POSSIBLE IMPACT ON COUNTRIES' TAX TREATY PRACTICE

In the digital era two major updates of the UN Model took place in 2017 and 2021 (Kukulski 2024a, 225–226). As in the case of the changes introduced to the OECD Model, the 2017 UN model's update was focused mainly on incorporating the anti-BEPS measure (Goede 2023, 12–16). Introducing a separate tax treaty provision dealing with fees for technical services (hereafter: FTS) in Art. 12A is the most significant outcome of the 2017 UN Model's update from the point of view of taxing income from cross-border services (Goede 2023, 12–16. See also: Báez Moreno 2015, 267–328). Following the OECD/G20 Inclusive Framework on BEPS on the Two Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy, in 2021 the new Art. 12B dealing with income from automated digital services (hereafter: ADS) was added to the UN Model.[14] Both updates may impact countries' tax treaty practice although to different extend.

Distributive norms governing taxation of FTS and ADS seem to be more attractive for countries rather than importing new technologies, so called developing countries. The common feature of solutions adopted in both cases is undoubtedly a withholding tax levied at the source on FTS and on income from ADS provided respectively in Art. 12A § 2 and in Art. 12B § 3 of the UN Model. However, an important difference between taxation rules applicable to these two types of income is provided in the case of ADS. The UN Model allows the source state, at the request of their beneficial owner being a resident of the other Contracting State, to tax so called "qualified profits from ADS" instead of a gross amount of the payments underlying the income from ADS – the so-called net basis taxation option. This option is allowed by §§ 3 and 4 of Art. 12B.[15] The solution adopted by the UN Committee of Experts is criticised in the literature since it generates asymmetries in the tax treatment of FTS and ASD – gross taxation in the case of FST and net taxation (optional) in the case of ADS (Báez Moreno 2021). A detailed discussion of this issue is beyond the scope of this study.

According to the OECD Model approach, followed by the OECD Members States, including Poland, FTS cannot be classified for tax purposes as royalty payments and therefore must be regarded as business income and treated under art. 7 of the OECD Model or – in case of its presence in DTC – as income from

[14] Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy – January 2020, https://www.oecd.org/en/about/news/announcements/2020/01/statement-by-the-oecd-g20-inclusive-framework-on-beps.html (accessed: 28.01.2025).

[15] See: Commentary on Article 12B Paragraphs 3 and 4, sections 39 et seq. pp. 449–454.

independent personal services under Art. 14 of the UN Model (Cracea 2018, 278–280).[16] This general rule does not apply to so called "mixed contracts", e.g. franchise agreements provided that services rendered by the franchisor are only of *anciliary and largely unimportant character*. In such case, Art. 12 dealing with royalties shall be applicable to the whole amount of the remuneration received by the franchisor (See also: Orzechowski-Zöller 2024, 129–131).[17] This OECD approach may, however, lead to interpretation disputes over the demarcation of the semantic substrate of the terms "royalties" and FSD.[18]

At the same time, a different treaty practice has been adopted, mostly by developing countries. Therefore, two variants of tax treaty provisions dealing with the elimination of double taxation of FTS were present in countries' tax treaty practice long before the Art. 12A – a separate distributive norm dedicated to FTS only – was introduced to the UN Model (Wijnen, Goede, Alessi 2012, 45–46). In the first variant, FTS were covered by the same article as royalties (e.g. the 1989 India–US DTC), in the second in a separate provision (e.g. 2001 India–Malaysia DTC) (Wijnen, Goede, Alessi 2012, 45–46). Both variants are also present in Poland's tax treaty practice, mostly with countries importing capital and new technologies (Kukulski 2022, 87).

Eliminating double taxation of FSD also become an issue in the context of developing the digital economy (Lipniewicz 2018, 327–328). This applies in particular to technical, managerial and consultancy services furnished digitally. The question, whether services provided with no physical presence in the other Contracting State fall under the scope of Art. 12A of the UN Model, is interconnected with the definition of this category of income. The UN Model definition of FTS is exhaustive. According to Art. 12A § 3 of the UN Model, the concept of the FTS encompasses any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made: a) to an employee of the person making the payment, b) for teaching in an educational institution or for teaching by an educational institution, or c) by an individual for services for the personal use of an individual. The Commentary to the UN Model stands on the position that Art. 12A does not apply to payments for all technical services, including those rendered digitally.[19] Payments for services of a routine nature that do not involve the application of a specialized knowledge, skill or expertise are without the scope of Art. 12A.[20] Therefore, only payments for digitalized technical services of a specialized nature that only have more than minimal human involvement furnished in a B2B context fall into the scope of the UN Model's FTS provision (Orzechowski-Zöller 2024, 57). Most authors

[16] See: Commentary on Article 12, paras. 11–19.

[17] Ibidem, pp. 279–280.

[18] See: Commentary on Article 12A para. 85, op. cit., p. 418.

[19] Commentary to Article 12A, para. 62, op. cit., p. 411.

[20] Commentary to Article 12A, para. 62, op. cit. p. 411.

agree that such an approach is restrictive and drastically limits the application of Art. 12A to services constituting the essential core of the digital economy (Báez Moreno 2021; Orzechowski-Zöller 2024, 57; Lipniewicz 2018, 328).

In order to minimize limits arising from a restrictive definition of FTS, the UN Committee of Experts proposed an alternative test for Art. 12A in the Commentary to the UN Model.[21] Under this alternative, a country will be entitled to levy a withholding tax generally on any payment in consideration for any service (fees for services) instead of on FTS paid by its resident or by a non-resident with a P.E. or fixed base located in that country to a resident of the other Contracting State if the fees arise in the first country.[22] No withholding tax should be levied for services furnished by a non-resident in a digital form without any physical presence in the country of the recipient of the service (Goede 2023, 16). However, in the alternative version of Art. 12A § 5, fees for services are deemed to arise in a country if: 1) the services are provided in that country or 2) the services are provided outside that country by a person who is closely related to the payer of the fees within the meaning of Art. 12A § 6 of the UN Model. Following the UN Model Commentary, the alternative provision would eliminate any disputes about whether the relevant services fall into the scope of FTS definition or not, because it will apply to fees for any service except those *expressis verbis* listed in Art. 12A § 3 of the UN Model, e.g. payment is made to an employee of the person making the payment, or for teaching in an educational institution or for teaching by an educational institution, and by an individual for services for the personal use of an individual. Under the alternative provision, the source state is entitled to levy a tax on fees for services rendered outside that state if the services are provided by persons closely related to the payer.[23] Although the alternative text for Art. 12A meets some challenges related to cross-border digital services, but not comprehensively. Still, fees for services of a purely digital nature provided by non-resident third parties are not covered by the alternative version of Art. 12A (Goede 2023, 16). Therefore, it is difficult to expect that Art. 12A in its version adopted in the UN Model or its alternative will contribute to the harmonisation of treaty practice in this area.

Also, the definition of ADS regulated in Art. 12B § 5 is exhaustive. The term "ADS" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider. Moreover, § 6 of Art. 12B lists examples of services that will often constitute ADS.[24] It includes: 1) online advertising services, 2) supply of user data, 3) online search engines, 4) online intermediation platform services, 5) social media platforms, 6) digital content services, as well as 7) online gaming,

[21] Commentary on Article 12A, paras. 26–31, op. cit., pp. 397–400.

[22] Ibidem, pp. 398–399.

[23] Ibidem, p. 399.

[24] Commentary on Article 12B, para. 52, op. cit., p. 454.

8) cloud computing services, and 9) standardized online teaching services. The Commentary to the UN Model explicitly emphasizes that the above-mentioned list of activities that might be qualified as ADS is only of an indicative nature.[25] The requirements set in the in Art. 12B § 5 must be met each time. An important indicator whether an activity, even if listed in Art. 12B § 6, falls into the concept of ADS is a minimal human involvement from the service provider. Therefore, according to the Commentary to the UN Model, the following services rendered digitally are not considered to be automated: 1) customized professional services, 2) customized online teaching services, 3) services providing access to the Internet or to another electronic network, 4) online sale of goods and services other than automated digital services, and 5) revenue from the sale of a physical good, irrespective of network connectivity ("internet of things").[26]

Moreover, some members of the UN Committee of Experts had concerns about the increase of the administrative burdens of Art. 12B application, especially in developing countries, related to small payments and payments by individuals acquiring services for personal use.[27] The majority of them were of the view that payments by individuals for ADS for personal use should be excluded from the definition of the ADS, as it is in case of FTS. In response to this, the Contracting States are suggested – according to the Commentary to the UN Model – to add the following Commentary to the UN Model, including the following phrase "income from automated digital services" into the general definition of the ADS in their DTC wherein "automated digital services" does not include payments made by an individual for services for the personal use of said individual.[28] This could to a certain degree minimize some of the overlapping of semantic ranges of the UN Model's concepts of FTS and ADS.

There is conviction in the literature that Art. 12B of the UN Model will play a complementary function to Art. 12A and its impact on countries tax treaty practice will be rather limited (Orzechowski-Zöller 2024, 139).[29] It is due to the fact that the ADS' definition focuses on non-customized, standardized and routine services involving minimal human involvement while Art. 12A of the UN Model applies to services demanding the application of specialized knowledge, skill or expertise which *per se* assumes a certain degree of human involvement in this process. Moreover, like Art. 12A, Art. 12B also met with justified criticism from both the members of the UN Committee of Experts and the representatives of international tax law doctrine. The majority members of the Committee of Experts claims, *inter alia*, that the term income from automated digital services: used in Art. 12B is not clear, including some terms and concepts used and relevant

[25] Commentary on Article 12B, para. 56, p. 456.

[26] Ibidem, para. 59, p. 462.

[27] Commentary on Article 12B, para. 14, op. cit., p. 439.

[28] Commentary on Article 12B, para. 65, op. cit., pp. 467–468.

[29] See also: Commentary on Article 12B, para. 59 (i) and (ii), op. cit., p. 462.

to the application of the net basis taxation option. Moreover, the gross basis of taxation of income from automated digital services even with the reliance on the profitability ratio for the multinational enterprises group can lead to excessive or even double taxation.[30] In summary, countries sharing these concerns expressed their view not to include Art. 12B in their DTCs.[31] The scholars stand that Art. 12B of the UN Model is not only unnecessary but also disrupting, due to the fact that it generates spillover effects on the interpretation of DTCs containing specific clauses for the taxation of services, exacerbates the qualification problems already raised by the restrictive interpretation of Article 12A contained in the Commentaries to the UN Model and generates asymmetries in the tax treatment of FTS and ADS (see: Báez Moreno 2012; Orzechowski-Zöller 2024, 59). Moreover, it cements different treatment for B2C services under Arts. 12A and 12B (Orzechowski-Zöller 2024, 59).

On the top of that, doubts are raised about the delimitation of the semantic substrate of technical services and ADS. As mentioned above, the UN Model's concept of FTS does not cover fees for services of a routine nature that do not involve the application of a specialized knowledge, skill or expertise, rendered both onsite and online. Needless to say, that certain types of digital services, including automatized ones, require the service provider to have such knowledge, skills and experience, e.g. at the stage of creating the digital content. Therefore, instead of solution more qualification disputes are to be expected.

4. CONCLUSIONS

The impact of the UN on the development of international tax law is recently growing.[32] The times when the OECD or the EU were the only international organizations setting the tone for the discourse on these matters are long gone. One of these areas is undoubtedly the elimination of double taxation of income from cross-border services.

The UN Model since its publication in 1980 contains several provisions dealing with taxation of cross-border services, including *service P.E. provision* in Art. 5(3)(b) and independent personal services provision in Art. 14(1)(a) and (b). Both rules are widely spread in tax treaty practice of mainly developing countries (Wijnen, Goede 2013, 120–122, 135–136. See also: Goede 2023, 11–12). Poland's tax treaty practice does not deviate from this trend (Kukulski 2015, 323–324, 336–337). The concept of *service* P.E. is based on physical presence requirement in the other Contracting State what makes it unsuitable in the digital era. Same,

[30] See: Commentary on Article 12B, paras. 12–15, op. cit., pp. 438–440.

[31] Ibidem, para. 16, p. 440.

[32] E.g. the UN Second Committee (Economic and Financial) resolution approving the Term of Reference for the Framework Convention on International Tax Cooperation adopted on 27 Nov. 2024, https://press.un.org/en/2024/gaef3614.doc.htm (accessed: 30.01.2025).

Art. 14(1)(a) and (b) of the UN Model allowing the source state to tax income from independent personal services to cases where there is a fixed base or after the 183-days threshold is met limits its usefulness in that area as well.

A tax treaty provision dealing with FTS was present in many countries' treaties practice – including Poland – a long time before Art. 12A was introduced to the UN Model. A separate model provision dealing with FTS solves most qualification conflicts discussed above with the concept of royalties as defined in Art. 12 § 2 of the OECD Model and respectively in Art. 12 § 3 of the UN Model and therefore should be assessed as a step forward. It does not change the fact that its legal construction, an especially restricted definition of FTS, is free from defects that may limit its applicability to tax challenges arising in the digital era. A more inclusive definition of such fees, e.g. covering remuneration for all kinds of services rendered, as proposed by the UN Committee of Experts in the Commentary to the UN Model, could be one of several possible solutions.[33] This approach seems to be rather revolutionary and therefore counterproductive.

2021 introduced a separate tax treaty provision dealing with income from ADS into the UN Model that faced – as quoted above – justified critique. Some authors even pointed out its high contentiousness and political sensitiveness for the OECD Member States as well as other members of the Inclusive Framework wishing to follow the so-called Two Pillar approach (Goede 2023, 17–18, 22–24). So far, Art. 12B of the UN Model is not present in countries tax treaty network. Therefore, it is highly unlikely that countries, especially the OECD Members, will accept it in their tax treaty practice.

BIBLIOGRAPHY

Báez Moreno, Andreas. 2012. "Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services." *World Tax Journal* 13(11). https://doi.org/10.59403/1nvpngc

Báez Moreno, Andreas. 2015. "The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?" *World Tax Journal* 7(3): 267–328. https://edisciplinas.usp.br/pluginfile.php/5503651/mod_resource/content/0/Andres%20Baez%20-%20wtj_2015_03_int_2.pdf (accessed: 10.01.2025).

Becker, Johannes. Joachim Englisch. 2018. "EU Digital Tax; A Populist and Flawed Proposal." *Kluwer International Tax Blog*. March 16, https://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/ (accessed: 27.01.2025).

Borders, Kane. Sofia Ballandares. Mane Barake. Enea Baseliga. 2023. "Digital Service Tax." *EU Tax Observatory*. June 2023, https://www.taxobservatory.eu/www-site/uploads/2023/06/EUTO_Digital-Service-Taxes_June2023.pdf (accessed: 26.01.2025).

Cracea, Andrei. Ed. 2018. *OECD Model Tax Convention on Income and Capital. Condensed Version and Key Features of Member Countries 2018*. Amsterdam: IBFD Publications.

[33] Commentary on Article 12A, para. 26, op. cit., pp. 397–398.

Goede, Jan de. 2023. "The 2017 and 2021 Model Tax Convention Updates and Their Impact on the Countries' Treaty Practice." *Kwartalnik Prawa Podatkowego* 4: 9–29. https://doi.org/10.18778/1509-877X.2023.04.01

Goede, Jan de. 2024. "Some Policy Reflections on Article 12B UN Model on Automated Digital Services. A Reasonable Alternative?" In *Challenges of Contemporary Tax Law. Jubilee Book Dedicated to Professor Włodzimierz Nykiel*. Vol. II. Edited by Ziemowit Kukulski, Małgorzata Sęk. 147–173. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Jamroży, Marcin. Filip Majdowski. 2022. "Permanent Establishment in Digital Business." *Studia Prawno-Ekonomiczne* 122: 9–35. https://doi.org/10.26485/SPE/2022/122/1

Kukulski, Ziemowit. 2015. *Konwencja Modelowa OECD i Konwencja Modelowa ONZ w polskiej praktyce traktatowej.* Warszawa: LEX a Wolters Kluwer business.

Kukulski, Ziemowit. 2017. "Klauzula nieruchomościowa w bilateralnych umowach podatkowych zawartych przez Polskę jako mechanizm zapobiegający międzynarodowemu unikaniu opodatkowania." In *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia.* Edited by Dominik Gajewski. 141–156. Warszawa: C.H.Beck.

Kukulski, Ziemowit. 2022. "Eliminacja podwójnego opodatkowania opłat za usługi techniczne w świetle art. 12A Konwencji Modelowej OECD – rozwiązanie problemu czy źródło nowych sporów interpretacyjnych." *Przegląd Prawa Publicznego* 4: 80–94.

Kukulski, Ziemowit. 2023a. "Aktualizacja Konwencji Modelowej ONZ i jej potencjalny wpływ na politykę traktatową państw." In *Księga Zjazdu Katedr i Zakładów Prawa Finansowego i Podatkowego „Misja prawa finansowego – wyzwania współczesności."* Edited by Elżbieta Feret, Paweł Majka. Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego.

Kukulski, Ziemowit. 2023b. "The Brazil-Poland Double Tax Convention in the Context of the Countries' Contemporary Tax Treaty Policy and Practice." *Kwartalnik Prawa Podatkowego* 4: 31–58. https://doi.org/10.18778/1509-877X.2023.04.02

Lipniewicz, Rafał. 2017. *Podatkowy zakład zagraniczny. Koncepcja i funkcjonowanie.* Warszawa: Wolters Kluwer.

Lipniewicz, Rafał. 2018. *Jurysdykcja podatkowa w cyberprzestrzeni.* Warszawa: Wolters Kluwer.

Litwińczuk, Hanna. 2020. *Międzynarodowe prawo podatkowe.* Warszawa: Wolters Kluwer.

Martin, Julie. 2018. "UN releases updated model tax treaty adding new technical services fees article", https://mnetax.com/un-releases-updated-model-tax-treaty-adding-new-technical-service-fees-article-27765 (accessed: 4.12.2025).

OECD. 2015. *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. https://doi.org/10.1787/9789264241046-en

OECD. 2017. *OECD Council approves the 2017 update to the OECD Model Tax Convention*, https://www.oecd.org/tax/treaties/oecd-approves-2017-update-model-tax-convention.htm (accessed: 26.01.2025). https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-un-updated-income-capital-model-tax-conventions.pdf (accessed: 26.01.2025).

Orzechowski-Zöller, David. 2024. *The Taxation of Fees for Technical Services on the Basis of Article 12A UN Model Convention.* Alphen aan den Rijn: Wolters Kluwer International BV.

Sęk, Malgorzata. 2023. "The Remuneration of Teachers and Researchers under Art 21 of the Brazil–Poland Double Taxation Convention of 2022 in the Light of the Polish Tax Treaty Practice." *Kwartalnik Prawa Podatkowego* 4: 87–103. https://doi.org/10.18778/1509-877X.2023.04.05

Wijnen, Wim. Jan de Goede. 2014. "The UN Model in Practice 1997–2013." *Bulletin for International Taxation* 68(3). https://doi.org/10.59403/1r99e4n

Wijnen, Wim. Jan de Goede. Andrea Alessi. 2012. "The Treatment of Services in Tax Treaties." *Bulletin for International Taxation* 66(1). https://doi.org/10.59403/2wm7nvs

Other sources

Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy – January 2020. https://www.oecd.org/en/about/news/announcements/2020/01/statement-by-the-oecd-g20-inclusive-framework-on-beps.html (accessed: 28.01.2025).

United Nations Model Double Taxation Convention between Developed and Developing Countries 2017 Update (2017). Department of Economic and Social Affairs, United Nations, New York. https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf (accessed: 4.12.2025).

United Nations Model Double Taxation Convention between Developed and Developing Countries 2021 Update (2021). Department of Economic and Social Affairs, United Nations, New York. https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed: 4.12.2024).

UN Second Committee (Economic and Financial) resolution approving the Term of Reference for the Framework Convention on International Tax Cooperation adopted on 27 Nov. 2024. https://press.un.org/en/2024/gaef3614.doc.htm (accessed: 30.01.2025).

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.05

*Stoycho Dulevski**

https://orcid.org/0009-0002-1334-0584

FROM ARTICLE 12B OF THE UN-MC TO ARTICLE 7 OF THE REGULATION 282/2011: BETWEEN AUTOMATON AND MINIMAL HUMAN INVOLVEMENT/INTERVENTION

Abstract. The current article draws a comparison between one of the necessary criteria both for the electronically-supplied services (ESS) under Article 7 of the Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down the implementing measures for the Directive 2006/112/EC on the common system of value added tax (Regulation 282/2011) as well as the automated digital services (ADS) under Article 12B of the United Nations Model Taxation Convention between Developed and Developing Countries (UN-MC). This is "minimal human involvement/intervention." The aim is to outline the similarities and the differences between the approaches for their design, as well as the possible challenges therewith.

Keywords: electronically-supplied services, automated digital services, minimal human involvement, minimal human intervention

OD ART. 12B UN-MC DO ART. 7 ROZPORZĄDZENIA 282/2011 – MIĘDZY AUTOMATEM A MINIMALNYM ZAANGAŻOWANIEM/INTERWENCJĄ CZŁOWIEKA

Streszczenie. Niniejszy artykuł przedstawia porównanie jednego z niezbędnych kryteriów zarówno dla usług świadczonych drogą elektroniczną (ESS) zgodnie z art. 7 rozporządzenia wykonawczego Rady (UE) nr 282/2011 z dnia 15 marca 2011 r. ustanawiającego środki wykonawcze do dyrektywy 2006/112/WE w sprawie wspólnego systemu podatku od wartości dodanej (rozporządzenie 282/2011), jak i dla zautomatyzowanych usług cyfrowych (ADS) zgodnie z art. 12B Modelowej Konwencji Narodów Zjednoczonych w sprawie opodatkowania krajów rozwiniętych i rozwijających się (UN-MC). Jest to „minimalne zaangażowanie/interwencja człowieka". Celem artykułu jest nakreślenie podobieństw i różnic w podejściach do jego projektowania, a także możliwych wyzwań z tym związanych.

Słowa kluczowe: usługi świadczone drogą elektroniczną, zautomatyzowane usługi cyfrowe, minimalne zaangażowanie człowieka, minimalna interwencja człowieka

* University of National and World Economy, Bulgaria; University of Picardy Jules Verne, France; sdulevski@unwe.bg

Received: 31.10.2024. Verified: 9.11.2024. Revised: 28.12.2024. Accepted: 16.01.2025.

1. ARTICLE 7 OF THE REGULATION 282/2011

The aim of this part of the paper is to briefly examine the history of the ESS in the VAT system. Special focus on the requirement for "minimal human intervention" will be made, as well as on its interpretation via soft law, case law, and the professional statements of the competent bodies. Also, more in-depth analysis of some of the examples because of its disputable nature that are (not) ESS will be carried out. The idea is to estimate whether Article 7 of the Regulation 282/2011 is unambiguously designed (both the general definition and the relevant examples) and gives a complete picture of this type of services.[1]

Annex L of the Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily the Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically-supplied services[2] may be estimated as an initial introduction for the ESS into the EU VAT system. It is in relation to Article 9(2)(e) of the Directive 77/388/EEC[3] by addition of this hypothesis. There is no explicit definition

[1] See the comparison between the relevant to the study analysis of Article 7 of the Regulation 282/2011, Article 12B of the UN-MC, and Article 3(5) of the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence as an appendix at the end of this paper.

[2] ANNEX L

ILLUSTRATIVE LIST OF ELECTRONICALLY-SUPPLIED SERVICES REFERRED TO IN ARTICLE 9(2)(e)

1. Website supply, web-hosting, distance maintenance of programmes and equipment.
2. Supply of software and updating thereof.
3. Supply of images, text, and information, and making databases available.
4. Supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific, and entertainment broadcasts and events.
5. Supply of distance teaching.

[3] The place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier shall be the place where the customer has established his/her business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he/she has his/her permanent address or usually resides:

- transfers and assignments of copyrights, patents, licences, trade marks, and similar rights,
- advertising services,
- services of consultants, engineers, consultancy bureaux, lawyers, accountants, and other similar services, as well as data processing and the supplying of information,
- obligations to refrain from pursuing or exercising, in whole or in part, a business activity or a right referred to in this point (e),
- banking, financial, and insurance transactions including reinsurance, with the exception of the hire of safes,
- the supply of staff,
- the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e).

and a non-exhaustive list of typical examples. Article 11(1) of the Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down the implementing measures for the Directive 77/388/EEC on the common system of value added tax (Regulation 1777/2005)[4] introduces the term 'ESS'. It is noteworthy that even then one of its main characteristics was "minimal human intervention." Article 11(2)[5] of this regulation contains a list of examples for ESS.

The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) includes these services in Article 56, l. "k" as a separate type with examples in Annex II[6] thereto. Compared with the previous directive, there is no definition, too.

Article 7(1) of the Regulation 282/2011, similarly to Article 11 of the Regulation 1777/2005, outlines the legal features of the ESS for the purposes of the VAT Directive. The two provisions are identical. Article 7(2) of the Regulation 282/2011 corresponds to Article 11(2) of the Regulation 1777/2005. The novelty in Article 7 of the Regulation 282/2011 is paragraph 3, which introduces examples that are out of the ESS' scope. It can be summarised that no

[4] 'Electronically-supplied services' as referred to in the 12th indent of Article 9(2)(e) of the Directive 77/388/EEC and in Annex L to the Directive 77/388/EEC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and in the absence of information technology is impossible to ensure.

[5] The following services, in particular, shall, where delivered over the Internet or an electronic network, be covered by paragraph 1:

(a) the supply of digitised products generally, including software and changes to or upgrades of software;
(b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;
(c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;
(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;
(e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather, or travel reports; playgrounds; website hosting; access to online debates, etc.);
(f) the services listed in Annex I.

[6] INDICATIVE LIST OF THE ELECTRONICALLY-SUPPLIED SERVICES REFERRED TO IN POINT (K) OF ARTICLE 56(1)

1. Website supply, web-hosting, distance maintenance of programmes and equipment.
2. Supply of software and updating thereof.
3. Supply of images, text, and information, and making available of databases.
4. Supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific, and entertainment broadcasts and events.
5. Supply of distance teaching.

significant textual change of the conceptual apparatus regarding these services has been noticed over the years. It is debatable whether this is an argument for the constant perception of their scope.

For the purposes of the current article, one of the ESS' criteria which is invariably present in the definition – namely "minimal human intervention" – will be analysed in details.[7] On the one hand, electronic services are usually associated with digitalisation and the lack of physical manifestations. On the other hand, the presence of people, according to the definition, is required without any additional guidelines.

The term in question contains the expression "minimal", which can give rise to different interpretations. For example, are some quantitative thresholds required for the people (e.g. at least 2 and more)? Are certain time criteria to be met (e.g. the completion of the work within a certain minimum time frame)? Can universal criteria be derived or is it dependent on the nature of the activity (e.g. given the differences in the industries)? Are there possible exceptions to the "minimum" (again based on the nature of the activity) and are there certain maximum limits (i.e. is the minimum the only limit)?

These are some of the inquiries that may arise during an initial careful reading of Article 7(1) of the Regulation 282/2011. The lack of detailed guidance on this mandatory for the ESS prerequisite leads the possibility of different views. This may also reflect to divergent practice.

Regarding the other two elements – i.e. "human" and "intervention" – no serious challenges are evident. "Human" should be construed according to its traditional understanding, indicating the need for human intervention. The same common interpretation's approach applies to "intervention."[8] It can be concluded that the idea is interaction between people and the automated provision of the service.

In its Working papers, the VAT Committee pays more detailed attention to the "minimal human intervention." The position on the direct connection between the term in question and the second criterion according to Article 7(1) of the Regulation 282/2011 has been expressed.[9]

Firstly, the VAT Committee outlines that "minimal human intervention" is relevant to the supplier.[10] Such view is logically supported, given that this person performs the supplies. At the same time, such clarification is not superfluous,

[7] For more details, see Merkx (2017).

[8] https://dictionary.cambridge.org/dictionary/english/intervention: "the act or fact of becoming involved intentionally in a difficult situation."

[9] The VAT Committee, WP No 843, taxud.c.1(2015)694775, p. 5: "the 2nd and 3rd elements of the definition are two sides of the same coin."

[10] The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, p. 5: "It is the activity of the supplier of the service that has to be assessed with a view to determine whether or not it involves human activity that exceeds the limit of minimal"; the VAT Committee, *WP No 896*, taxud.c.1(2016)922288, p. 3: "the involvement on the side of the supplier and not on the side of the customer"; the VAT Committee, *WP No 1013*, taxud.c.1(2021)2147591, p. 7: *WP No 919*, taxud.c.1(2017)1270284, p. 8: "When the services are provided with more than minimal human

since the recipient may also be qualified as a required party for the transaction. For example, without the VAT Committee's position, the understanding that at least two people should be available to fulfil the "minimal human intervention's" requirement for the supply may be shared.

Another essential aspect is the relationship between the supplier and the recipient.[11] This is directly related to the very nature of the service.[12] It is necessary to analyse to what extent a general approach to all recipients or a separate one to each individual is applied. In general, there will be "minimal human intervention" in the first case, while in the second one – no "minimal human intervention". The last hypothesis exceeds the notions of "minimal", since the rendering of the service takes into account the specific needs of the individual.

This approach provides guidance for its field of application. At the same time, it can hardly be universal for all such activities given their diversity. The same understanding is shared by the *Confédération Fiscale Européenne* (CFE).[13] However, no further proposals for the differentiation of the activities according to certain criteria have been made.

The introduction of different thresholds seems fairer at first sight, but also more difficult for implementation. Challenges may arise in their delineation. It is also not entirely clear whether this will provide greater legal certainty taking into account the constant dynamics of this type of activities.[14]

---

intervention on the side of the supplier they should be seen as intermediation services excluded from the scope of the electronically-supplied services."

[11] The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, p. 6: "The decisive element for these games to be qualified or not as an electronically-supplied service is (…) the level of interaction between that dealer and the players influencing individual supplies of services."

[12] The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, pp. 6–7: "The requirement of minimal human intervention is referring to the activity deployed by the supplier to provide each individual service when such a service is required by the customer (…) Only in cases where the action of the player leads to a reaction by the supplier in relation to an individual supply, the level of that human intervention should be analysed in order to determine whether or not the service can qualify as an electronically-supplied service"; the VAT Committee, *WP No 896*, taxud.c.1(2016)922288, pp. 5–6: "We should look at what the supplier is doing when providing a particular service and whether there is a requirement of human involvement for that service to be supplied to his customer. If yes, then there is more than minimal human intervention involved in the supply of such a service. (…) The requirement of minimal human intervention should be seen as referring to the activity deployed by the supplier to provide each individual service when such a service is requested by the customer."

[13] CFE, *Opinion Statement FC 9/2018 on the notion of "minimal human intervention" in the definition of "electronically-supplied services" for the purposes of Article 58 of the VAT Directive*, p. 3: "However, it cannot be ignored that this test may not necessarily be of universal application, and that it would not be reasonable to apply a one-size-fits-all approach."

[14] See Beretta (2022), where an analysis of the tax treatment of virtual activities was made.

The VAT Committee specifies that the actions of third parties are irrelevant to the determination of "minimal human intervention."[15] This is consistent with the understanding that this criterion applies to the supplier. The CFE generally follows such view, but also pays attention to some specifics in certain types of activities.[16] Outsourcing is indicated as such. The author of this article also shares this position. It is rational to apply the economic rather than the purely formal approach. An overly restrictive interpretation may reflect to abuse of law. In some scenarios, the use of subcontractors and other persons, different from the supplier, is a typical manifestation. Therefore, it is recommendable to rethink how much third parties should influence "minimal human intervention."

Working Paper No. 919 follows the previous views of the VAT Committee, further developing them through examples. In the majority thereof, it is again evident that it is important to the "minimal human intervention" whether there is an individual approach from the supplier to the recipient's requirements.[17]

Some of them can be defined as particularly relevant to the term in question. The author shares the position that the provision of non-standardised PDF-files via

[15] The VAT Committee, *WP No 882*, taxud.c.1(2015)4459580, p. 4: "In the case of betting activities, they usually refer to a sport event that can be performed by humans or animals (football games, tennis, horse races, greyhound races…). However, the fact that these events imply the activity of humans cannot lead to the conclusion that the betting activity is not an electronically-supplied service." The VAT Committee, *WP No 896*, taxud.c.1(2016)922288, p. 3: "Therefore the activity of a third party, to which services may in one way or the other relate (…) cannot be relevant for the assessment of the 'minimal human intervention' element of the supply of those services."

[16] CFE, *Opinion Statement FC 9/2018 on the notion of "minimal human intervention" in the definition of "electronically-supplied services" for the purposes of Article 58 of the VAT Directive*, p. 3: "To the extent that the outsourced component is labour-intensive and central to the supply of the service, then the fact that those activities are carried out by a 'third party' should not be relevant to the assessment of whether the service delivered to the customer is an electronically-supplied service or otherwise."

[17] The VAT Committee, *WP No 919*, pp. 4–7: "For these two packages the engagement on the side of the supplier should be seen as more than 'minimal human intervention' (i.e. services supplied via premium and professional packages should not be seen as electronically-supplied services). There is an additional human intervention on the side of the supplier in relation to each individual supply."; "Where digital products are personalised (adapted to the identified needs of an individual client as a result of his/her request), more than minimal human intervention is involved in their supply. Further where the supplier sends each product individually via e-mail the supply involves more than just 'minimal human intervention'."; "The assessment of the supply depends on the existence or not for a customer of the possibility to interact with persons making the presentations during the seminar. Where the customer can ask questions and receives feedback online during the seminar, the intervention on the side of the supplier is more than just minimal. However, where the customer can only watch the seminar without the possibility to interact in any other way the scope of 'minimal human intervention' is not exceeded. In this second case the seminar takes place at a given time regardless of the online presence of any customer."; "Every time where there is any individual human feedback provided by the supplier as a part of the concrete/particular supply, the scope of minimal human intervention is exceeded."

e-mails cannot be defined as minimal. Here, a query could arise regarding this type of files. For example, do they fall into this hypothesis with another extension? By literal interpretation of the example, the answer should be negative, because no others are included, or the expression "and others" is not added.

It is also reasonable that the understanding regarding the support itself in the case of functional problems meets the requirements of "minimal human intervention." However, could it not be entirely aimed at solving problems, but, for example, at updating and improving the system? Example 8 seems to answer this question affirmatively. According to the author, it is advisable to apply the same understanding. The reason is not as crucial as the intervention itself. If the opposite view is applied, i.e. that this goes beyond the notion of "minimal", then a series of practical difficulties may arise. Sometimes, it will be difficult to determine by mixed activities when one is talking about solving a problem and when about simple improvement.

The scenario when the maintenance is aimed at completing this system is also not covered. However, this cannot be defined as an omission, because the provision of the services in question is terminated in this case. It can also be construed as solving a problem.

A common hypothesis is regarding distance teaching and educational supplies. Here, attention has been paid to the cases where questions can be asked during an online event. Then one cannot talk about minimal human intervention. Rewatching a seminar leads to the opposite hypothesis. Of interest are the cases where questions are posed after the expiration of these supplies.

Example 7 goes some way to answering this question. As evident thereof, this goes beyond the original idea of these services and requires more significant human intervention. The author also shares the understanding that this should not count towards the original supply. On the one hand, this is not explicitly covered by the programme, since there may be no questions asked at all. At the same time, it is possible that they are also a significant number and, therefore, only a part of them can be answered. A more limited field of application is assigned to the hypothesis that it is answered only by software with preset algorithms (e.g. only with "yes" or "no"). However, even in the latter case, if this is not expressly specified in advance and included in the supplies, it rather exceeds them.

As already mentioned, it is difficult to find a universal solution due to the specifics of the activities. This is evident, for example, in online gambling activities.[18] Due to their nature, it is sometimes disputable whether they meet the requirements under Article 7(1) of the Regulation 282/2011. In this regard,

[18] "This leads to an interesting question what would be the classification of these games for VAT purposes? If the online game fulfils the elements of gambling but exceeds the minimal human intervention, does it mean that game is exempted from VAT since it is not considered as electronically-supplied service?" (Ahonen 2023, 21).

special attention is paid to them by the VAT Committee.[19] By similar factual circumstances, it is evident that there may be a significant difference in their tax treatment. Again, this depends on the "minimal human intervention", respectively, whether they are ESS.

According to the author, the evaluation of the human factor will become increasingly difficult in the future. With the advent of artificial intelligence (AI), there will be a number of trials in relation to "minimal human intervention." Sometimes, it will be challenging to estimate whether the responses will be standardised for everyone or whether they will vary according to the specific needs of the recipient and more precisely who/what decides about this – AI or the human being.

Regarding "minimal human intervention", the CFE also pays attention to the role of the preparatory/support functions.[20] Given the different manifestations of digitalisation, they can play a decisive role in some cases. Therefore, it is inappropriate that they not always satisfy the requirements under Article 7(1) of the Regulation 282/2011.

In its practice, the Court of Justice of the European Union (CJEU) has already had the opportunity to consider cases regarding ESS. The followed approach is a *verbatim* reference to the requirements of Article 7(1) of the Regulation 282/2011.[21] However, the CJEU does not provide additional guidance, including through the "minimal human intervention's" perspective. The absence of more detailed instructions does not contribute to the legal certainty.

The derivation of the ESS's prerequisites under Article 7 of the Regulation 282/2011 is rather construed by the soft law through the VAT Committee's Working Papers. The CJEU follows the provision without adding detailed arguments. Possible challenges are related to the differences in the activities, which in some cases are characterised by particular complexity. This is also due to the dynamics of this matter.

[19] See the VAT Committee, *WP 844 REV*, taxud.c.1(2015)1619349 and *WP No 882*, taxud.c.1(2015)4459580.

[20] CFE, *Opinion Statement FC 9/2018 on the notion of "minimal human intervention" in the definition of "electronically-supplied services" for the purposes of Article 58 of the VAT Directive*, p. 4: "In our view, preparatory/support functions refer to those functions which enable the technical infrastructure and the creation of the environment in which the electronic service is supplied."

[21] See CJEU's judgements in cases C-479/13, para. 36 and 39; C-502/13, para. 43 and 46.

2. ARTICLE 3(5) OF THE PROPOSAL FOR A COUNCIL DIRECTIVE LAYING DOWN RULES RELATING TO THE CORPORATE TAXATION OF A SIGNIFICANT DIGITAL PRESENCE

The aim of this part of the paper is to make comparison between ESS and digital services in the proposal in question as well as, more specifically, what the positive and the negative aspects of their identical wording are.

The proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence does not find realisation nowadays. It can be defined as one of the examples of finding a proper solution regarding the taxation of the digital economy.[22]

Article 3(5) thereof contains a definition for "digital services." By comparison with the text of Article 7(1) and (2) of the Regulation 282/2011, they are identitical. Moreover, despite the fact that the term is "digital services" instead of ESS, even the hypotheses are structurally and chronologically the same. It also contains the term "minimal human intervention."

Some may express concerns that this is a risky approach given the different legal nature of direct and indirect taxes. Therefore, the same text is no guarantee of their conceptual identity. It is also possible that they may have different practical manifestations.

According to the author, the identity of digital services in these two provisions is rather a positive approach, given their role and perception in society. Despite the specificity of direct and indirect taxes, deriving a universal concept of these services does not contradict the traditional postulates. On the contrary, the introduction of completely different definitions for them can create ambiguity regarding their legal nature.

Equality can take many forms. For example, it may be textual in nature, but with practical differences. It is possible to have different definitions, but the same tax treatment. Therefore, it is not possible to derive an unequivocal answer as to which approach is the most rational one.

According to the author, it is more essential to determine to what extent their theoretical perception brings clarity to the practical cases related to them. Taking into account the great dynamics of this type of activities, which undergo daily modifications, general views thereof seem to be the more recommended option.

Although the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence has no effect at the moment, it shows willingness for the unification of these services at the EU level. How feasible this is internationally remains an open question.

[22] See more on taxation of digital economy in, e.g., Mikhaylova-Goleminova, Tarkhova (2022, 71–78).

3. ARTICLE 12B OF THE UN-MC

The aim of this part of the paper is to analyse the relevant texts to ADS in the UN-MC and the significance of the soft law (2021 UN Commentary) for their interpretation. There is also comparison with other relevant provisions from direct and indirect taxes' perspective on this issue. First, differences and similarities with Article 7 of the Regulation 282/2011 are examined. Second, a parallel regarding the structure of the provision in question (Article 12B of the UN-MC) with Article 5 of the UN-MC is carried out. Third, there is a comparison with another type of services under Pillar 1 that are similar to this matter. Such multi-layered examination of the relationship between different relevant provisions may derive the best practices regarding the proper application of this type of services.

Article 12B of the UN-MC[23] can be defined as the relevant provision regarding such services from direct taxes' perspective at the international level. It was discussed at the 21st meeting of the UN Tax Committee[24] and subsequently analysed at the 22nd meeting of the UN Tax Committee.[25] Therefore, the provision in question is relatively new and has yet to have any effect on this matter.

Article 12B of the UN-MC consists of eleven paragraphs. For the purposes of this article, attention will be paid to three of them – Article 12B(5–7) of the UN-MC. By comparison with another provision – namely Article 5 of the UN-MC (the concept of "permanent establishment") – a similar approach in the structure of the concept is noticeable. Both Article 5(1) of the UN-MC and Article 12B(5) of the UN-MC start with a general rule outlining the necessary criteria. As is the case with Article 12B(6) of the UN-MC, Article 5(2) of the UN-MC provides a non-exhaustive list of typical examples of the concept. Respectively, Article 12B(7) of the UN-MC and Article 5(4) of the UN-MC examine the opposite hypothesis – the cases that fall outside the scope of the concepts. Therefore, the understanding that such approach is not new in the UN-MC can be shared.

Article 12B(5) of the UN-MC introduces the definition for ADS – "The term 'automated digital services' as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider." By comparison with Article 7(1) of the Regulation 282/2011, several things should be considered.

In the secondary EU law, the expression used regarding the services is "electronically", whereas in the UN-MC, it is "automated." The author does not consider that there is a serious conceptual difference between them.

---

[23] For more details, see Knotzer (2024).

[24] UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the 21st session*, 2021, pp. 18–21.

[25] UN, Committee of Experts on International Cooperation in Tax Matters, *Report on the 22nd session*, 2021, pp. 21–24.

There is also a noticeable difference in the name in one of the necessary prerequisites. In Article 7(1) of the Regulation 282/2011, it is "minimal human intervention", while in Article 12B(5) of the UN-MC, it is "minimal human involvement." The author is of the opinion that this difference is more of a lexical nature and does not have a significant effect on the perception of the concepts.

Here, following the same approach from the indirect taxes, challenges about the proper interpretation of "minimal" may arise. In this regard, it is intriguing to assess whether the same views under Article 7(1) of the Regulation 282/2011 for this criterion are applicable.

As already mentioned, the use of the expression "human" is associated with a physical intervention of the digital service. Regarding the expression "involvement", traditional perceptions should be applied, i.e. the idea of interaction between people and the performance of the service.[26]

Whereas, four necessary criteria are outlined in Article 7(1) of the Regulation 282/2011, there are two in Article 12B(5) of the UN-MC. The first prerequisite is textually and semantically identical in both provisions – the use of the Internet or an electronic network.

It is noteworthy that Article 12B(5) of the UN-MC contains clarification about the second term – "minimal human involvement." According to the text, it is in relation to the service provider. It corresponds to the logic outlined by the VAT Committee that this criterion is applicable for the supplier.

Differences between Article 7(2) of the Regulation 282/2011 and Article 12B(6) of the UN-MC regarding the list of examples that can be defined as such services are noticeable. By careful comparison, it can be stated that they are relatively similar.[27] This is another argument for the importance of the actual meaning rather than the textual structure.

Article 12B(7) of the UN-MC outlines which hypotheses cannot be defined as ADS.[28] These are the royalties according to Article 12 of the UN-MC and the fees for technical services according to Article 12A of the UN-MC. While in Article 7(3) of the Regulation 282/2011, the same approach with a list of examples as in paragraph 2 of the same provision is used, Article 12B(7) of the UN-MC is designed as delineation with other provisions of the UN-MC.

This can be defined as a more substantial structural difference. The outlined exceptions for ADS presuppose a correct interpretation of other provisions of the UN-MC. Only one paragraph is available on this hypothesis in the 2021 UN Commentary, which does not provide further details.[29] However,

---

[26] https://dictionary.cambridge.org/dictionary/english/involvement: "the act or process of taking part in something."

[27] For more details, see para. 58 to Art. 12B of the 2021 UN Commentary.

[28] For the purposes of the current study, not all of the exclusions will be analysed.

[29] Para. 66 to Art. 12B of the UN Commentary from 2021 that refers again to the provisions mentioned in the article in question.

the 2021 UN Commentary contains a list of examples that do not fall within the scope of ADS.[30] That is why a mixed approach is followed here. To sum up, the "positive catalogue" is placed in the provision, and the "negative" one – in the 2021 UN Commentary.

Regarding the scope of the activities, differences can be seen when compared to ADS outlined in OECD Pillar 1.[31] The latter include Consumer-Facing Business (CFB)[32] in their scope. Moreover, some of the exceptions laid down in Article 12B of the UN-MC can be construed as CFB (Chand 2021). Thus, according to Article 12B of the UN-MC, activities that have physical presence in the source state can fall outside the scope of ADS (Singhania et al. 2021, 11).

The proposal for Article 12B of the UN-MC is considered as a positive approach by some authors (Teijeiro 2020). However, there are also a number of challenges. There is no definition of "services" in the UN-MC, including the provision in question (Bendlinger, Mitlehner 2020, 516). The Regulation 282/2011 also does not contain it. Reference is made to the VAT Directive in significant part of the texts for the various types of services.

Article 23(1) of the VAT Directive derives a definition for "service." According thereto, everything that is not a good is a service. This view is also applicable to ESS under Article 7 of the Regulation 282/2011, taking into account their legal nature.

The author does not consider that having a definition in the UN-MC would lead to greater legal certainty. From the VAT point of view, it is broadly defined and can also create ambiguity in some cases. What is more important for the UN-MC is to make a proper distinction between the types of services so as not to create any conflict between them. This determines their separation into clearly outlined hypotheses.

According to Article 12B(5) of the UN-MC, there is no specific threshold that should be met for the presence of ADS. In general, there are two criteria – regarding the type of provided services and regarding the human factor (Aiftpho n.d., 2).

As with the indirect taxes, it is not entirely clear in which cases the human factor requirement is met (Báez 2021, 16, 18). An interesting hypothesis – the so-called "complex contracts" – is explored by Báez. These contracts include both ADS and other supplies outside their scope (Báez 2021, 20). Therefore, risks regarding their proper tax treatment may arise.

Báez also mentions challenges regarding the activities that may fall within the scope of Article 12, Article 12A, and Article 12B of the UN-MC. Teaching activities may serve as an example by making the comparison between

[30] Para. 59–60 to Art. 12B of the 2021 UN Commentary.

[31] For more details on the relationship between Art. 12B of the UN-MC and OECD Pillar 1, see Goede (2023, 19–22).

[32] See more detailed explanation in OECD (2020, 21–23; 2023).

Article 12A(3), l. "b" of the UN-MC[33] and Article 12B of the UN-MC (Báez 2021, 26). Thus, risks may arise under Article 12B of the UN-MC not only due to the diversity of activities, but also due to the possible conflict with other provisions of the UN-MC.

As under Article 12B(5) of the UN-MC, as well as in paragraph 53 to Article 12B of the 2021 UN Commentary, it is outlined that "minimal human intervention" applies only to the supplier. Another distinctive feature thereof is that it "focuses on the provision of services and therefore does not include human involvement in creating or supporting or maintaining the system needed for the provision of services." This is again identical to the perception with the VAT perspective. With such understanding, one can have the impression that the main activity is decisive.

The UN's understanding that "the provision of services to new users involves very limited human response to individual user requests/input" is intriguing. According to the author, it is not entirely clear what is meant by "new user." This leads to the possibility of using different criteria. It is possible that the user has multiple accounts that satisfy the conditions for new user. Also, the date of registration can be determined as a decisive factor. In this regard, the question whether it matters when the user is registered and when the service is used may arise. A valid response cannot be given by its use in the "individual user requests" expression.

It is also noteworthy that by the clarification of "minimal human intervention" in the 2021 UN Commentary, the expression "very limited" is used. This may give rise to discussions about its implementation. However, it is not specified that it is synonymous with "minimal." Its logical interpretation leads to a similar understanding. The lack of proper arguments and their explicit presence cannot provide a definite answer. If the understanding that there is difference between them is followed, the inquiry of what it consists of will also arise.

[33] Article 12A.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a mmanagerial, technical or consultancy nature, unless the payment is made for teaching in an educational institution or for teaching by an educational institution.

4. CONCLUSION

Both the legal nature and the clarifications regarding the list of examples of ESS and ADS in direct and indirect taxes are derived from soft law. In one case, these are the VAT Committee's Working Papers, and in the other – the 2021 UN Commentary. Due to the lack of another detailed guidance on this issue, these means of interpretation are of great importance. It should be noted that the VAT Committee's Working Papers and the 2021 UN Commentary are not legally-binding, so their application is not mandatory.

By comparison with the hypotheses outlined in Article 7 of the Regulation 282/2011 and Article 12B of the UN-MC, the following aspects are common.

Both provisions in question begin with a general rule that introduces their necessary prerequisites. Another paragraph contains a list of typical examples without further guidance.

The human factor appears as a necessary prerequisite of the common definition in Article 7 of the Regulation 282/2011 and Article 12B of the UN-MC. Its textual variation – namely "minimal human intervention/involvement" – does not reflect the theoretical perception. This view would be followed in practice.

"Minimal human intervention/involvement" is characterised by a number of challenges, some of which are addressed in the present article. They can be divided into several groups. The first one concerns its interaction with other necessary prerequisites for these services. The possibility of ambiguity in some cases also reflects the uncertainty towards the perceptions of the human factor. The second one is related to the activities themselves. It is difficult to cover all examples of ESS/ADS. It is even more challenging to outline general views about all possible hypotheses. This is directly related to the third aspect – the requirement for "minimal." Despite an illustration through relevant examples, it is still rather impossible to derive a definitive answer.

The author is of the opinion that, at this stage, the more appropriate option for ADS'/ESS' interpretation is soft law. From the VAT perspective, the CJEU does not provide detailed explanations and generally follows the provisions in question. As evident, it is also impossible to cover all cases, which may change their characteristics over the years. Therefore, the VAT Committee's regular Working Papers are a rational approach.

Through the international tax law's perspective, the 2021 UN Commentary is also the appropriate means of interpretation. Article 12B of the UN-MC is a relatively new provision that has no equivalent in the OECD-MC. Its actual effect is still debatable given the possibility of competition and even conflict with other provisions of the UN-MC. It is also not entirely clear what the practice of the states that follow this text will be. Therefore, adding new hypotheses to the 2021 UN Commentary seems to be the most recommendable opportunity for ADS' delineation. This approach is also applicable to other UN-MC's provisions.

It will be intriguing to see to what extent the good practices from Article 7 of the Regulation 282/2011 are applicable for Article 12B of the UN-MC. On the one hand, the first provision has more history and practice. Also, the services in question, including the examples, are of a similar legal nature. On the other hand, there are some differences regarding the scope of direct and indirect taxes. Divergent views of identical scenarios are more likely to negatively influence the ADS' perceptions. In this regard, the author finds the first position for the application of the good practices to be more appropriate.

Future trends can significantly modify this criterion, including its complete rethinking. According to the author, "minimal human intervention/involvement" will continue to play a significant role for ADS/ESS. Therefore, it is recommended to periodically examine the possible evolution thereof.

BIBLIOGRAPHY

Ahonen, Jaro. 2023. "VAT Treatment of online gambling services." Master Thesis. Lund University.

Aiftpho. n.d. "Taxing 'Automated Digital Services': Proposed Article In UN Model Double Taxation Convention." https://aiftponline.org/journal/2021/june-2021/taxing-automated-digital-services-proposed-article-in-un-model-double-taxation-convention/ (accessed: 25.07.2024).

Báez, Andrés. 2021. "Because not always B comes after A: Critical Reflections on the new Article 12B of the UN Model Tax Convention on Automated Digital Services." https://law.indiana.edu/instruction/indiana-leeds/assets/tax_il-baez-moreno_digital-economy.pdf (accessed: 25.07.2024). https://doi.org/10.2139/ssrn.3923508

Bendlinger, Stefan. 2020. "UN-Vorschlag zur Besteuerung von automatisierten digitalen Dinestleistungen." *SWI* 10: 510–520.

Beretta, Giorgio. 2022. "Virtual Activities: EU VAT's Effort to Recompose the Broken 'Unity of Action, Time and Place' – Part 1." *Kluwer International Tax Blog*, https://kluwertaxblog.com/2022/01/04/virtual-activities-eu-vats-effort-to-recompose-the-broken-unity-of-action-time-and-place-part-i/ (accessed: 25.07.2024).

CFE. 2018. "Opinion Statement FC 9/2018 on the notion of 'minimal human intervention' in the definition of 'electronically-supplied services' for the purposes of Article 58 of the VAT Directive." https://taxadviserseurope.org/new_ahgency/wp-content/uploads/2018/12/CFE-Opinion-Statement-on-minimum-human-interaction-with-ESS-Final.pdf (accessed: 25.07.2024).

Chand, Vikram. 2021. "The UN Proposal on Automated Digital Services: Is It in the Interest of Developing Countries?" *Kluwer International Tax Blog*, https://kluwertaxblog.com/2021/03/05/the-un-proposal-on-automated-digital-services-is-it-in-the-interest-of-developing-countries/ (accessed: 25.07.2024).

Dictionary Cambridge. 2024. "Intervention." https://dictionary.cambridge.org/dictionary/english (accessed: 25.07.2024).

Goede, Jan. 2023. "The 2017 and 2021 UN Model Tax Convention and Their Impact on the Countries' Treaty Practice." *Kwartalnik Prawa Podatkowego* 4: 9–29. https://doi.org/10.18778/1509-877X.2023.04.01

Knotzer, Christian. 2024. *Article 12B UN Model Convention 2021: The UN's Response to the Tax Challenges Arising From the Digitalization of the Economy.* Frederick: Kluwer Law International.

Merkx, Madeleine. 2017. "VAT and E-Services: When Human Intervention Is Minimal." *International VAT Monitor* 29(1). https://doi.org/10.59403/3snqasm

Mikhaylova-Goleminova, Savina. Yekaterina Tarkhova. 2022. "Izsledvaniya vŭrkhu sotsialnite i ikonomicheskite prekhodi." In *Yubileĭna konferentsiya, posvetena na 30-ata godishnina ot vŭzstanovyavaneto na Stopanskiya fakultet na Sofiĭskiya universitet "Sv. Kliment Okhridski."* Edited by Cvetan P. Davidkov et al. 71–78. Sofiya: Univ. izd. "Sv. Kliment Okhridski."

OECD. 2020. "Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS."

OECD. 2023. "Taxation Working Papers No 66, Update to the economic impact assessment of pillar one: OECD/G20 Base Erosion and Profit Shifting Project."

Singhania, Amit. Arjun Raghavendra. Sinha Himanshu. Meyyappan Nagappan. 2021. "Taxation of Digitalized Economy, Analysing the United Nations Article 12B Solution." https://space.levo.so/WGLBUT82/7124828796118077364.pdf (accessed: 25.07.2024).

Teijeiro, Guillermo. 2020. "Automated digital services – The UN Proposal at glance." *Kluwer International Tax Blog*, https://kluwertaxblog.com/2020/08/12/automated-digital-services-the-un-proposal-at-glance/ (accessed: 25.07.2024).

UN. 2021. "Committee of Experts on International Cooperation in Tax Matters. Report on the 21st session." https://digitallibrary.un.org/record/3898885?ln=es&v=pdf (accessed: 25.07.2024).

UN. 2022. Committee of Experts on International Cooperation in Tax Matters, Report on the 22nd session.

VAT Committee. 2015. WP No 843, taxud.c.1(2015)694775, https://circabc.europa.eu/sd/a/e346e09e-f06e-44cc-8f39-4334fb99c841/843%20-%20Scope%20of%20notion%20of%20electronically%20supplied%20services.pdf (accessed: 25.07.2024).

VAT Committee. 2015. WP No 844 REV, taxud.c.1(2015)1619349, https://circabc.europa.eu/sd/a/b13cdf24-cc55-4d91-b6b7-be169ffd0a9e/844%20REV%20-%20New%20Legisl%20Online%20gambling.pdf (accessed: 25.07.2024).

VAT Committee. 2015. WP No 882, taxud.c.1(2015)4459580, https://circabc.europa.eu/sd/a/d2dad701-4568-47c8-ba03-c5996822b59e/882%20-%20New%20 (accessed: 25.07.2024).

VAT Committee. 2016. WP No 896, taxud.c.1(2016)922288, https://circabc.europa.eu/sd/a/e263d4ea-78b8-426b-a548-e5d2d73ae4f6/896%20-%20Electronically%20supplied%20services;%20minimal%20human%20intervention.pdf (accessed: 25.07.2024).

VAT Committee. 2017. WP No 919, taxud.c.1(2017)1270284, https://circabc.europa.eu/sd/a/d3e89803-eecf-4b1a-87d2-2ccf342ee346/919%20-%20Minimal%20 (accessed: 25.07.2024).

Jurisprudence

Judgement of the Court of 5 March 2015, C-479/13, *European Commission v French Republic*, EU:C:2015:141.

Judgement of the Court of 5 March 2015, C-502/13, *European Commission v Grand Duchy of Luxembourg*, EU:C:2015:143.

APPENDIX 1

Similarities and differences between Art. 7 of the Regulation 282/2011, Art. 12B of the UN-MC, and Article 3 of the Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence

Article 7(1) of the Regulation 282/2011:	Article 12B(5) of the UN-MC:	Article 3(5) of the Proposal:
'Electronically-supplied services' as referred to in the Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.	The term "automated digital services" as used in this Article means any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider.	'Digital services' means services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology
Article 7(2) of the Regulation 282/2011: Paragraph 1 shall cover, in particular, the following: (a) the supply of digitised products generally, including software and changes to or upgrades of software; (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;	Article 12B(6) of the UN-MC: The term "automated digital services" includes especially: (a) online advertising services; (b) supply of user data; (c) online search engines; (d) online intermediation platform services; (e) social media platforms; (f) digital content services; (g) online gaming; (h) cloud computing services; and (i) standardised online teaching services.	Article 3(5) of the Proposal: including in particular (a) the supply of digitised products generally, including software and changes to or upgrades of software; (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage; (c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;

(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer; (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.); (f) the services listed in Annex I.		(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer; (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part, in other words packages going beyond mere internet access and including other elements such as content pages giving access to news, weather or travel reports, playgrounds, website hosting, access to online debates or any other similar elements; (f) the services listed in Annex II.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.06

Marciano Godoi[*]
https://orcid.org/0000-0002-9587-3917

Melody Furman[**]
https://orcid.org/0000-0002-3627-0710

THE BRAZILIAN REFORM OF TRANSFER PRICING RULES: COMPLYING WITH THE OECD'S STANDARDS

Abstract. The article analyses the international context that led to a broad reform of Brazilian domestic legislation on transfer pricing. The former Brazilian transfer pricing legislation (1996) lacked compliance with the comparability analysis and the arms' length principle. The new legislation, published in 2023, adopted the Organisation's for European Economic Cooperation (OECD) guidelines on the subject. One important issue that may arise from implementing the new rules and the comparability analysis in Brazil is the relative lack of databases on the subject.

Keywords: the Brazilian Tax Law Reform, Transfer Pricing Rules, Arms' length principle, OECD Guidelines

BRAZYLIJSKA REFORMA ZASAD DOTYCZĄCYCH CEN TRANSFEROWYCH – ZGODNOŚĆ ZE STANDARDAMI ORGANIZACJI EUROPEJSKIEJ WSPÓŁPRACY GOSPODARCZEJ

Streszczenie. Artykuł zawiera analizę kontekstu międzynarodowego, który doprowadził do szeroko zakrojonej reformy brazylijskiego ustawodawstwa krajowego w zakresie cen transferowych. Poprzednie brazylijskie przepisy dotyczące cen transferowych (1996) nie były zgodne z analizą porównywalności i zasadą ceny rynkowej. Opublikowane w 2023 roku. nowe przepisy przyjęły wytyczne Organizacji Europejskiej Współpracy Gospodarczej (OECD) w tym zakresie. Ważną kwestią, która może wiązać się z wdrożeniem nowych przepisów i analizy porównywalności w Brazylii, jest względny brak baz danych na ten temat.

Słowa kluczowe: brazylijska reforma prawa podatkowego, zasady dotyczące cen transferowych, zasada ceny rynkowej, wytyczne OECD

[*] Pontifical Catholic University of Minas Gerais (Brazil); m.godoi@rolim.com
[**] Statura Ltd UK; melodyfurman@hotmail.com

Received: 24.10.2024. Verified: 9.11.2024. Revised: 28.12.2024. Accepted: 16.01.2025.

1. INTRODUCTION

Issues related to digitalisation are one of most discussed topics within international taxation. The Organisation for European Economic Cooperation (OECD) has addressed such matters through the BEPS Action Plan, and profit allocation and nexus rules have been discussed in order to tackle how taxation can align with digitalised economy and how countries can address challenges that have emerged from digitalisation. Transfer pricing and the arm's length principle (ALP) play a key role in such discussions, since they tackle profit allocation when transactions are held between related parties.

In 1996, Brazil adopted their own framework for transfer pricing rules, which were not aligned with the OECD's Transfer Pricing (TP) Guidelines. In 2018, Brazil and the OECD launched a joint project to analyse and modify the Brazilian framework for transfer pricing rules, which resulted in a new legislation effective from 2024 (Federal Law no. 14.596/23).

This article aims to review Brazil's previous and current TP rules and to describe how the process of adapting Brazilian legislation to the standards recommended by the OECD was carried out.

2. THE PREVIOUS BRAZILIAN TP LEGISLATION AND THE OECD GUIDELINES

2.1. OECD and Brazil's Joint Project (2018–2019)

Internal studies by the Brazilian Tax Administration aimed at reforming transfer pricing legislation began in 2017, with the formation of a specific technical group to analyse the topic. In 2018, the joint OECD-Brazilian Tax Administration project began, with the declared objective being the analysis of the similarities and differences between Brazilian legislation and the OECD's standards on transfer pricing (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2023).

The joint project was concluded in 2019, with the publication of its final report. The main conclusions of that report were that Brazil's former TP rules, which remained practically unchanged since 1996, were not aligned with the OECD's guidelines, did not achieve ease regarding tax compliance, and raised concerns in terms of protecting the Brazilian tax base (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019).

It was not until 1995 that the Brazilian legislation introduced measures to tax worldwide income (Federal Law no. 9.249/95), as opposed to taxing only income raised within its jurisdiction. Soon after, transfer pricing rules were introduced by Federal Law no. 9430/1996. This legislation – which did not follow the OECD's Transfer Pricing Guidelines (Organisation for Economic Cooperation

and Development 2022) and was maintained until 2023 – aimed to impose objective and simplified rules which, according to the joint work performed by the OECD and the RFB, seemed to have taken in regard the lack of information available on comparable uncontrolled transactions and profitability levels, limited administrative resources, and the costs and time involved in litigating transfer pricing cases (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019).

The joint project was divided into two work streams. The first one analysed differences and gaps between the Brazilian framework and the OECD's TP framework. The second one considered the effectiveness of Brazil's TP rules regarding the criteria of: (i) the prevention of BEPS risks; (ii) the prevention of double taxation; (iii) the ease of tax administration; (iv) the ease of tax compliance; and (v) tax certainty.

The goal of the joint project was to design a new Brazilian TP framework in order to (i) ensure the appropriate allocation of tax base which would include BEPS risks (including under-taxation and double non-taxation) as well as (ii) prevent double taxation.

The OECD and the Brazilian Tax Administration collected inputs from Brazilian taxpayers in their joint project, which was conducted through the application of tailored questionnaires. The inputs came from Brazilian-headquartered MNE groups and foreign-headquartered MNE groups with operations in Brazil, and from sixteen countries which trade with Brazil, fifteen of them being OECD members (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 62–69).

2.2. The Arm's Length Principle (ALP) and the comparability analysis

In order to comply with the ALP, as foreseen by the OECD's TP Guidelines and Art. 9(1) of the OECD MTC 2017 (Organisation for Economic Cooperation and Development 2017), it is fundamental to evaluate whether the conditions made or imposed in a commercial or financial relation between two related enterprises differ from the conditions which would have been made between independent enterprises. Such evaluation requires two main aspects: the first one is to delineate the commercial and financial relations between associated parties and the second one is to compare the conditions set out between related enterprises to the conditions which would have been established between independent enterprises in comparable circumstances (Andrus, Collier 2017, 101).

In order to verify if the transaction aligns with arm's length prices, the conditions set out by the controlled transaction are tested by one of the OECD's Guidelines methods, and the application of such methods is accompanied by a functional analysis of the factors involved in the particular situation, such as risks or asset allocation (Oats 2023, 314). The OECD sets out nine steps to perform the comparability analysis, five of them involving the delineation of the

commercial and financial relations and the remaining four of them addressing the selection and application of the TP methods (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 245).

Considering such process, it is important to highlight that the ALP is at core intertwined with the comparability analysis, since comparability is used both to select the most appropriate transfer pricing method (considering the circumstances of the case) and to apply the method in order to achieve the arm's length price.

Brazil's former TP legislation lacked compliance with the comparability analysis and the ALP. The legislation did not make any referrals to the ALP and the rules did not compare the conditions that relevant characteristics of the operation held between related parties to uncontrolled transactions.

2.3. The extent of TP rules

The extent of TP rules can be divided into personal (the extent of associated enterprises), material (transactions reached), and territorial (cross-border or also domestic operations) scopes.

The main differences between the OECD's framework and the Brazilian framework could be found in the material extent of the rules. According to the OECD's Guidelines, the rules should apply to any related-party transaction, such as a transfer of goods, assets, rights, or services. There are also specific provisions which deal with commodities, intangibles, intra-group services, financial, and others.

However, Brazil's former legislation had had a narrower scope and did not reach royalties and payments with regard to technical, scientific, administrative, or similar assistance. Also, it was a common practice for taxpayers in Brazil to make use of a broad interpretation of what could be held as a cost contribution/cost-sharing agreement (CCA) in order to argue that the operation does not involve profits/costs subject to TP rules. Although tax authorities had issued guidance on the matter, the OECD pointed to the need for a clearer legal framework to limit the CCA scope (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 561).

2.4. Methods

The OECD recommends that entities aim to find the most appropriate method for their particular case considering the nature of the transaction and foresee the possibility of applying other methods if the circumstances require so.

In contrast, Federal Law no. 9.430/1996 allowed taxpayers to freely choose a method regardless of whether it was the most appropriate one for a particular case (with the exception of commodities) and it was not possible to apply a different method than the one provided by the legislation.[1]

[1] See Article 18 and Article 19, paragraph 3 of Brazilian Federal Law no. 9.430/1996.

The OECD provides two broad categories of methods – the transaction-based method and the transactional profit method, which, as their respective nomenclatures imply, consider either comparable transactions or comparable profits, respectively. The transaction-based methods include the comparable uncontrolled price (CUP), resale price (RPM), and cost plus, and the profit-based methods include the transactional net margin (TNMM) and profit split.

In contrast, Brazil's former rules divided transfer pricing rules into imports and exports. All the methods provided by Brazil were transaction-based and there were no equivalent methods for TNMM and profit split. Reassembling the CUP, the following methods were included in the Brazilian legislation: Compared Independent Prices (used for imports), Exports Sales Price (used for exports), and Export Quotation Prices (used for commodities exports). Similar to RPM, the following methods were included in the Brazilian legislation: Resale Price Less Profit (used for imports), Wholesale Price Less Profit, and Retail Price at Destination Less Profit (both used for exports). Finally, reassembling the cost plus, the following methods were included in the Brazilian legislation: Production Cost More Profit (used for imports) and Production or Acquisition Cost More Profit (used for exports).

2.4.1. *CUP*

As for the methods *per se*, the closest methods to the OECD's standards were the ones which reassembled the CUP method. The CUP method compares the price charged for an item in a controlled transaction with the price charged for the same or comparable item in an uncontrolled transaction, as long as they are held in comparable circumstances (Oats 2023, 326).

In the Brazilian legislation, Compared Independent Prices (used for imports) and Exports Sales Price (used for exports) would perform a similar function, since they would determine the price on the basis of the weighted arithmetic average of identical or similar items in transactions carried out either on the domestic market or on foreign markets by the interested party itself or by third parties under similar payment conditions. For commodities, there were similar and mandatory methods which would establish a comparison with the daily average values of the quotation of goods or rights subject to public prices on internationally recognised commodity and futures exchanges. The main differences between CUP and Brazil's similar methods relied on the fact that the Brazilian methods would consider the average price/costs of the same items, focusing on the feature of the item itself (good, services, or rights),[2] but it did not take into account other trading factors which may influence the transaction, e.g. quality, commercial reputation, and others (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 191–214).

Furthermore, other Brazilian methods would foresee pre-fixed profit margins, which are detached from the comparability analysis.

[2] Commodity future contracts are considered by the legislation as "rights."

2.4.2. *RPM*

The OECD's RPM method tends to be used when the operation involves one company (Company A) selling to another (Company B), and the later making the final sale to the consumer with minimum processing or added value. Such method considers the price charged by Company B to the final consumer and deducts an appropriate gross margin, which should cover selling expenses and net profit. The difference between the final sale price and the gross margin should be the price charged by Company A to Company B. An industry average gross profit percentage might be applied or the gross margin can be obtained by comparison between independent suppliers (Oats 2023, 327).

The former Brazilian TP legislation provided Resale Price Less Profit as a similar method for imports. The taxpayer would initially verify the average net price of the sale and how much the imported items would represent in terms of the final sold product, which would then be reduced by a pre-fixed profit margin in order to verify if the costs exceeded reasonable amounts. The pre-fixed profit margins would be of 40, 30, or 20%, depending on the industrial sector of the enterprise.

The same rationale would be applied for export methods – Wholesale Price Less Profit and Retail Price at Destination Less Profit. By Wholesale Price Less Profit, an arithmetic average of the wholesale price of identical or similar goods in the country of destination under similar payment terms would be initially obtained, less taxes included in the price that are levied in the country of destination, but it would consider less a profit margin of 15%. Retail Price at Destination Less Profit would apply the same methodology, but would consider the average of the retail price rather than a profit margin of 30% (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 203).

2.4.3. *Cost Plus*

The cost plus method considers initially the costs incurred by the supplier of property or services in a controlled transaction. A mark-up, determined by reference to comparable uncontrolled transactions, is then added to these costs to consider an appropriate profit margin in the light of the performed functions and the market conditions. It is frequently used when semi-finished goods are sold between associated parties (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 184).

The former Brazilian TP legislation methods which reassembled cost plus were Production Cost More Profit (used for imports) and Production or Acquisition Cost More Profit (used for exports). Production Cost More Profit would consider the average production cost of identical or similar products, services, or rights in the country or jurisdiction where they were originally produced, increased by taxes paid in that jurisdiction and by a mandatory fixed profit margin of 20%. Production or Acquisition Cost More Profit would consider the acquisition

or production cost of exported goods, services, or rights, plus domestic taxes and contributions, plus a profit margin of 15% on the sum of costs, taxes, and contributions. Those methods would consider not only comparable transactions, but also pre-fixed profit margins, which represented the main issue of divergence between Brazil's and the OECD's transfer pricing rules. Such margins were supposedly based on industry practices, but, as pointed out in the joint report, there was no specification as to how these figures were reached and if they, in fact, reflected what would be expected from entities (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 198–212).

Whilst pre fixed margins can be practical and reduce compliance costs, they could also entail fairness and equity problems – as non-compliant with the principle of ability to pay – since they did not consider the specific circumstances of each contributor.

2.5. Safe harbours

Although the initial OECD's Guidelines from 1995 expressed a view against safe harbours, recent TP frameworks have recognised that such measures might contribute to enhance tax certainty and can be favourable both to tax administration and taxpayers. The OECD's Guidelines recommend that those safe harbours be directed at taxpayers and transactions which involve low transfer pricing risk, recognising that such rules could, for example, allow taxpayers to apply methods in a specific way, exempt some taxpayers or transactions from the TP rules, or relieve from burdensome compliance obligations (Organisation for Economic Cooperation and Development 2022).

In Brazil, the safe harbours provided by previous TP legislation could be and were used by taxpayers as a tax loophole, providing an opportunity for inappropriate tax planning and double non-taxation. The legislation used to foresee three main safe harbours, all of them applicable to exports: (i) taxpayers with export revenues of 5% or less of total revenue (in relation to both related and unrelated parties) were exempt from applying TP rules; (ii) if the export price represented at least 90% of the domestic market price, the adopted export price would be deemed acceptable; (iii) if exports to related parties generated a minimum 10% net profit margin, the transactional conditions would be deemed acceptable, except for taxpayers entering into outbound inter-company transactions whose net revenue from related parties represents more than 20% of the total outbound transaction net revenue (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 395).

Many issues were raised with regard to those questions. The first safe harbour did not distinguish different size of taxpayers, which meant that even huge companies would have been able to escape from TP rules if their exports had not been significant to their revenues. Also, a company could misprice their exports in order to fall under such safe harbours. The second safe harbour raised concerns in

terms of appropriateness, because it compared prices based on the domestic market with prices in foreign markets. The last safe harbour was applied both to significant MNE's and smaller companies, and could also lead to under-taxation, since the taxpayer only needed to justify the minimum of the 10% net profit margin.

As noticeable, those safe harbours were not in line with the OECD's standards, which direct safe harbours only to taxpayers and transactions involving low transfer pricing risk.

2.6. Corresponding adjustments and DTCs

In terms of avoiding and resolving transfer pricing disputes, a number of concerns were raised regarding former Brazilian TP rules. The first concern was due to the fact that Brazil had reserved their right not to insert Art. 9(2) in their DTC, which addresses the need for states to account for the adjustments made by other parties as a consequence of TP rules in order to avoid double taxation.[3]

When Art. 9(2) is not included in DTC, mutual agreement procedures provided by Art. 25 can be used. However, even though Brazil has included MAP provisions in most of their tax treaties and such procedure is domestically regulated, the OECD raised a time issue for applying the MAP procedure in Brazil. This is due to the fact that Brazil has stated the position that reliefs and refunds from mutual agreement procedures should be linked to time limits prescribed by domestic law – i.e. five years (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 376–382).

According to BEPS Plan Minimum standards and to Action 14, a DTC should either foresee that domestic time limits do not prevent the implementation of MAP and do not frustrate the objective of resolving cases, or should accept an alternative treaty provision that limits the time during which a Contracting State may make an adjustment pursuant to Art. 9(1) in order to avoid late adjustments and the impossibility of applying MAP to relieve double taxation. The Peer Review Report for Action 14 states that Brazil does not fully meet such BEPS Plan Minimum Standard and that the domestic time limits had caused MAP disputes not to be resolved in the past (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2019, 388).

[3] "Art. 9(2) OECD Model Convention: Where a Contracting State includes in the profits of an enterprise of that State – and taxes accordingly – profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other."

3. THE OVERVIEW OF BRAZILIAN NEW TRANSFER PRICING RULES

The final report of the already mentioned joint project between the OECD and the Brazilian Tax Administration was finalised and published at the end of 2019. In early 2022, the Brazilian Tax Administration formally announced that it would send a bill to the parliament to amend transfer pricing legislation with the aim of aligning it with the OECD's standards. However, this bill was not sent to the parliament for deliberation during the year 2022. At the end of the year 2022, on 28 December, the executive branch published Provisional Presidential Decree no. 1.152, provisionally establishing new rules on the subject.

After five months of parliamentary debate, and without any significant changes in relation to the rules of this Provisional Presidential Decree, a new law regarding transfer pricing rules was approved by parliament (Federal Law no. 14.596/2023).

Federal Law no. 14.596/2023 restates the arm's length principle (Art. 2) and delimitates the identification of commercial and financial relations which are relevant to TP rules, expressing that the comparability analysis must be used (Art. 5–9).

The new rules also align with personal, material, and territorial scope provided by the OECD's framework. The personal scope provided by the OECD should follow the conditions set out in Art. 9(1) of the OECD MTC, which includes enterprises participating directly or indirectly in the management, control, or capital of another enterprise of the other Contracting State, and Brazil's new rules consider all enterprises which participate in at least in 20% of another's capital (Art. 3 and 4).

The material scope now reaches intangibles (Art. 19–22 of Federal Law no. 14.596/2023), intra-group services (Art. 23), cost-sharing agreements (Art. 25), business restructures (Art. 26), financial operations, specifically addressing issues related to hybrid instruments (Art. 27–31), as well as other situations. Furthermore, the deduction of royalty payments was banned if they result in double non-taxation, such as when the same amount is held as deductible by the other related party or when the amount is not taxed in foreign jurisdiction (Art. 44).

The territorial scope of the new rules was limited to cross-border operations (Art. 1 of Federal Law no. 14.596/2023), although former domestic provisions were affected, such as ones which used to limit royal payments between the parties.

All of the OECD's methods were included in the new legislation and the taxpayer should choose one of them according to the most appropriate fit to their circumstances (Art. 5 of Federal Law no. 14.596/2023).

The previous safe harbours were eliminated, and the legislation now foresees that specific regulations can be further provided by tax authorities in order to simplify the application of the comparability analysis or the required documentation. Such regulations should also provide further guidance regarding transactions with intangibles, cost-sharing, business restructuring, financial and others special situations, and should provide means to assist taxpayers when the

available information upon the controlled or comparable transactions is limited (Art. 37 of Federal Law no. 14.596/2023).

These new rules also provide for the Advance Pricing Agreement procedure (Art. 38 of Federal Law no. 14.596/2023), allowing taxpayers to consult the best method and applicable comparable/prices with their operations. The consultancy response would be valid for a period of four years, subject to a postponement of extra two years. This procedure is similar to the regular tax consultation process implemented in Brazil, by which taxpayers can question tax authorities, and their response will be binding, unless tax authorities change their interpretations and notify the taxpayer of such change.

The new rules also reinforce the Mutual Agreement Procedure in Art. 39 of Federal Law no. 14.596/2023, but the mentioned time limit issue (five years) was not resolved.

Considering such changes and its alignment with the OECD's TP Guidelines, a question arises as to whether or not Brazil will start introducing Art. 9(2) into their DTC's in order to prevent double taxation arising from TP adjustments, and if the new rules will impact international commerce in a positive way, i.e. if foreign companies will be motivated to do business with Brazilian taxpayers, since the new rules are now in accordance with the OECD's standard.

One important issue that may arise from implementing the new rules and the comparability analysis in Brazil is the lack of databases. The OECD's Guidelines recognise that databases are usually developed by independent companies and rely on public available information presented in an electronic format suitable for searches and statistical analysis. However, in Brazil, no such database system has been made available yet and developers might find endurance considering that many companies are not obligated to publish their financial statements. In fact, only companies incorporated as "anonymous societies" (S.A.) need to publish their accounting statements according to Law 6.404/1976, but most companies in Brazil are incorporated as "limited companies" (LTDA) and do not need to disclose their accounting information.

An interesting tool could be developed by the Brazilian Tax Administration itself, since the federal authorities collect all financial data from companies' electronic accounting and fiscal systems (Digital Accounting Records and Digital Fiscal Records), and such databases could reduce both tax compliance burden from a taxpayer perspective and inspections costs from the perspective of tax authorities.

4. FINAL REMARKS

The movement of the Brazilian Executive Branch and Tax Administration, initiated in 2018, towards aligning itself with the OECD's standards on transfer pricing was interpreted as a clear sign of Brazil's interest in becoming a full

member of the OECD, joining Mexico (1994), Chile (2010), Colombia (2020), and Costa Rica (2021) in the restricted set of Latin American countries that are part of the organisation.

In January 2022, the Brazilian government announced that it had been invited by the 38 members of the OECD to "start the formal process of joining the organisation". At the time, the Brazilian government revealed that becoming a full member of the OECD was a "priority of its foreign policy".

The Provisional Presidential Decree that provisionally adopted new transfer pricing rules aligned with OECD's standards was adopted in the last days of President Bolsonaro's government, which ended on 31 December 2022. President Lula's government, which began in 2023, fully supported the approval by Congress of the new transfer pricing rules (Organisation for Economic Cooperation and Development, *Receita Federal do Brasil* 2023), but does not treat the country's accession to the OECD as a priority of its international policy.

BIBLIOGRAPHY

Andrus, Joseph. Richard Collier. 2017. *Transfer Pricing and the Arm's length Principle After BEPS*. Oxford: Oxford University Press.

Oats, Lynne. 2023. *Principles of International Taxation*. London: Bloomsbury Publishing. https://doi.org/10.5040/9781526526199

Organisation for Economic Cooperation and Development. 2017. *Model Tax Convention on Income and on Capital: Condensed Version 2017*. Paris: OECD Publishing.

Organisation for Economic Cooperation and Development. 2022. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Paris: OECD Publishing.

Organisation for Economic Cooperation and Development. *Receita Federal do Brasil*. 2019. *Towards Convergence with the OECD Standard*. Paris: OECD Publishing.

Organisation for Economic Cooperation and Development. *Receita Federal do Brasil*. 2023. *The New Transfer Pricing Framework*. Paris: OECD Publishing.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.07

*Dragoș Mihail Mănescu**
https://orcid.org/0009-0002-3954-3320

THE E-TRANSPORT SYSTEM FOR THE SHIPMENT OF GOODS IN ROMANIA AND POLAND: A MODERN FAUSTBUCH IN DIGITAL FISCAL REGULATION

Abstract. This paper aims to provide an overview of the e-Transport System through an ingenious analogy with the Faustian pact envisioned by Johann Wolfgang von Goethe in his tragedy *Faust*. Additionally, the paper conducts a comparative legal analysis between Romania and selected few other countries that have implemented a similar e-Transport system, with a particular focus on Poland. Moreover, the paper presents a diverse collection of industry examples, crafted to enrich the exploration of fiscal regulations while shedding light on evolving trends and pressing challenges encountered by lawmakers, businesses, and consumers alike. We target both the technological solutions through a holistic view of the industry as well as the regulatory layers of the fiscal system in the field.

Keywords: e-Transport, SENT System, tax evasion, VAT fraud

SYSTEM E-TRANSPORT DO PRZEWOZU TOWARÓW W RUMUNII I POLSCE. NOWOCZESNY FAUSTBUCH W CYFROWEJ REGULACJI FISKALNEJ

Streszczenie. Niniejszy artykuł ma na celu przedstawienie przeglądu systemu e-Transport poprzez pomysłową analogię do paktu faustowskiego, który Johann Wolfgang von Goethe przewidział w swojej tragedii *Faust*. Ponadto artykuł przeprowadza porównawczą analizę prawną między Rumunią a kilkoma innymi krajami, które wdrożyły podobny system e-Transport, ze szczególnym uwzględnieniem Polski. Ponadto artykuł gromadzi zróżnicowany zbiór przykładów branżowych, opracowanych w celu wzbogacenia eksploracji przepisów fiskalnych, a jednocześnie rzucających światło na ewoluujące trendy i pilne wyzwania napotykane przez prawodawców, przedsiębiorstwa i konsumentów. Skupiamy się zarówno na rozwiązaniach technologicznych poprzez holistyczne spojrzenie na branżę, jak i na regulacyjnych warstwach systemu fiskalnego w terenie.

Słowa kluczowe: e-Transport, System SENT, System Elektronicznego Nadzoru Transportu, unikanie opodatkowania, wyłudzenia podatku VAT

* Bucharest University of Economic Studies; dragos.manescu@drept.ase.ro

Received: 30.12.2024. Verified: 8.01.2025. Revised: 2.02.2025. Accepted: 26.02.2025.

PREAMBLE

In Johann Wolfgang von Goethe's tragedy *Faust*, the protagonist, in his quest for ultimate knowledge and power, makes a pact with Mephistopheles, selling his soul in exchange for transcending human limitations. Although initially it seems he achieves his desires, Faust ultimately faces loss and existential dilemmas, paying a steep price for absolute knowledge. This choice symbolizes the hidden dangers of a "pact" made to attain one's goals but at a cost that cannot be fully anticipated; it may promise immediate benefits but it can also bring long-term costs.

In a modern economic context in which digitalization and efficiency are imperative, countries such as Romania and Poland, and several others, have adopted advanced technologies to combat tax evasion and enhance transparency in goods transportation through the implementation of digital monitoring systems – e-Transport in Romania as well as SENT [Pol. *System Elektronicznego Nadzoru Transportu*] in Poland. These systems promise efficiency and control but raise fundamental questions about the balance between fiscal transparency and economic freedom, as well as between oversight, bureaucracy, and a possible abuse of power from the authorities. Thus, this paper attempts to draw an analogy between these systems and the Faustian pact; states seek absolute knowledge and control over economic flows, but a price must be paid, namely economic and administrative costs, and, in some cases, restricted economic freedoms.

1. THE E-TRANSPORT SYSTEM IN ROMANIA – THE FISCAL FAUSTIAN PACT WITH TECHNOLOGY

One of the main pillars of the e-Transport system is tax transparency[1], a fundamental principle in national and European legislation. By monitoring transport in detail, tax authorities acquire a powerful tool for verifying commercial transactions and combating illegal practices. This legislative approach is supported by Romania's obligation to comply with European regulations on tackling tax evasion and cross-border fraud.

The e-Transport system is based on the legal framework for monitoring road transport of goods identified by the law as having a high fiscal risk.[2] These goods are classified as such due to their vulnerability to tax evasion during road

[1] Tax transparency is a legal principle aimed at preventing tax evasion by regulating the redistribution of income generated by intermediary entities registered in jurisdictions with a favourable tax regime so that they are allocated and subject to taxation directly to the final beneficiaries residing in states with higher taxation, as if the said income had been obtained directly by them.

[2] The Order no. 802 of 29 April 2022, regarding the determination of goods with high fiscal risk transported by road that are subject to monitoring through the RO e-Transport System of the National Agency for Fiscal Administration.

transport. The system integrates with other platforms, such as RO e-Factura, and customs systems to enhance monitoring.

Under the current legislation, economic operators are required to input transport-related data[3] into an electronic platform managed by tax authorities. This platform serves as a central tool for monitoring and surveillance.

The system stems from the state's responsibility to ensure proper tax collection and prevent tax fraud, as outlined in the Fiscal Code and related legislation, both national and European. A similar idea has also been expressed by the famous tax law professor Philip Baker in his presentation[4] called "Taxation, taxpayers' rights and human rights", which concerned the states' obligation to ensure the correct collection of taxes and to prevent tax fraud in order to have resources for the development of the countries and to provide good-quality public services to their citizens.

However, these measures introduce procedural obligations that directly affect the rights and responsibilities of taxpayers, increasing compliance demands while reinforcing fiscal oversight.

2. SIMILAR E-TRANSPORT SYSTEMS FROM OTHER COUNTRIES

I believe it is important to point out that systems similar to RO e-Transport have been implemented by other states, with varying degrees of success. These systems are designed to align with international tax legislation and customs regulations, as well as to support the digitalisation of tax administrations. Without going into details, the following platforms and systems can be recalled:

- **Hungary** – EKAER (Electronic Public Road Trade Control System), since 2015.[5] It tracks goods transports that cross borders or are transported domestically, in order to prevent tax evasion. Transporters are required to record transport data in the system, including information about goods, weight, value, sender, and

[3] The sender and recipient, the name, characteristics, quantities, and the value of the goods, loading and unloading locations, as well as information about the transport means, including the system-generated UIT (Unique Transport Code).

[4] Philip Baker OBE is a barrister and KC practising from Field Court Tax Chambers. He specialises in international tax issues and undertakes corporate and private clients as well as government advisory work. He is the author of *Double Taxation Conventions* and *International Tax Law*, editor of the *International Tax Law Reports*, and joint editor of the *British Tax Review*. He is a member of many committees, including the Permanent Scientific Committee of the International Fiscal Association and the OECD Advisory Group on the Model Tax Convention.

[5] "EKAER Regulation" means the Electronic Trade and Transport Control System [Hun. *elektronikus közúti áruforgalom-ellenőrző rendszer*], mandatory in Hungary since January 2015, monitoring the traffic of goods on the territory of Hungary, but also goods transported on public roads between the Member States of the European Union.

recipient, but the system relies on pre-registration and electronic reporting and does not impose GPS tracking universally.[6]

Initially, EKAER covered all goods, similar to RO e-Transport, but later it focused on high-risk products, just like SENT. Sanctions include fines of up to 40% of the value of unreported or inaccurately declared goods.

- **Portugal** – *E-Fatura System*: Although it is not an exclusive transport monitoring system, Portugal uses it to track invoices issued within commercial transactions. The system also includes information about transported goods.
- **Italy** – *Sistema di Interscambio* (SdI): Italy is among the states that have opted, with regard to the control of administrative acts, for a system formed by jurisdictional administrative authorities, with well-defined powers (Lazăr 2011, 372). In this context, Italy has implemented a centralised electronic invoicing system that includes the traceability of transported goods based on fiscal documents and ensures the cross-checking of invoice data and goods flows. It became mandatory for B2B and B2G transactions.
- **Brazil** – NFe and CT-e System. Outside Europe, Brazil uses *Nota Fiscal Eletrônica* (NFe) and *Conhecimento de Transporte Eletrônico* (CT-e), which are two systems that monitor invoices and shipments in real time as well as collect data on the transport of goods, being integrated with customs and tax systems to ensure transparency.
- **the United States** – ACE (Automated Commercial Environment): This system is used to monitor international shipments and goods crossing borders. It is managed by US Customs and Border Protection (CBP) and aims to detect tax and customs fraud. Also, it manages import and export documentation and ensures that shipments comply with US regulations while it integrates data from multiple agencies (e.g. FDA, USDA, and the Department of Transportation) for comprehensive risk management and evaluation.

The above-mentioned systems are adapted to the needs of each country, so they present several important differences, but they have in common the use of digital technologies to monitor transport and economic transactions. However, their approaches vary, with some focusing directly on transport monitoring and others focusing on electronic invoicing.

Of course, there are other countries that have implemented some kind of digital reporting systems, but the great majority have focused on an electronic invoice system which allows real-time monitoring by tax authorities. Several examples include:

- Mexico – CFDI (Comprobante Fiscal Digital por Internet);
- Saudi Arabia – e-Invoicing System;

[6] The EKAER System – Hungarian Tax Authority (NAV).

- United Arab Emirates – e-Invoicing System;
- Singapore – e-Invoicing System;
- South Africa – e-Invoicing System.

These systems are part of a global trend towards digital tax administration, aiming to improve efficiency, reduce fraud, and enhance compliance through real-time monitoring and reporting. Romania (through e-Transport) and Poland (through SENT) align with this global trend, contributing to integration into the European fiscal ecosystem.

3. POLAND'S SENT SYSTEM – A SIMILAR APPROACH, BUT WITH STRICTER REGULATIONS

I have left out the Polish system, which deserves far more attention.

In Poland, the SENT system [Pol. *System Elektronicznego Nadzoru Transportu*] was implemented in 2017 to prevent tax fraud in sensitive areas such as fuel, alcohol, and other excise goods. Like Romania, Poland introduced this system to ensure full traceability of transport and combat tax evasion. This system is integrated with the European framework and helps tax authorities control trade in excise goods. Operators must register goods in an electronic platform managed by the Ministry of Finance.

The reporting requirement applies to both domestic and international companies, regardless of whether Poland serves as the destination or merely a transit point. However, an exception is made for transit shipments operating under the NCTS procedure. All goods must be declared digitally using the PUESC electronic platform.

The main regulations governing this system include, among others:

– the Act on the Monitoring of Road Transport of Goods enacted in 2017 – this Act establishes the legal framework for the monitoring of transport, defining the categories of goods subject to reporting as well as the obligations of operators;
– the specific regulations issued by the Ministry of Finance – these detail the technical and procedural requirements, such as the use of GPS devices for tracking transport.

The main features of the SENT system:

- **the obligation to use GPS devices** – one of the distinguishing features of the SENT system compared to e-Transport is that Poland imposes the mandatory use of GPS devices for all transports of excisable goods. Transporters are required to register in the SENT system and ensure the traceability of goods throughout the transport. This allows tax authorities to track transports in real time, providing more rigorous and transparent control.

- **the categories of goods covered** – unlike Romania, where e-Transport covers a wide range of goods with high tax risk, Poland has decided to focus specifically on excise goods, such as fuels, tobacco, and alcohol. This makes the system easier to manage, as there is a more clearly defined set of products that are monitored.
- **severe penalties** – Poland applies harsh penalties in case of non-complying with the SENT regulations. Non-compliance with the registration requirement or any violations will incur penalties of up to 45% of the goods' value, capped at 20,000 PLN (approximately 4,650 EUR). These penalties include the confiscation of transported goods, which is a penalty applied since the beginning also in Romania, although not in a balanced and coherent way, as well as the suspension of transport authorisations, which makes the risks of non-compliance much higher for economic operators.

The Polish SENT system may, therefore, seem more rigid and strict than the Romanian e-Transport system, but both are based on the same premise of digitalised fiscal control.

In the Faustian analogy, Poland, like Romania, has made a pact with technology, giving the state the power to track every movement of goods in detail. At the same time, the risks related to the loss of economic freedom of companies[7], which are now subject to more rigorous control and severe sanctions, should not be left outside the scope of concern of the authorities.

- In summary, I have tried to make a concise comparison between the Polish and Romanian systems, from which a series of conclusions and lessons can be drawn that can be integrated into the implementation process of the system in Romania. This is even more so since the Polish system is one that benefits from legislative evolution and adaptation to the requirements of the Polish market, including in terms of protecting Poland's road transport industry. Thus, the Polish Senate adopted, without amendments, a bill to modify the law on the posting of drivers in road haulage and introduce a faster registration requirement in the SENT system for non-EU transport companies. An increase in unfair competition from carriers

[7] For example, a small Polish distributor of high-value goods, such as alcohol or fuel, can struggle with the strict reporting deadlines and system failures in SENT. A minor technical error in reporting the transport details could result in disproportionate penalties, such as a fine of up to 46% of the goods' value. This significantly impacts financial stability and operational freedom, discouraging smaller businesses from competing with larger companies that can absorb such costs more easily. Similarly, in Romania, a transport company may face severe delays due to increased customs scrutiny under the eTransport system. This could cause delivery disruptions, contract breaches, and reputational damage, ultimately leading to market distortions where only well-capitalised companies can navigate the bureaucratic landscape, reducing competition and economic freedom.

beyond Poland's eastern border has led to the weakening of the domestic road transport sector, which is currently facing unprecedented challenges, according to the explanatory memorandum of the bill.[8] Moreover, starting from 1 January 2025, carriers from EU member states, Switzerland, or EFTA member states conducting road transport to or from a third country under a permit required by international agreements with Poland will need to notify the SENT register before entering Poland. They must obtain a reference number for each transport. The notification will include details such as the origin and destination countries, the foreign transport entity's information, and the vehicle registration numbers.

Similarities between the SENT System and e-Transport:[9]

- both systems are designed to reduce tax evasion, especially in vulnerable sectors;[10]
- reporting obligations – in both countries, transporters and economic operators must record transport data in a national electronic system;
- both SENT and e-Transport focus on goods with high tax risk, such as fuels, alcohol, and excise goods;
- both systems use digital technologies to track transport, in some cases including GPS devices.

Differences between SENT and e-Transport:

- SENT focuses on a well-defined set of excisable products, while RO e-Transport has a more extensive list of goods with fiscal risk, including agri-food products. In this regard, the Polish system is evolving. As an example, among the categories of goods covered by the system the following can be listed: fuels, alcohol, tobacco products, oils, chemicals such as solvents and thinners classified under CN code 3814, containing more than 70% by weight of petroleum oils, and, starting from February

[8] https://trans.info/en/poland-changes-to-the-goods-transport-control-system-sent-399837?utm_source

[9] https://www.pwc.pl/en/services/polish-sent-transport-monitoring.html?utm_source

[10] Case Scenario: Illegal Alcohol Production and Distribution:

A company operating in Romania and Poland sells and distributes alcoholic beverages. To maximise profits, they engage in tax evasion by misdeclaring shipments and selling products off the books.

Taxes Evaded:

Value-Added Tax (VAT) – the company issues fake invoices or operates in the shadow economy, selling alcohol without reporting VAT. This allows them to offer lower prices than that of competitors who comply with the law;

Excise Tax – since alcohol is subject to high excise duties, the company may underreport production volumes or smuggle liquor from lower-tax countries without paying the required excise tax;

Corporate Income Tax (CIT) – by understating revenue and inflating expenses, the company reduces its taxable profit, lowering or completely avoiding corporate income tax.

2022, waste in import and transit[11], in the meaning of the Waste Act. The obligation to report does not apply to the transport of goods covered by customs procedures and re-exportation.[12]

- In Poland, the SENT system requires the mandatory use of GPS devices for certain transports, providing more precise monitoring in real time. For this, a special GPS navigator is needed (the so-called external ZSL Geo Location Systems), or a GPS tracker, i.e. a device (a regular smartphone or a tablet) with the SENT GEO application installed, which serves to monitor the route of the transportation of goods.[13] In the SENT system, the following are monitored:
  - the transport and turnover of goods beginning on the territory of Poland and ending on the territory of Poland or outside the territory of Poland;
  - the carriage and turnover of goods beginning and ending outside the territory of Poland;
  - the transport of goods beginning and ending outside the territory of Poland and ending in the territory of Poland.[14]
- In Poland, the sanctions for violations in the SENT system are more drastic, including the confiscation of goods and the suspension of licences. In Romania, the sanctions include significant fines, but the approach is more flexible in the case of reporting errors.
- The SENT system is better integrated with other tax and customs regulations in Poland, offering increased interoperability with other European systems. The e-Transport system is still in the adaptation and optimisation phase for full integration.

Poland's experience with the SENT system can provide valuable lessons for optimising the e-Transport system in Romania:

- **the simplification of procedures** – SENT has demonstrated that providing clear guidelines and easy-to-use digital tools can increase voluntary compliance;
- **interoperability with other systems** – integrating e-Transport with other tax and customs platforms, including at the European level, can bring significant benefits;
- **the balancing of sanctions** – an approach that differentiates between intentional and unintentional mistakes can encourage compliance and reduce legal disputes.

[11] https://ekologistyka24.pl/en/the-sent-system-everything-you-need-to-know/?utm_source

[12] https://www.roedl.pl/en/good-to-know/good-to-know/law-and-tax-news/changes-in-the-sent-system?utm_source

[13] https://ganex-group.com/en/2020/02/26/what-is-sent-and-when-do-we-need-to-do-it/

[14] https://puesc.gov.pl/en/web/guest/uslugi/przewoz-towarow-objety-monitorowaniem-sent?utm_source

4. THE FAUSTIAN ANALOGY – A PACT WITH FISCAL CONTROL AND ECONOMIC FREEDOM

Both Romania and Poland have introduced digital systems to combat tax fraud, but these systems also impose certain trade-offs and costs on economic operators, similar to the "price" that Faust pays for knowledge and power.

a) Absolute knowledge

By implementing these digital systems, states gain total or quasi-total control over the flows of goods and economic movements, having real-time access to information essential for preventing tax evasion. This "absolute control" over the economy is an equivalent of Faust's desire to overcome human limits, i.e. to reach a supreme understanding, but it comes with significant risks to economic freedom and confidentiality in terms of trade flows and supply chains, as well as in terms of synergies specific to economic operators. Of course, for international traders, the addresses of suppliers and clients are valuable trade secrets. Mandatory entry of transportation data into the national electronic system could jeopardise the confidentiality of this information. At the same time, economic adaptability is limited, and the "pact" with tax authorities can result in overregulation. Moreover, the Romanian tax system, being a declarative system, has the consequence of conferring control prerogatives on the tax authorities, which are tasked with ensuring that persons subject to tax law fulfil their obligations (Lazăr 2023, 544). Improving the efficiency of tax authorities would be a better approach than burdening businesses with uncertain systems.

b) The loss of economic freedom

Another essential trade-off is the loss of the economic autonomy of economic operators. If the system is applied unevenly or abusively, Romanian companies could be disadvantaged compared to foreign ones, operating under more permissive conditions. In addition, arbitrary interpretations of the rules can create uncertainty, affecting the ability of companies to plan and operate efficiently. These regulations can also place a significant burden on small entrepreneurs who do not have the necessary resources to comply with the imposed requirements and may be required even to change some of their contracts with their business partners or with regard to the insurance contracts for the merchandise.[15] In the name of combating tax evasion, states impose their own complex digital regulations, which require significant investments in technological infrastructure and administrative resources. Just as Faust loses control over his own life, users of the system may perceive e-Transport as a mechanism that limits economic freedom and increases fiscal authoritarianism as well as state intervention in the

[15] See also Militaru (2024, 27).

economy, limiting the free market and competition. Finally, taking into account the fact that economic operators organise the transport of goods with values that can reach hundreds of thousands or even millions of lei, the application of a sanction that involves the confiscation of the undeclared value of these goods can have disastrous consequences on their activity.

c) The risk of the abuse of power

Another danger is the risk of abuse by tax authorities who, having access to extensive control over economic flows, could use the collected data in an abusive manner, which would further limit the freedoms of economic operators. This risk of abuse can be compared to the harmful effects of the Faustian pact, in which, in the end, the one who wants the ultimate power ends up paying for it with a much higher price than anticipated.

This risk can manifest itself through:

- **excessive bureaucracy and disproportionate penalties** – the obligation to report and obtain a reference number for each transport can create a complex bureaucratic framework, in which minor errors or unintentional delays could attract disproportionate penalties. This could be used as an instrument of pressure on companies, especially small and medium-sized ones, which have limited resources for compliance;
- **excessive surveillance and impact on confidentiality** – by requesting detailed data on goods, carriers, and routes, one creates a risk that this information will be used for purposes other than those officially declared. The authorities' extensive access to sensitive data can create an asymmetry of power, allowing public institutions to intervene arbitrarily or to favour certain economic operators;
- **the risk of corruption** – it can facilitate corrupt practices by favouring companies that agree to pay "informal taxes" to avoid detailed controls or sanctions. This situation would undermine the fairness and transparency objectives for which the system was created;
- **the lack of a clear appeal mechanism** – it is about the absence of effective and transparent mechanisms through which companies can appeal decisions considered abusive. This leaves economic operators vulnerable to unfair sanctions, without the possibility to defend their point of view.

5. LESSONS AND CONCLUSIONS

It is crucial to emphasise that the deployment of a system such as e-Transport or SENT must align with the principles of proportionality and predictability, as guaranteed by the EU law. Any implemented monitoring measures must be

substantiated, ensuring they do not disproportionately hinder the ability to conduct commercial activities or impose unwarranted obstacles on economic operators. At the same time, the following elements are crucial:

- **GPS surveillance** – Poland has demonstrated that the implementation of GPS for tracking transports can bring significant control over economic flows, but it also imposes considerable costs for companies that must comply with these regulations. Romania could assess the benefits of such a measure for high-risk transports;
- **regulatory clarity** – both Poland and Romania should continue to improve regulatory clarity and provide precise guidelines for economic operators. This will contribute to reducing uncertainties and increasing voluntary compliance, representing a real support in encouraging taxpayers towards this compliance. It is no less true that, since the entry into force of OUG no. 41/2022 until today, no less than seven legislative amendments have been enacted regarding the application of the e-Transport system, which is a fact likely to create instability and a lack of coherence;
- **an important legal challenge** – such as the need for a well-defined and easy-to-understand legislative framework. It is essential that legislation ensures that taxpayers can fulfil their obligations without difficulty and guarantee the fair application of the rules. In order to reduce the impact on the economy, measures such as simplifying procedures, granting adaptation periods for compliance, and creating efficient mechanisms to challenge the sanctions are strongly required;
- **the protection of the rights of economic operators** – it is essential that any monitoring system should protect the fundamental rights of economic operators and not impose excessive control on them that could lead to a limitation of competition and economic freedom;
- **data protection and confidentiality** – confidentiality must be adequately justified, particularly in relation to tax benefits. Digital monitoring and reporting fiscal systems entails the collection and processing of substantial volumes of sensitive commercial data, raising significant concerns regarding compliance with the General Data Protection Regulation (GDPR). In the absence of uniform legal provisions at the EU level, it is essential that national legislations provide explicit safeguards to ensure the protection of this data against misuse or unauthorised disclosure.

In conclusion, states seem to be choosing to implement modern digital transport monitoring and control systems, making a "pact" with technology and tax authorities to combat tax evasion. At the same time, these systems raise fundamental questions about the balance between fiscal security and economic freedom. Like Faust, who sold his soul for unlimited knowledge and power, but at a much higher price than he had imagined, states must be aware of the costs and risks of these measures, and find the balance between control and freedom, i.e.

between knowledge and the price paid for it in order not to produce fundamental losses in the long term.

Simultaneously, authorities must maintain an ongoing dialogue with the business community to foster the creation of a legislative framework that promotes both legal compliance and sustainable economic growth.

The role of accountability must not be forgotten; just as Faust had to answer for his choices, tax authorities have the responsibility to use technology ethically and fairly, avoiding its transformation into a coercive mechanism. As a result, it is necessary to consider simplifying processes and reducing the complexity of reporting obligations for taxpayers, especially SMEs[16], in parallel with organising information sessions for taxpayers to ensure efficient and fair implementation as well as to ensure that the work of tax control bodies or courts where sanctioning measures are challenged is not blocked, as happened in mid-2024 (Militaru 2024a, 25).

These efforts must be complemented by investments in information technology security and the establishment of robust internal procedures to safeguard the collected data and prevent its misuse. Just as Faust finds redemption only through deep reflection and by assuming his mistakes, both Romania and Poland can turn their specific systems into a success through an ethical, balanced, and future-oriented approach.

Although digitalised systems hold the potential to enhance transparency and mitigate tax fraud, their implementation necessitates a careful equilibrium between regulatory oversight and the protection of corporate rights. To mitigate the risk of the abuse of power, it is imperative to establish clear regulations, proportionate penalties, restricted access to data, and effective mechanisms for challenging decisions. Only through the adoption of these safeguards can the system fulfil its intended purpose without becoming a tool for undue pressure or arbitrary control.

The SENT and RO eTransport systems that formed the basis of this analysis require increased attention and, perhaps, an improvement, meaning that the legislator should consider (*de lege ferenda*):

- a possible elimination of the reporting obligation for external transports, since, most of the time, beneficiaries do not have control over the data necessary to obtain the UIT code (Romania). At the same time, INCOTERMS rules (e.g. DAP) establish that the seller organises and supports the transport, and the mentioned systems transfer unjustified responsibilities to the beneficiary. It is added that the implementation of the obligation to transmit vehicle positioning data via GPS represents a requirement that is difficult to apply for international transports;
- the simplification of reporting for partial and complex deliveries and the possibility of obtaining the unique transport identification code also based on the parcel AWB, instead of the registration number; reporting should be limited to national transport for grouped transports;

[16] See also Buliga (2023, 207–210).

- adding the introduction of a post-tax fiscal control remediation period for compliance with any mistakes and omissions that might occur in the daily business and that are without intent.[17]

BIBLIOGRAPHY

Anghel, Tanti. 2022. "Comentarii asupra modificărilor Codului de procedura fiscala, aprobate prin Ordonanta de Urgenta nr. 188/2022." *Revista Consultant fiscal* 77: 4–11.

Baker, Philip. 2024. "Taxation, taxpayers' rights and human rights." Paper presented at the International Conference Contemporary Challenges of Tax Law, Uniwersytet Łódzki, 16–17.12.2024.

Bufan, Radu. Mirela Violeta Buliga. Andreea Deli-Diaconescu. 2021. "Instituția suspendării inspecției fiscale, corelația dintre dreptul fiscal și dreptul comun." *Revista Română de Drept al Afacerilor* 6: 80–93.

Buliga, Mirela Violeta. 2023. "Noi modificări ale impozitului pe veniturile microîntreprinderilor." *Revista Curierul Fiscal* 5: 207–210.

Lazăr, Ioan. 2011. *Jurisdicții Administrative în materie financiară*. T. 10. Bucuresti: Universul Juridic.

Lazăr, Ioan. Bogdan Florea. 2023. *Dreptul finanțelor publice*. Vol. II. Bucuresti: C.K.Beck.

Militaru, Ioana Nely. 2024. "Considerații referitoare la încheierea contractului de asigurare prin mijloace electronice, la distanță și prin intermediary." *CECCAR Business Review* 9: 25–32.

Militaru, Ioana Nely. 2024a. "Contractul de furnizare." *CECCAR Business Review* 6: 23–29. https://doi.org/10.37945/cbr.2024.06.03

Legal Acts

Emergency Ordinance no. 41/2022 for the establishment of the National System for the monitoring of road transport of goods RO e-Transport and repealing art. XXVIII of Government Emergency Ordinance no. 130/2021 on some fiscal-budgetary measures, the extension of some deadlines, as well as for the amendment and completion of some normative acts.

Emergency Ordinance no. 188/2022 of December 28, 2022 amending and supplementing Law no. 207/2015 on the Fiscal Procedure Code and amending Government Emergency Ordinance no. 74/2013 on some measures for the improvement and reorganization of the activity of the National Agency for Fiscal Administration, as well as amending and supplementing some normative acts.

Emergency Ordinance no. 43 of April 30, 2024 for the amendment and completion of certain normative acts.

Emergency Ordinance no. 129/2024 on the amendment and completion of Government Emergency Ordinance no. 41/2022 for the establishment of the National System for the monitoring of road transport of goods RO e-Transport and repealing art. XXVIII of Government Emergency Ordinance no. 130/2021 on some fiscal-budgetary measures, the extension of some deadlines, as well as for the amendment and completion of some normative acts.

GEO no. 115/2023 regarding some fiscal and budgetary measures in the field of public expenditure, for fiscal consolidation, combating tax evasion, for amending and supplementing some normative acts, as well as for extending some deadlines.

Order no. 802 of April 29, 2022 on the establishment of high tax risk goods transported by road that are subject to monitoring through the RO e-Transport System of the National Agency for Fiscal Administration.

[17] See also Bufan, Buliga, Deli-Diaconescu (2021, 80–93).

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.08

COPE Member since 2018 JM13714

*Ewa Fabian**

https://orcid.org/0000-0003-3061-396X

READING THE COSTANZO OBLIGATION IN THE LIGHT OF THE PURE THEORY OF LAW

Abstract. In this article, I discuss the obligations of administrative authorities in European Union (EU) member states applying EU law from the perspective of some of the views presented by Hans Kelsen in his Pure Theory of Law. Reference is made particularly to the case of Fratelli Costanzo (Judgment of the Court of 22 June 1989, 103/88, Fratelli Costanzo SpA v Comune di Milano, ECLI:EU:C:1989:256). The judgment established a rule requiring national administrative authorities, in certain matters, to refuse the application of the provisions of national law which are incompatible with EU law (this rule is also known as the Costanzo Obligation). It is sometimes claimed, however, that administrative bodies are not expected to disregard the binding provisions of national law which are unambiguous in their content, and interpret them in a pro-EU manner, filling thus established gaps with domestic laws of their choosing. It is claimed that such interpretation may only be performed by the national judiciary but not by the administrative branch. In this article, I oppose this position, referring to the views expressed by Hans Kelsen, in three separate arguments. I present these arguments pointing out that the non-application of the principles of EU law by an administrative branch may deprive the applicant of the right to judicial protection.

Keywords: Hans Kelsen, pure theory of law, law of the European Union, public administration, access to court, monistic theory of international law, application of law

ANALIZA OBOWIĄZKU COSTANZO W ŚWIETLE CZYSTEJ TEORII PRAWA

Streszczenie. W artykule omówiono obowiązki organów administracji państw członkowskich Unii Europejskiej (UE) stosujących prawo UE – z perspektywy niektórych poglądów prezentowanych przez Hansa Kelsena w czystej teorii prawa. W szczególności odniesiono się do sprawy Fratelli Costanzo (Wyrok Trybunału z dnia 22 czerwca 1989 r., 103/88, Fratelli Costanzo SpA przeciwko Comune di Milano, ECLI:EU:C:1989:256). W wyroku wprowadzono zasadę zobowiązującą krajowe organy administracji do odmowy stosowania w określonych sprawach przepisów prawa krajowego jako niezgodnych z prawem unijnym (zasada ta znana jest również jako obowiązek Costanzo). Niekiedy jednak uznaje się, że od organów administracji nie można oczekiwać pominięcia obowiązujących przepisów prawa krajowego, które są jednoznaczne w swojej treści, i interpretowania ich

* Biblioteka Narodowa; kontakt@ewafabian.pl

Received: 31.12.2023. Verified: 15.02.2024. Revised: 7.01.2025. Accepted: 7.01.2025.

w sposób prounijny, i wypełnienia powstałych w ten sposób luk wybranym przez siebie prawem krajowym. Zgodnie z tym poglądem, takiej interpretacji może dokonać jedynie krajowy wymiar sprawiedliwości, a nie organ administracji. W artykule zajmuję stanowisko przeciwne, odwołując się w trzech odrębnych argumentach do poglądów Hansa Kelsena. Omawiam te argumenty wskazując jednocześnie, że niezastosowanie przez organ administracji zasad prawa Unii Europejskiej może pozbawić wnioskodawcę prawa do ochrony sądowej.

Słowa kluczowe: Hans Kelsen, czysta teoria prawa, prawo Unii Europejskiej, administracja publiczna, prawo do ochrony sądowej (prawo do sądu), monistyczna teoria prawa międzynarodowego, stosowanie prawa

1. INTRODUCTION

It can be argued that Hans Kelsen is most commonly known for his views on law and morality. The assumption may be, therefore, that discussing Kelsen or legal normativism inevitably leads to debates on ethics, which, though very important, at times provide little guidance in terms of practical application. The problem reflected in this article is related to the position of administrative authorities in EU member states. On the one hand, some may claim that it is not for the administrative body to decide how to apply general principles of EU law. Public sector bodies function on the basis of, and within the limits of, the law. Administrative authorities are at times discouraged from using sophisticated methods of interpretation. Judicial supervision may be viewed as a sufficient safeguard:

> Although it would not be justified to expect that the tax authorities would disregard the binding provisions of national law, which are unambiguous in their content, and interpret them in a pro-EU manner, either using the formula of legislative modification or following the *analogia legis* legal reasoning, it is still up to the administrative courts controlling the activities of public administration in terms of compliance with the law, including Community (EU) law, to examine the possibility and justification of carrying out such interpretation. Its result is the discovery of the existence of a gap in the law (...) which must be filled in a way that enables the implementation of the norms of Community (EU) law (...). (Judgment of the Polish Supreme Administrative Court – wyr. NSA 2.02.2017, II FSK 506/16, Legalis 1578653, translation my own – Author)

Even though the judgment quoted above was issued, in essence, in accordance with the spirit of EU law and with careful consideration of relevant judgments of the Court of Justice of the EU, there remains an argument that the application of the principles of EU law by the administrative branch is "not to be expected." On the other hand, the EU Court – previously known as the European Court of Justice, the ECJ, currently known as the Court of Justice of the EU, the CJEU – requires national administrative authorities to be proficient in applying the principles of EU law when dealing with EU law. Under the Costanzo Obligation, which is a rule formulated in EU case law, administrative authorities are required to apply the EU's direct effect principle. Administrative authorities are expected, at least by EU courts and institutions, to apply certain EU law

principles in the same way that domestic courts do. This means that they are deemed authorised to assess if their local laws are compliant with EU law, and, if they are not, whether to decide on the basis of other provisions or invoke general principles of EU law.

This matter of the application or non-application of EU laws may be of secondary importance in matters such as in the judgment quoted above. There, interested parties had access to an administrative court due to the subject matter of the case under domestic law. There are, however, matters where the application or non-application of EU laws by the administrative branch determines whether the matter may be reviewed by an administrative court, or not at all. In such matters, the application of EU law by an administrative official directly reflects on the access to court (the right to an effective remedy under the Charter of Fundamental Rights of the European Union). According to the spirit of EU law, as expressed in the judgments issued by the CJEU, if the domestic law directs matters involving EU law to a domestic procedure where access to courts is never granted, it is for the administrative body to establish that the domestic procedure is contrary to EU law. In order to make EU law fully effective, the administrative body should apply such domestic laws that will make it possible for the matter to be brought to a court at a later stage, if needed. If the official is not expected to apply EU laws, the individual applicant has no clear path to have their case reviewed by a court of law.

It can be argued that the application of the principles of EU law demands knowledge that can be obtained, generally speaking, either through clear instruction, which would pose practical and constitutional challenges, or through an analysis of a great amount of legal texts. For the legal tradition which is said to reject certain elements of Neo-Kantianism adapted by Kelsen in his legal theory, the application of EU law would require comparative interpretation in search of the substance of EU law in national regulations so as to make sense of open textuality of EU law and eliminate the carelessness of meaning (Zirk-Sadowski 2009, 59–60). In the light of that practical obstacle, opposition against the requirements of sophisticated legal reasoning becomes all the more understandable. The extent of the Costanzo Obligation is also debated among legal scholars (Verhoeven 2011). The relationship between the EU and EU member states is of a fundamental nature while also undergoing change and growth, both politically and in the field of law.

In this article, I oppose the view that the application of the principles of EU law by administrative authorities is not justified. I will present the relevant arguments with reference to some of the points contained in the works by Hans Kelsen. The focus is on three aspects of the problem, namely: 1) the matter of the choice between applying domestic law and EU law; 2) whether the law applied by the judicial branch is different from the law applied by the administrative branch; 3) the political nature of any such application of law. With any luck, the application of Kelsen's theory in an analysis of judgments issued by the CJEU will shed new light on the role of administrative authorities in the EU.

2. THE COSTANZO OBLIGATION

In general terms, the legal order of the EU rests upon a number of principles, relying, when invoked by the CJEU, mainly on the primary law of the EU, i.e. the founding treaties and general principles of EU law (Syrpis 2015, 1). The CJEU is also known to tie its reasoning to the pan-European law of fundamental rights, now set in the framework of the Charter of Fundamental Rights of the European Union – the EU Charter – on the basis of Article 6(1) of the Treaty on European Union (Paunio 2013, 31). The EU is a union of law; the main body of legal principles is assumed to be shared among all EU member states. It is understood that this shared legal tradition predates the existence of the European Communities. The CJEU invokes general principles of law and expects them to be applied when making sense of legal provisions in all kinds of cases, not only when the so-called "hard cases" are brought before the high courts. As far as the principles of law are concerned, references are also made to the European Convention of Human Rights, in particular Article 52(3) of the EU Charter (Paunio 2013, 31). Whatever their origin, the principles of EU law are taken into consideration and further elucidated in judgments issued by the CJEU. When making such references, the CJEU often refers to its "case law" and, within that, to certain general principles of interpretation:

> [i]n accordance with settled case-law, it is necessary, in interpreting a provision of Community law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (...) In addition, under a general principle of interpretation, a Community measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole. (Judgment of the Court (First Chamber) of 16 September 2010, C-149/10, Zoi Chatzi v Ypourgos Oikonomikon, ECLI:EU:C:2010:534, 42–43)

The level of discretion enjoyed by the CJEU is usually determined by a number of factors, which include the lack of clarity and imprecision of interpreted provisions, the level of conflict between "conclusions suggested by the applicable interpretative *topoi*", and indetermination in previous CJEU judgments (Beck 2012, 434).

The CJEU often deals with the issue of whether a national court of a EU member state should apply national law even if it is incompatible with EU law, or should it apply EU law and, if so, what conditions apply. Thus, the CJEU plays an important role in the shaping of the EU legal order at every level, not excluding the protection of individual rights in first-instance decisions; the reach of EU law should not be limited to national legislature and the high courts. The question remains whether the EU legal order can be described as hierarchical, heterarchical (Avbelj 2011), or a multi-central system with a *quoad usum* division (Łętowska 2005). One can observe that some legal issues are resolved only within the national legal system, while other matters, regulated by EU laws, are expected

to be resolved with reference to EU laws, including the primary law of the EU, and by laws based on EU laws, as far as reasonable. EU member states retain their procedural autonomy, but this is also limited by a set of principles, namely the principle of effectiveness and the principle of equivalence, often referred to as the *Rewe* or *Rewe-Comet* effectiveness formula (see Judgment of the Court of 16 December 1976, C-33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, ECLI:EU:C:1976:188; Judgment of the Court of 16 December 1976, C-45/76, Comet BV v Produktschap voor Siergewassen, ECLI:EU:C:1976:191; Widdershoven 2019). In an attempt to make laws of EU member states and their application as compatible with EU laws as possible, this expectation is not understood only as an obligation of national legislatures to enact new laws. Pointing to the duty of sincere cooperation, the CJEU goes beyond national legislation in a variety of ways, relying on the interpretation and application of law in each and every individual case decided by common courts, administrative courts, and – in accordance with the Costanzo Obligation – by national administrative bodies in every EU member state. The issue in question here is whether differences between the judicial power and the administrative branch have enough bearing to justify the disregarding of EU obligations with respect to the latter. For the sake of argument, it is assumed here that hypothetical national laws are irreconcilable with hypothetical EU laws to the point where an administrative authority deciding a case has to choose on its own initiative whether to apply EU laws or national laws. In certain cases, by applying EU law principles and rejecting an express provision of national law, an administrative body would choose a procedure which allows redress to court, thus facilitating access to court in a matter concerning EU laws. The analysis described in this article is, therefore, not limited to the Costanzo Obligation, but also takes into account the principle of judicial protection. When an administrative body decides on matters pertaining to EU law, their decision involves also the form that the act should take. By selecting a form which cannot be brought before a court of law nor an administrative court, they act as gatekeepers barring access to justice.

The main principle of EU law is the principle of primacy, set out in a number of groundbreaking CJEU judgments: Costa v ENEL (Judgment of the Court of 15 July 1964, 6–64, Flaminio Costa v E.N.E.L., ECLI:EU:C:1964:66), Internationale Handelsgesellschaft (Judgment of the Court of 17 December 1970, 11–70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114), Simmenthal (Judgment of the Court of 9 March 1978, 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA, ECLI:EU:C:1978:49) and IN.CO.GE (Judgment of the Court of 22 October 1998, Joined cases C-10/97 to C-22/97, Ministero delle Finanze v IN. CO.GE.'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A. Cecchini & C. Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing. Luigi Martini Srl, Giacomo Srl and Mafar Srl, ECLI:EU:C:1998:498). It establishes

a conflict rule which "imposes an obligation on all national authorities to «set aside conflicting national measures» and leave them inapplicable" (Claes 2015, 182). This rule does not affect the validity of national laws conflicting with EU law.

One can say, in such a situation, that there are two or more valid legal systems contemplated by a national authority in parallel. The application of EU law is often portrayed this way by the judiciary and even in academic works. After all, the entire theory of a multi-centric legal system is based upon this argument as it seeks to point out "which law" is to be applied in a given legal matter (Łętowska 2005). This divided view (i.e. on the one hand, the national law, and on the other, the EU law, or EU and international law) is, for practical reasons, a familiar starting point for the purposes of discussion. However, the problems one faces when required to choose one law over another shows why the monistic theory of international law provides a promising change of perspective. If an entire legal system is to be chosen over another, one can make a false assumption that there is an option to disregard an entire "body of law" as "alien" to national law, without any further distinction between principles and specific provisions. This view of the body of law is then simplified – "our law" as opposed to "international" or "community" law. This divided view also feeds arguments against the democratic legitimacy of EU law. Since there is a division between "our law" and community law coming from "the outside", democratic legitimacy of the latter is also debated. Scholars introduced the term of "functional legitimacy", which "arises from the (hoped-for) realisation of certain values" such as the common welfare (Bindreiter 2000, 9). An increase of democratic legitimacy in the EU could justify the process of supra-national decision-making (Bindreiter 2000, 297), thus solving the initial riddle of legal cohesion. However, it is not clear whether it could, in fact, change the way in which EU law is thought and written about in practice. It appears that the EU court attempted to make EU law "our law" of EU member states early on through a series of rules of interpretation and application of law, as can be seen in early judgments of the ECJ.

As a *sui generis* system, EU law is based upon the direct effect principle. The direct effect principle was established in 1963 in Van Gend & Loos (Judgment of the Court of 5 February 1963, 26–62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECLI:EU:C:1963:1). In Van Gend & Loos, Dutch revenue authorities applied expressly worded national rules on tariffs, while Van Gend & Loos relied upon the EEC Treaty. The *Tariefcommissie,* listed as a judicial branch, established that the matter at hand raised a question concerning the interpretation of the EEC Treaty. It then referred the matter to the CJEU (then the ECJ). The Court ruled that "according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect" (Van Gend & Loos, 13). Thus, the CJEU required that national authorities disregard national laws which were

incompatible with EU law. The principle was further explained and developed in subsequent judgments (Judgment of the Court of 21 June 1974, 2–74, Jean Reyners v Belgian State, ECLI:EU:C:1974:68; Judgment of the Court of 8 April 1976, 43–75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, ECLI:EU:C:1976:56 and in other cases). In the Reyners case, the CJEU reaffirmed, in the context of EU law, the rules commonly used by national authorities when applying international law, namely – the requirement that a provision must be sufficiently clear and precise to have direct effect (Reyners 2–74, *passim*). In this context, when discussing the direct effect from the academic perspective, Verhoeven invokes the term of "justiciability", which is a situation when "a norm which has direct effect is suitable for application by a court" (Verhoeven 2011, 21).

Then there is the important point of the language used by the CJEU. The notion of a kind of a EU common court was observed first between 1988 and 1990 (Wróbel 2010, 474). The CJEU ruled that "(...) a duty of sincere cooperation with the judicial authorities of the Member States, which are responsible for ensuring that Community law is applied and respected in the national legal system" (Order of the Court of 6 December 1990, 2/88 Imm, J.J. Zwartveld and Others, ECLI:EU:C:1990:440, 10). The notion was followed by phrases such as "ordinary courts of Community law" (Order of the President of the Court of First Instance of 22 December 1995, T-219/95 R, Marie-Thérèse Danielsson, Pierre Largenteau and Edwin Haoa v Commission of the European Communities, ECLI:EU:T:1995:219, 77) and "Community courts of general jurisdiction" (Judgment of the Court of First Instance of 10 July 1990, T-51/89, Tetra Pak Rausing SA v Commission of the European Communities, ECLI:EU:T:1990:41, 42). Since then, national courts have been regarded as the courts of that state and, in EU-related matters, as EU courts. The use of such phrases appears to make a difference, at least in the sense of the legal culture currently taking shape.

Around the same time, the CJEU interpreted the established principle of direct effect and the principle of primacy as requiring "national administrative authorities to set aside provisions of national law which are incompatible with EU law. When necessary, this may also imply the obligation to apply provisions of European law instead of the unapplied provisions of national law, if the disapplication leads to the emergence of a legal gap" (Verhoeven 2011, 10). This rule, known as the Costanzo Obligation, was expressed in the Fratelli Costanzo case (Costanzo 103/88), referred to earlier in the article. The rule was expressly confirmed in the Ciola case: "all administrative bodies, including decentralised authorities, are subject to that obligation as to primacy, and individuals may therefore rely on such a provision of Community law against them" (Judgment of the Court (Second Chamber) of 29 April 1999, C-224/97, Erich Ciola v Land Vorarlberg, ECLI:EU:C:1999:212, 30).

It was later confirmed that the Costanzo Obligation applies to tax authorities, decentralised authorities, constitutionally independent authorities, and even

authorities providing public health services (Verhoeven 2011, 9). It also "applies regardless of the question whether the Court of Justice has already established the incompatibility between rules of national law and rules of European law" (Verhoeven 2011, 286). This approach strongly supports EU integration, requiring all authorities of EU member states to read and interpret EU law in line with interpretations provided by the CJEU. Moreover, when analysing incompatibility with EU law, the CJEU invokes not only the context of interpretation as when law is applied by courts, but also legislation: "provisions of national law which conflict with such a provision of Community law may be legislative or administrative (see, to that effect, Case 158/80 Rewe v Hauptzollamt Kiel [1981] ECR 1805, paragraph 43)" (Ciola C-224/97, 31). Thus, the CJEU circumvents any theoretical arguments related to the double role of administrative authorities in the legal system, bearing in mind that administrative authorities are at times expressly delegated to create laws, if only to a limited extent.

In one of the judgments, the CJEU put forward a definition of a body required to follow the direct effect principle. It is

> a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon. (Judgment of the Court of 12 July 1990, C-188/89, A. Foster and others v British Gas plc, ECLI:EU:C:1990:313, 20)

In this approach, the CJEU expressed a view that any authority which is not a private individual and has "special powers" is under the obligation to respect the rights of individuals regulated by EU law.

The expectation that national administrative authorities apply EU laws has several justifications. One of them, as mentioned in the opening chapter, is linked to the access to court (the right to an effective remedy assessed in the light of the *Rewe* principles of equivalence and effectiveness as well as the EU principle of effective judicial protection (Widdershowen 2019)). It is possible to imagine a case where a national entity questions its authority to issue administrative decisions, acting on the basis of the provisions of domestic law. It then decides on EU law matters informally, finally, and prohibiting any review, barring the applicant from seeking judicial protection. A domestic court of law, believing itself to be a EU court or not, may refuse to hear the case on formal grounds, pointing out that, since there were no grounds to issue an administrative decision, there is no matter for an administrative review and, thus, no matter for a judicial review either.

A similar problem was described in the Judgment of the Court (Fourth Chamber), 17 September 2014, C-562/12, Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007–2013 Seirekomitee, ECLI:EU:C:2014:2229. In that judgment – pts 70, 71, and 75 – the CJEU explained and reminded that:

> It is therefore not possible for an applicant whose application for aid has been rejected to contest that rejection decision. (...) In those circumstances, the lack of any remedy against such a rejection decision deprives the applicant of its right to an effective remedy, in breach of Article 47 of the Charter. (...) the requirement for judicial review of any decision of a national authority constitutes a general principle of EU law. Pursuant to that principle, it is for the national courts to rule on the lawfulness of a disputed national measure and to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case. (see, to that effect, judgment in Oleificio Borelli v Commission, EU:C:1992:491, paragraphs 13 and 14)

In other words, "individuals are entitled to have access to the national courts if Union law confers rights on them ('*ubi Union jus, ibi national remedium*')" (Widdershowen 2019, 20).

3. A BREAKDOWN OF ARGUMENTS

The problems which arise when EU law is applied by the administrative branch in EU member states invite analysis in the light of some elements of Kelsenian Pure Theory of Law. In this article, I disagree with the view that an administrative body should not be allowed to apply principles of EU law and in so doing refuse to apply express provisions of domestic law. Such principles may, for instance, include the principles of effectiveness and equivalence setting the limits of procedural autonomy of EU member states – also known as the principle of effective judicial protection.

In the judgment quoted in the opening chapter, the administrative branch was said to be "not expected" to act in favour of EU law even if the meaning of the principles of EU law, as they are linked directly to the provisions of primary law of the EU, has already been elucidated by the CJEU and usually leaves little room for legal manoeuvre. That judiciary claim is based, I assume here, on certain preconceived ideas related to the understanding of law.

One of these preconceived premises is that an interpreter of law may choose between applying EU law and the domestic law in EU-law-related cases as if there were two "legal systems" operating in parallel to each other, concurrently binding but offering different norms when applied to the same legal matter. An administrative official is expected to apply the domestic law even knowing that, in doing so, they would act in breach of EU law. The official is to apply an express provision of the domestic law which is contrary to EU law. If there was an express EU law provision, the official would probably be allowed to apply it; the principles of law, however, are different in their nature. The official is not permitted to find an express provision of the domestic law inapplicable by reference to principles, since every act issued by public administration must invoke legal grounds which are deemed to be sufficiently clear. If an express provision of the domestic law is in breach of EU law, the domestic law must be amended

in the procedure provided for in the domestic law. Only when the domestic law is amended and the official has a clear provision of law to invoke as legal grounds, the official is allowed to act according to the spirit of EU law, but not before then. The official acts always on behalf of a sovereign state and not on behalf of the EU. The official must obey the domestic law; in other words, they need to choose the domestic law over EU law, despite the fact that, in cases involving EU law, all state officials are supposed to ensure that EU laws are effective and that the citizens are granted access to the courts in all EU-related matters. The reason for these "two legal systems" being concurrently in force and binding does not exactly lie in any lack of hierarchy between them. The difference recognised here is between express provisions of legal rules (such as the domestic rules of procedure or an express, directly applicable provision of EU law) and the (general) principles of law which may be perceived as less clear or less conclusive.

This viewpoint – which I oppose – can be analysed in the light of Kelsen's works despite the fact that his theory – namely the monistic constructions of international law – concerned international law. This is possible partly because Kelsen contemplated sovereignty in international law, which is a term still in frequent use, in politics and in legal studies. Arguments raised by Kelsen are very general and rather on the macro scale.

Secondly, the claim that an administrative body is not allowed to treat EU law as primary to the domestic law contains an idea that laws should be applied differently by the administrative branch and by the judiciary. There are areas, such as the interpretation of the principles of law, which are sophisticated, require deep understanding, and are, to a point, unpredictable. Relying on principles when refusing to apply provisions of the domestic law is similar to the interpretation of law performed by high courts – in particular, constitutional tribunals. It is generally assumed that only high courts make such judgements, or – at the very least – only the judiciary but not the administrative branch. This second side of the argument may result in a presumption that there are, in fact, "two laws" not only on the plane where EU law and the domestic law appear to compete with each other but also in relation to the branch applying it, distinguishing between the law applied by the administrative branch and the "more sophisticated" law applied by the judiciary. This distinction is often made without reference to any specific rules of procedure but solely on the basis that, if a matter involves the application of a legal principle instead of a specific provision of the domestic law, it is not for an administrative body to see that distinction and make the decision. At the same time, it is assumed that, in the same situation, a court of law would be allowed or even expected to make such a choice.

The third, additional facet of the argument is the question whether the application of EU law in accordance with the principles of EU law, including its primacy and effectiveness, is a political act. This third point is brought on directly by the views of Hans Kelsen. It is obvious, though, that any choice expected to be made

between express provisions of the domestic law and the more general provisions of EU law or international law contains a strong political charge. One can try to avoid thinking about it, but it remains, obviously, at the bottom of the argument. Otherwise, discussions about sovereignty in that context would not really resonate.

4. THE FIRST ARGUMENT

When discussing the notion of sovereignty *vis-à-vis* international law, Hans Kelsen notes that, in reality, international law is addressed to individuals; the state is not a superhuman organism (Kelsen 1952 (1959), 100).

If international law imposes obligations and confers rights on the state to behave in a certain way, this means that it imposes obligations and confers rights on human beings, in their capacity as organ of the state, to behave in this way (Kelsen 1962 (1998), 526).

The main point of Kelsen's views on sovereignty is, however, that when the notion of sovereignty is used to oppose international law, it only betrays a political agenda. According to Kelsen, sovereignty is not a valid argument against the effectiveness of international law. Since both international law and domestic laws clearly exist, one needs to understand how they relate to each other. When one argues that a state is not a superhuman being that may be subject to rights and obligations, it is unsustainable – for Kelsen – to claim that there are two legal systems – i.e. international law and the domestic law – in effect and in force at the same time

> If one recognises that the imposition of obligations and the conferral of rights on the state by international law simply means that international law delegates powers to the state legal systems to specify the human beings whose behaviour makes up the content of these obligations and rights, then the dualistic construction of the relation between international law and state law collapses. (Kelsen 1962 (1998), 527)

Kelsen does not distinguish state from its legal system and from that perspective there is no real subject for discussion about the relationship between the state, its domestic law, and international law. Theoretical analysis may only concern the relationship between the domestic law and international law. In the monistic concept of international law, there are two ways of looking at the way they relate to each other, either from the perspective of the domestic law as enabling international law, or from the perspective of international law as enabling the domestic law. In both propositions, one law is contained within the other. Kelsen explains that it is impossible to determine which view is correct, as, from the theoretical perspective, both of them are (Kelsen 1962 (1998)).

Since there is an "epistemic unity" between international law and the domestic law, it could be ventured at this point that the domestic law should not be chosen in favour of international law as a whole, in any discriminatory matter, with the invocation of the notion of sovereignty. Yet, the problem

discussed in this article rests with the application of law and the hierarchy of norms inferred from their level of generality (express provisions of domestic laws confronted with the general principles of EU law). Kelsen discussed the practical possibility of a conflict between "an established norm of international law" and the domestic law, assuming that "the state organs are bound to apply national law, even if it is contrary to international law" (Kelsen 1952 (1959), 419–420). A system where the judiciary is empowered to disregard national law in such situations is possible (Kelsen 1952 (1959), 419; Kelsen 1942, 188). Yet, in the view supported by Kelsen, a lower norm may only be invalidated in a procedure leading to its invalidation (Kelsen 1952 (1959), 532). A solution to the problem of conflict between international law and the domestic law in the application of norms "cannot be deduced from the relation which is assumed to exist between international law and national law" (Kelsen 1952 (1959), 420). For Kelsen, the solution is the same as when a conflict arises between higher and lower norms within the domestic legal systems – in particular, with the constitution (Kelsen 1952 (1959), 421). A legal norm deemed contrary to a higher principle of law (be it international or domestic) has to go through the formal procedure of invalidation. The principles of international law enjoy no special treatment in this respect. Since both systems – international law and the domestic law – enable each other, their hierarchy cannot be established at the theoretical level.

At this point, it would appear that EU law is not compatible with Hans Kelsen's basic theory of international law. The order brought by EU law at the international law level – i.e. as far as the treaties are concerned – pierced the epistemic unity where international law and the domestic law described by Hans Kelsen enjoy similar treatment. Instead, the EU established a different system, agreed upon by EU member states. In EU-law-related matters, EU law is privileged; state organs are in some cases expected to disregard the provisions of the domestic law to make sure that the principles of EU law are effective. If state organs are usually not entitled to refuse the application of domestic norms on the grounds that they deem them unconstitutional, their powers in EU-law-related matters go further.

In EU member states, state organs need to treat EU law as if it were for them to decide whether their domestic law remains applicable in the light of EU law or not. Such is the legal system shaped by the CJEU in its judgments. Given this expectation, it is clear that EU law goes beyond the basic model described by Hans Kelsen in his theory of international law. However, Kelsen also stated that

> [p]ositive international law (...) sets no bounds on limiting state sovereignty, that is, the freedom of action or the authority of the state. An international treaty can create an international organisation so centralised that it has itself the character of a state, with the result that the states entering into the treaty and incorporated into the organisation lose their character as states. (Kelsen 1952 (1959), 533–534)

He also advocated for international tribunals and deemed them more necessary in the process of creating law than an international legislator "there can

be no legislator without a judge, even though there can very well be a judge without a legislator" (Kelsen 1943, 401). For these reasons, I assume here that, since international agreements come in all shapes and forms, there is a scale between a fully sovereign statehood and "states losing their character as states." On that scale, one can imagine an organisation where certain, but not all, legal matters are centralised. Since, for Kelsen, there is no real difference between the state and its laws (Widłak 2018, 60), if specified areas of regulation are transferred to the organisation, the state cedes, by agreement, a specified part of its sovereignty. From then on, it is no longer for the state to decide upon the shape of the legal system concerning the matters which had been ceded. The legal system, including not only the wording of specific provisions, but also the binding rules related to the interpretation and application of law, is transferred from the state to the organisation. Since accession to such an organisation was freely agreed upon, the state organs can indeed be deemed to apply laws pertaining to that organisation within a different legal environment than their domestic one. They were allowed to do so from the moment of accession to that organisation by their state. I would conclude that, under such circumstances, an analysis of the relationship between the state law and an external legal system, such as EU law, cannot be made by reference to any general theory of international law. Instead, it needs to be limited to international treaties that created the organisation in question. All acts issued by EU member state organs with reference to EU law need to be analysed in the light of the treaties and their interpretation, not in the light of the general theory of international law.

It is possible for a state to agree upon obligations leading to the creation of a federation or a similar organisation, placed, like the EU, somewhere halfway towards a federation. Such a state takes on the obligation to loyally cooperate under the treaty. The obligations of state organs should therefore be analysed in the light of the particularities of EU treaties and other acts comprising primary EU laws (in particular the EU Charter). The obligations of state organs to treat EU laws differently are rooted in the treaties, as they were ratified in EU member states. MacCormick refers to it as "a self-referential and independently valid legal order" based on the "*pacta sunt servanda*" norm (MacCormick 1997, 336, 337). The privileged manner in which EU laws are to be applied was, therefore, agreed upon by each EU member state and should be obeyed not because there is any intrinsic, theoretical supremacy of principles of international or EU law, but because such a shape of the EU legal system was agreed upon by each member state at the fully sovereign, international level. Sovereignty existing at the level of international law enabled EU member states to freely agree to join the EU. After that, each time EU laws are expected to take precedence over domestic laws without recourse to the procedure of invalidation, a reference is made to the principle of sincere cooperation. Since EU member states agreed to such a system of enforcement at the international level, state organs which

follow the rules and principles of EU law are not only loyally fulfilling promises made by their respective states but are, in fact, acting on the grounds of their domestic laws, in particular their constitutions and accession treaties.

What this means for the problem contemplated in this article is that it is not for the state courts to decide whether administrative bodies of that state are allowed to disregard domestic laws which are contrary to the principles of EU law. State courts of law are to ensure that EU laws are effective. Even when state courts act as EU courts, in their basic function when applying EU laws, they should avoid reshaping the EU legal system with the patterns they apply in purely domestic matters. As long as state administrative bodies are deemed permitted – and obligated – under EU laws and in judgments issued by the CJEU, to refuse to apply domestic laws contrary to EU law, they should be assumed to act within their rights when they do so.

5. THE SECOND ARGUMENT

The second preconceived idea analysed in this article is the difference – or lack thereof – between the law applied by the judicial branch and by the administrative branch. There may be situations where the same provisions of substantive law apply in cases decided upon by the administrative branch and by the judiciary. Most of all, the same general principles of law may apply when a case is decided by an administrative body and, when a case is adjudicated, by a court of law. No legal system can perfectly separate the two branches. The question here is whether an administrative body official enjoys the same discretion as a judge in the court of law when applying laws in matters related to EU law in the context of the Pure Theory of Law. One must agree that the administrative branch applies the same law but it does not hold the judicial power which is reserved for the judiciary. Public administration is generally linked to the executive branch and, within this sphere, can sometimes be granted powers to create laws. However, in Kelsen's Pure Theory of Law, creating laws takes place every time the law is applied; in the dynamic process of concretising norms, the application of a higher-ranking norm with the hierarchy of norms translates into the creation of a lower norm (Bernstorff 2015, 37).

In Kelsen's view, the application of law involves an act of will. Kelsen put strong emphasis on the element of volition: "[a]t the same time, it must be remembered, the activity of the judge is in no way exhausted by the act of recognition: this is only the forerunner of an act of will by which is to be set up the individual norm of the judicial sentence" (Kelsen 1934a, 480). There is a "degree of freedom granted to the judge by the dynamic idea of law-creation", which "allows the court to adjust the law to the current needs of society" (Bernstorff 2015, 41). Discretionary choice is, however, enjoyed not only by judges, but also by other officials, thus involving administrative bodies (Chiassoni 1995, 41;

Paulsson 2019, 209–211). Kelsen advocated for equal treatment of administration and the judiciary because of the judicial oversight of the administrative branch (Kelsen 1928a, 110; Techet 2024, 8). A legal norm functions as a scheme of interpretation (Kelsen 1967, 4); it does not dictate it, also as far as the method of interpretation is concerned. Kelsen refrained from prescribing any specific methods of interpretation (Chiassoni 1995, 47; Paulson 1990, 139; Bernstorff 2015, 39). As I understand it, this means that both branches – the judicial branch and the administrative branch – apply the law within the same theoretical framework. This theoretical framework and the application of law as an act of will describes all cases involving EU law – from the decision of an administrative official, through a judgment of a domestic court of law, to the judgments issued by the CJEU. It is important, however, as far as Kelsenian ideas are concerned, that one should assume judicial oversight of the administrative branch. This, again, shows how important it is to uphold a system where effective judicial protection is the primary rule which should take precedence over specific norms of the domestic law (without recourse to the procedures of invalidation).

6. THE THIRD ARGUMENT

The third argument which needs to be discussed in this article is whether the application of EU law in accordance with the principles of EU law, including its primacy and effectiveness, is a political act. For Hans Kelsen, since the application of law is an act of will, not of intellect, it should be presented as the creation of law (Paulsson 2019, 211). In the framework known as "the law *qua* politics", legislators, judges and administrative officials are all lawmakers and political actors. They are empowered to act and, according to Kelsen, they are authorised to act "for political reasons" (Paulsson 2019, 189). Making decisions on political grounds is, for Kelsen, "entirely appropriate" (Paulsson 2019, 189). He claimed that "there is only a quantitative, not a qualitative difference between the political character of legislation and that of the judiciary" (Kelsen 1931, 586; transl. Techet 2024, 11), since "every legal dispute is a political dispute" (Kelsen 1931, 587; transl. Techet 2024, 11).

If put this way, there is no room for separation between law and politics. For that reason, I must conclude that, in the light of the Pure Theory of Law, any decisions made by administrative officials in EU member states are political in nature. Acts of will involved in issuing administrative acts create legal norms and, as such, cannot be perceived merely as the "execution" of law. In reality, every time an administrative official issues any act concerning EU laws (or any other laws, for that matter), the reasoning behind the application or non-application of the domestic legal provisions or principles of law (EU law or any other law) may involve other concerns, such as ethics, morality, economic reasons, or politics. Thus, an official whose tasks involve,

for example, the allocation of EU funds or deciding on the petitioner's future access to a court of law in a EU matter, takes up a position on the membership in the EU of their member state every time they make a decision. I would add that such officials are not exempt from political responsibility by virtue of them not taking part in the legislative process. Maintaining the shape of the EU's legal system rests with all political actors participating in the application of EU laws, including the judiciary and the administrative branch.

* * *

To conclude, under the Costanzo Obligation, administrative officials are authorised to refuse to apply express provisions of the domestic law and apply other norms on the basis of the principles of EU law. When arguments against such obligations are voiced, they may be made on the premise that there are differences between the administrative branch and the judiciary. In the light of the Pure Theory of Law, however, there are no inherent differences between these branches as far as the application of law is concerned. What is more, the acts of the administrative branch can be perceived as political in nature. There remains the question whether an international organisation may impose upon its members an obligation to treat its laws in a different manner than their domestic laws. In a member state where lower-ranking norms are binding until the procedure of invalidation is carried out, a different approach would constitute a privileged position. I conclude, however, that such obligations are possible if agreed on at the international level. The obligations of the state officials to treat the "external" legal system differently would stem from the agreement entered into by that state based on the "*pacta sunt servanda*" norm. Acting in accordance with such obligations goes with the principle of sincere cooperation. General models concerning sovereignty and the relationship between international law and the domestic law no longer apply when the treaties of international law altered the relationship between the organisation and its member state by privileging external law in relation to its domestic law.

BIBLIOGRAPHY

Avbelj, Matej. 2011. "Supremacy or Primacy of EU Law-(Why) Does it Matter?" *European Law Journal* 17: 744–763. https://doi.org/10.1111/j.1468-0386.2011.00560.x

Beck, Gunnar. 2012. *The Legal Reasoning of the Court of Justice of the EU*. Oxford: Hart Publishing.

Bernstorff, Jochen von. 2015. "Hans Kelsen on judicial law-making by international courts and tribunals: theory of global judicial imperialism." *Law & Practice of International Courts and Tribunals* 14(1): 35–50. https://doi.org/10.1163/15718034-12341284

Bindreiter, Uta. 2000. *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine.* Lund: Springer.

Chiassoni, Pierluigi. 1995. "Varieties of judge-interpreters." In *Cognition and interpretation of law*. Edited by Letizia Gianformaggio Bastida, Stanley L. Paulson. 39–50. Torino: G. Giappichelli.

Claes, Monica. 2015. "The primacy of EU law in European and national law." In *The Oxford Handbook of European Union Law*. Edited by Damian Chalmers, Anthony Arnull. 178–211. Oxford: Oxford University Press.

Kelsen, Hans, 1928a. "Der Begriff des Kompetenzkonflikte nach geltendem österreichischen Recht." *Juristische Blätter* 57(6): 105–110.

Kelsen, Hans. 1931. "Wer soll der Hüter der Verfassung sein?" *Die Justiz* 6: 576–628.

Kelsen, Hans. 1934a. "Pure Theory of Law, The – Its Method and Fundamental Concepts." *Law Quarterly Review* 50(4): 474–498.

Kelsen, Hans. 1934b. "Zur Theorie der Interpretation." *Internationale Zeitschrift für Theorie des Rechts* 8: 9–17.

Kelsen, Hans. 1942. "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution." *The Journal of Politics* 4(2): 183–200. https://doi.org/10.2307/2125770

Kelsen, Hans. 1943. "Compulsory Adjudication of International Disputes." *The American Journal of International Law* 37(3): 397–406. https://doi.org/10.2307/2192721

Kelsen, Hans. 1945. *General Theory of Law and State*. Cambridge, MA: Harvard University Press.

Kelsen, Hans. 1952 (1959). *Principles of International Law*. New York: Rinehart & Company Inc.

Kelsen, Hans. 1962 (1998). "Sovereignty" (Souvernänität). In *Normativity and Norms. Critical Perspectives on Kelsenian Themes.* Edited by Stanley L. Paulson, Bonnie Litschewski-Paulson. Translated by Stanley L. Paulson, Bonnie Litschewski-Paulson. 525–536. Oxford: Clarendon Press.

Kelsen, Hans. 1967. *Pure theory of law.* Translated from the Second (Revised and Enlarged) German Edition by Max Knight. Berkeley: University of California Press. 2005 reprint by Clark, New York: The Lawbook Exchange.

Kelsen, Hans. 1973. "Law and Morality." In *Essays in Legal and Moral Philosophy. Synthese Library* 57: 83–94. Dordrecht: Springer. https://doi.org/10.1007/978-94-010-2653-6_4

Kelsen, Hans. 1990. "On the Theory of Interpretation." *Legal Studies* 10(2): 127–135. https://doi.org/10.1111/j.1748-121X.1990.tb00595.x

Łętowska, Ewa. 2005. "Multicentryczność współczesnego systemu prawa i jej konsekwencje." *Państwo i Prawo* 4: 3–10.

MacCormick, Neil. 1997. "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'." In *Constructing Legal Systems: "European Union" in Legal Theory.* Edited by Neil MacCormick. 1–26. Dordrecht: Springer Science+Business Media. https://doi.org/10.1007/978-94-017-1152-4

Paulson, Stanley L. 1990. "Kelsen on Legal Interpretation." *Legal Studies* 10(2): 136–152. https://doi.org/10.1111/j.1748-121X.1990.tb00596.x

Paulson, Stanley L. 2019. "Hans Kelsen on legal interpretation, legal cognition, and legal science." *Jurisprudence* 10(2): 188–221. https://doi.org/10.1080/20403313.2019.1604887

Paunio, Elina. 2013. *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*. Farnham, Surrey, UK: Routledge.

Syrpis, Phil A.J. 2015. "The relationship between primary and secondary law in the EU." *Common Market Law Review* 52(2): 461–487. https://doi.org/10.54648/COLA2015029

Techet, Peter. 2024. "The role of the judiciary: Interpreting vs creating law – or how Hans Kelsen justified 'judicial activism'." *Oñati Socio-Legal Series*. https://doi.org/10.35295/osls.iisl.1919

Verhoeven, Maartje Joke Margot. 2011. *The Costanzo Obligation. The obligations of national administrative authorities in the case of incompatibility between national law and European law*. Cambridge: Intersentia.

Widdershoven, Rob. 2019. "National procedural autonomy and general EU law limits." *Review of European Administrative Law* 12(2): 5–34. https://doi.org/10.7590/187479819X15840066091222

Widłak, Tomasz. 2018. *Teoria i filozofia prawa międzynarodowego Hansa Kelsena.* Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Wróbel, Andrzej. 2010. "Sądy administracyjne jako sądy Unii Europejskiej." *Zeszyty Naukowe Sądownictwa Administracyjnego* 5–6: 474–496.
Zirk-Sadowski, Marek. 2009. "Soft Kelsenism versus Multicentrism: Some Remarks on Theoretical Foundations of European Law." In *Multicentrism as an emerging paradigm in legal theory*. Edited by Marek Zirk-Sadowski, Mariusz Jerzy Golecki, Bartosz Wojciechowski. 51–68. Frankfurt: Peter Lang.

Case law

Judgment of the Court of 5 February 1963, 26–62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECLI:EU:C:1963:1.
Judgment of the Court of 15 July 1964, 6–64, Flaminio Costa v E.N.E.L., ECLI:EU:C:1964:66.
Judgment of the Court of 17 December 1970, 11–70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114.
Judgment of the Court of 21 June 1974, 2–74, Jean Reyners v Belgian State, ECLI:EU:C:1974:68.
Judgment of the Court of 8 April 1976, 43–75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, ECLI:EU:C:1976:56.
Judgment of the Court of 16 December 1976, 45–76, Comet BV v Produktschap voor Siergewassen, ECLI:EU:C:1976:191.
Judgment of the Court of 16 December 1976, C-45/76, Comet BV v Produktschap voor Siergewassen, ECLI:EU:C:1976:191.
Judgment of the Court of 16 December 1976, 33–76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, ECLI:EU:C:1976:188.
Judgment of the Court of 16 December 1976, C-33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, ECLI:EU:C:1976:188.
Judgment of the Court of 9 March 1978, 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA, ECLI:EU:C:1978:49.
Judgment of the Court of 22 June 1989, 103/88, Fratelli Costanzo SpA v Comune di Milano, ECLI:EU:C:1989:256.
Judgment of the Court of First Instance of 10 July 1990, T-51/89, Tetra Pak Rausing SA v Commission of the European Communities, ECLI:EU:T:1990:41.
Judgment of the Court of 12 July 1990, C-188/89, A. Foster and others v British Gas plc, ECLI:EU:C:1990:313.
Judgment of the Court of 22 October 1998, Joined cases C-10/97 to C-22/97, Ministero delle Finanze v IN.CO.GE.'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A. Cecchini & C. Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing. Luigi Martini Srl, Giacomo Srl and Mafar Srl, ECLI:EU:C:1998:498.
Judgment of the Court (Second Chamber) of 29 April 1999, C-224/97, Erich Ciola v Land Vorarlberg, ECLI:EU:C:1999:212.
Judgment of the Court (First Chamber) of 16 September 2010, C-149/10, Zoi Chatzi v Ypourgos Oikonomikon, ECLI:EU:C:2010:534.
Judgment of the Court (Fourth Chamber), 17 September 2014, C-562/12, Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007–2013 Seirekomitee, ECLI:EU:C:2014:2229.
Judgment of the Polish Supreme Administrative Court – wyr. NSA 2.02.2017, II FSK 506/16, Legalis 1578653.
Order of the Court of 6 December 1990, 2/88 Imm, J. J. Zwartveld and Others, ECLI:EU:C:1990:440.
Order of the President of the Court of First Instance of 22 December 1995, T-219/95 R, Marie-Thérèse Danielsson, Pierre Largenteau and Edwin Haoa v Commission of the European Communities, ECLI:EU:T:1995:219.

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.09

*Liana Spytska**

https://orcid.org/0009-0008-1801-7907

THE CHARACTERISTICS AND CONSEQUENCES OF SERIAL SEX OFFENDERS' ACTIONS: THE EXAMPLE OF UKRAINE

Abstract. Serial sexual crimes are considered highly dangerous and have lasting effects on both victims and society. As such, the importance of investigating and preventing these crimes is increasingly recognised, with particular attention given to forensic analysis and the study of the perpetrators' *modus operandi*.

The purpose of this study was to explore the characteristics of serial sexual offences, their unique features, and the consequences for both the victims and the society, based on Ukrainian experiences.

The study employed methods such as analysis, generalisation, and the normative-dogmatic method.

The findings indicate that serial sexual offenders can be classified based on their methods of attack into two main categories: the "stranglers" and the "butchers." These groups differ in their approach, motivations, and the nature of the offences. The study also identified four key psychological profiles of serial sexual offenders: "Power–Calming", "Power–Affirmation", "Anger–Vengeance", and "Anger–Arousal", with each of them representing different motivations behind the crimes. Additionally, the study examined the concept of *modus operandi* and ritualistic elements in serial sexual crimes, which play a crucial role in understanding the criminal's profile, motives, and behavioural patterns. The research emphasises the need for developing investigative profiles that consider factors such as location, time of the crime, weather conditions, and movement patterns of victims and perpetrators. Moreover, the study identified significant gaps in Ukraine's legal framework regarding serial sexual offences, highlighting the need for specialised legislation. The consequences of these crimes for victims and the society are profound, underscoring the necessity for a multi-faceted approach to prevention, including education, psychological support, and enhanced cooperation between various societal sectors. The study's findings can inform public awareness campaigns and contribute to the development of strategies to reduce the incidence of serial sexual crimes.

Keywords: series of crime, motives for murder, criminal style, psychological trauma, sexual intercourse

* Kyiv International University; spytska_l@ukr.net

Received: 19.08.2024. Verified: 23.09.2024. Revised: 17.10.2024. Accepted: 17.12.2024.

CHARAKTERYSTYKA I KONSEKWENCJE DZIAŁAŃ SERYJNYCH PRZESTĘPCÓW SEKSUALNYCH PRZYKŁAD UKRAINY

Streszczenie. Seryjne przestępstwa seksualne są uważane za bardzo niebezpieczne i mają trwały wpływ zarówno na ofiary, jak i na społeczeństwo. W związku z tym coraz bardziej docenia się znaczenie badania i zapobiegania tym przestępstwom, ze szczególnym uwzględnieniem analizy kryminalistycznej i badania *modus operandi* sprawców.

Celem niniejszego badania było zbadanie charakterystyki seryjnych przestępstw seksualnych, ich unikalnych cech oraz konsekwencji zarówno dla ofiar, jak i społeczeństwa, w oparciu o przykład Ukrainy.

W badaniu wykorzystano metody takie jak analiza, uogólnienie i metoda normatywno-dogmatyczna.

Wyniki wskazują, że seryjnych przestępców seksualnych można podzielić na podstawie ich metod ataku na dwie główne kategorie: „dusicieli" i „rzeźników". Grupy te różnią się pod względem podejścia, motywacji i charakteru przestępstw. W badaniu zidentyfikowano również cztery kluczowe profile psychologiczne seryjnych przestępców seksualnych: „Uspokojenie władzy", „Potwierdzenie władzy", „Gniew–zemsta" i „Gniew–podniecenie", z których każdy reprezentuje różne motywacje stojące za przestępstwami. Ponadto w badaniu przeanalizowano koncepcję *modus operandi* i elementów rytualnych w seryjnych przestępstwach seksualnych, które odgrywają kluczową rolę w zrozumieniu profilu, motywów i wzorców zachowań przestępcy. Badania podkreślają potrzebę opracowania profili dochodzeniowych, które uwzględniają takie czynniki, jak lokalizacja, czas popełnienia przestępstwa, warunki pogodowe oraz wzorce przemieszczania się ofiar i sprawców. Co więcej, badanie zidentyfikowało znaczące luki w ukraińskich ramach prawnych dotyczących seryjnych przestępstw seksualnych, podkreślając potrzebę wprowadzenia specjalistycznych przepisów. Konsekwencje tych przestępstw dla ofiar i społeczeństwa są poważne, co podkreśla konieczność wieloaspektowego podejścia do zapobiegania, w tym edukacji, wsparcia psychologicznego i wzmocnionej współpracy między różnymi sektorami społecznymi. Wyniki badania mogą być wykorzystane w kampaniach uświadamiających i przyczynić się do opracowania strategii mających na celu zmniejszenie liczby seryjnych przestępstw na tle seksualnym.

Słowa kluczowe: seria przestępstw, motywy zabójstwa, styl przestępczy, uraz psychiczny, stosunek seksualny

1. INTRODUCTION

Understanding the motivations and psychological characteristics of serial sexual offenders is key to identifying their unique behavioural patterns and preventing such attacks in the future. Research on this topic is important for understanding the profound consequences of sexual crimes for victims and developing effective psychological and legal support programmes. The investigation of this issue not only reveals the complex mechanisms of serial sexual crimes, but also contributes to the improvement of security systems and the protection of citizens' rights. As for the situation in Ukraine, statistical data shows a certain dynamic in the number of registered cases of sexual violence. In 2019, 355 cases of rape were recorded, in 2020 – 382 cases, in 2021 – 399 cases, and in the period up to November 2022 – 250 cases. In terms of sexual violence, there is an analogous trend, with

a slight increase in the number of cases. In 2020, 86 cases were recorded, in 2021 – 85 cases, and in the period up to November 2022 – 88 cases (Petechel 2022, 165). These figures show the need to improve measures to control and combat sexual violence. It is also important to remember that statistics may differ from the factual number of cases, as a considerable proportion of sexual offences may go unreported due to various social, cultural, and legal factors. One problem with researching serial sexual offences is connected with limited access to data on serial sexual offences due to their confidential nature or incomplete reports from law enforcement agencies.

O.V. Aleksandrenko and V.I. Zhenuntii (2020, 181) note that serial sexual offences, specifically murder, are complex and reveal unique motives and the specific features of the psyche and psychology of the criminals. Researchers argue that these features complicate the investigation and identification of the killers, which then complicates prompt detection and prosecution of the perpetrators. Considering these factors, researchers believe that it is important to understand that knowledge of forensic techniques and investigative tactics alone is not sufficient for the successful investigation of such crimes.

According to the findings of K.M. Vasyuk (2021, 136), the classification of serial sexual offenders can be divided into two main categories: "compulsive" and "catathymic". The first category, according to the researcher, is characterised by the organised planning of crime scenes, and the perpetrators of these crimes show pronounced sexual sadism as well as antisocial and narcissistic personality traits, accompanied by emotional alienation and pronounced signs of psychopathy. In the second category, the crime scene is chosen in a disorganised manner, and the perpetrators are characterised by mood disorders and schizoid personality disorders. The researcher is convinced that they may be of a moderately psychopathic type and may have suffered physical or sexual trauma in the past.

R. Campbell and colleagues (2020, 259–260) show that most cases of sexual violence registered in the criminal system are not prosecuted. In order to establish whether additional sexual assaults have occurred, reliable links between two or more cases must be established, making it difficult to identify serial sexual offenders, according to the researchers. While criminal records are typically used to identify repeat sexual offences, biological evidence in rape investigations takes a different approach to examine the frequency of additional sexual offences among the offenders. Furthermore, the researchers have discovered that approximately one-third (35.7%) of unique offenders identified through DNA were found to have two or more sexual assaults linked to each other, which is higher than conventional recidivism rates reflected in court records (8–15%). Scientists emphasise that forensic DNA evidence can link multiple sexual assaults to the same perpetrator, revealing a serial pattern of sexual offences. The researchers point out that forensic DNA testing reveals a more complete picture of the extent of the offenders' sexual behaviour than what is recorded in criminal cases alone.

A.S. Politova (2023, 383–384) emphasises the importance of the priority measures that an investigative officer should take upon arrival at the scene of a sexual assault. These measures, according to the scientist, include securing the scene and identifying all the people present to avoid a distortion of the trace picture. The researcher notes that failure to comply with this condition may lead to an incorrect direction of further investigation. According to the scientist, the detected shoe print allows the establishing of the size and height of the offender, as well as indicates the direction of their movement before and after the crime, e.g. the presence of a shoe print on soft ground makes it possible to roughly estimate the physique and weight of the offender.

According to R. Lovell and colleagues (2020, 477–481), serial sex offenders often have a considerable criminal history and continue to commit crimes even after the sexual assault associated with rape kits. Researchers are convinced that the perpetrators usually have no previous arrests for rape. According to the results of the latent class analysis, scientists have identified three classes of offenders based on their offence history: "Ordinary offenders", "Minor offenders", and "Sexual specialists." Most of them belonged to the category of generalists, and a considerable number had committed many serious crimes.

It is necessary to conduct a more in-depth investigation of the characteristics of serial sexual offences to understand their nature and identify the factors underlying this phenomenon. Particular attention should be paid to aspects of the personality of offenders, including their motivations, psychological characteristics, and the dynamics of criminal activity. It is important to carefully consider the manifestations of seriality in such crimes in order to understand their structure and typology. The purpose of this study was to cover and clarify the unique features of serial sexual crimes, as well as their consequences for victims and the general welfare of society, based on the example of Ukraine.

2. MATERIALS AND METHODS

This study used various research methods, including analysis, generalisation, and the normative-dogmatic method. Each of these methods had its own unique characteristics and helped to understand the problem of sexual offences, including serial assaults. As a result of using these research methods, a more profound understanding of the problem of sexual offences, including serial assaults, was gained.

The method of analysis was one of the key research methods, which consisted of a systematic consideration of the issue of the specific features of serial sexual offences. Using the method of analysis, the study systematically examined the features of serial sexual crimes. Based on the analysis, a classification of these crimes was developed by time and method of commission, which helped

to distinguish between "stranglers" and "butchers", depending on their methods and motivation. Four main types of sexual offenders were also identified, reflecting their motivations and psychological characteristics, which made it possible to understand how the type of offender and his (these are predominantly men) psychological characteristics affect the way he commits the crime and the choice of potential victims. Furthermore, this method of research revealed why sadistic actions of criminals pose a serious threat and why this type of criminals enjoy the suffering and punishment of others.

The use of the generalisation method was an important stage of the study, as it helped to systematise the data and highlight key findings. This method helped to cover important aspects, such as the "*modus operandi*" concept and the ritual aspects of sexual offences, which became the basis for understanding the motives and characteristics of the perpetrators. In addition, based on the method of generalisation, the study identified countries where sexual homicide is considered an aggravating circumstance in a murder case. The use of the method of generalisation in the study indicated the importance of compiling search portraits for the effective investigation of serial sexual offences, as well as the specific temporal features in the activities of serial sexual offenders. The generalisation method also confirmed the need for a comprehensive approach to preventing sexual offences, including education, psychological support, and cooperation between different segments of society. The statistical methods used in this study primarily include descriptive statistics to summarise the characteristics of serial sexual offenders, such as offender types and crime methods. Additionally, cluster analysis is applied to explore the relationships between offender motivations, psychological profiles, and the types of sexual crimes committed.

The use of the normative-dogmatic approach helped to systematically analyse the key aspects related to this problem. To determine the regulatory aspects of the fight against sexual crimes, this method of scientific research was applied by examining legislative acts, including the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence.[1] The application of the normative-dogmatic method helped to identify current shortcomings in the legislation relating to the necessary aspects of combating serial sexual offences, which allowed the drawing of conclusions on which concrete aspects need to be improved at the legislative level. The normative-dogmatic method has proved to be an effective tool for analysing legal norms and their practical application in the context of combating serial sexual crimes. This

[1] Responsibility for Committing Violence. 2024. https://1547.ukc.gov.ua/dovidkova-informatsiya/protydiya-nasylstva-za-oznakoyu-stati/vidpovidalnist-za-vchynennya-nasylstva/ (accessed: 18.09.2023).

Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Violence. 2012. https://zakon.rada.gov.ua/laws/show/994_927#Text (accessed: 18.09.2023).

method helped to thoroughly examine the relevant provisions of the legislation and identify problematic aspects that require attention and improvement in order to increase the effectiveness of combating this phenomenon.

3. RESULTS

Serial sexual offences are characterised by systematic and planned commission, and usually include elements of psychological pressure, physical aggression, and control over the victim. Such crimes can take many forms, including rape, sexual violence, sexual assault, and other forms of sexual exploitation. The consequences for victims can be extremely severe, including psychological trauma, health damage, and even death. Serial sexual offences can be characterised by their multiple episodes. The criminals who commit these crimes demonstrate a different frequency of activity, which can range from a few minutes to several years. They point to the possibility of classifying these murders in terms of time, dividing them into three main groups. The first group includes a series of murders that take place one after another with a minimum break of several minutes. These crimes usually take place in urban areas, especially involving children and people with whom the perpetrator is familiar. The second group includes a series of murders that take place at intervals of several days or months, and last for about a year. The third group includes a series of murders that last for several years, with time intervals ranging from a few days to several years. When investigating these murders, it is important to consider that the time intervals between individual episodes vary from subject to subject. However, two features can be identified: an increase in the frequency of homicides over time and the ability of the perpetrator to adjust his behaviour in certain situations. The next element is the method of committing the crime, which considerably affects its investigation and qualification. In the mechanism of the "series" of sexual murders, one can observe the specific features of actions that reflect the "handwriting" of the perpetrator, which arises from the characteristics of his personality.

The classification of serial sexual murders by the method of commission proposed by Y.M. Antonian is of great forensic importance for the organisation of investigating and preventing such crimes. She divides all serial sexual killers into two broad groups: "stranglers" and "butchers", who demonstrate different methods and motivations. "Stranglers" are characterised by the use of strangulation without causing bodily harm, strangulation with bodily harm in the sexual sphere, or strangulation with bodily harm in the non-sexual sphere. They can be divided into three groups depending on the characteristics of the individual and the victims. Murderers from the first group often have mental illness and lead a secluded lifestyle. They are addicted to collecting and target mostly women over the age of 18. Murderers from the second group have a relatively high level of education

and extensive contacts with their environment. They use vehicles to commit crimes, and their victims are children under the age of 12. Murderers from the third group show non-sexual aggression directed against peers and animals. They have frequent contact with children and arrogant ideas. These offenders typically use strangulation as their primary method of attack, often selecting victims in isolated areas and employing a calculated, deliberate approach. A notable example is the case of the "Green River Killer" (Gary Ridgway), who strangled numerous women in Washington state during the 1980s and 1990s. His choice of strangulation, along with the ritualistic disposal of the bodies, suggests a desire to assert control over his victims, which is consistent with the psychological profile of "Power–Calming."

The "butchers" criminals can be further divided into two groups, depending on whether they commit crimes involving bodily harm to the victim in the sexual sphere or not in the sexual sphere (Danyliv 2017, 123). In contrast to "stranglers", "butchers" tend to use more violent, disfiguring methods, often resulting in severe bodily harm or mutilation. The "Zodiac Killer" (whose true identity remains unknown) is an example of this type. His crimes, committed in the late 1960s and early 1970s in Northern California, involved brutal attacks on victims, including stabbing and the use of symbolic, ritualistic elements. The disfigurement of victims and the methodical approach to each crime point to a higher degree of rage and a desire to cause suffering, aligning with the psychological profile of "Anger–Vengeance."

Sexual offences can also be classified into four main types, reflecting the different motivations and psychological characteristics of the perpetrators (Table 1).

Table 1. The classification of sexual offenders depending on the motives for committing the offence

o.	Type	Description
1	"Power–Calming"	It is characterised by the fact that the perpetrator commits a planned rape but does not always try to murder the victim. Such criminals are characterised by fantasies and seeking reassurance from the victim. They seek to control the situation, but they do not always intend to murder.
2	"Power–Affirmation"	It covers killers who commit sexual violence to maintain control over their victims, but do not always intend to commit murder. They view sexual violence as a means of expressing power and dominance.
3	"Anger–Vengeance"	It is defined by the fact that the perpetrators plan both rape and murder, with anger as the main motive. They commit a crime for revenge and they choose a victim with the aim of not only satisfying their needs but also punishing the victim.
4	"Anger–Arousal"	It also includes murderers who plan rape and murder, but who carry out these acts under the influence of anger. They may use torture, mutilation, and other forms of exploitation to express their anger and satisfy their fantasies.

Source: Page 2023, 2928.

These four types of sex offenders reflect different motivations and characteristics of the offenders who commit these crimes. Although each type has its own characteristics, they all represent serious threats to society and require careful investigation and prevention.

Another type of sexual offence is sadistic acts, including murder, of a sexual nature, which are manifested in the physical and psychological suffering of others and which bring the perpetrator a sense of pleasure. A sadist is a person who has learned the habit of achieving sexual satisfaction only through cruelty and punishment. Their behavior is driven by persistent and intense arousal associated with causing pain and distress to others. This type of sex offenders is not only marked by a desire to inflict pain, but also by strongly expressed fantasies and urges to violence. Its gratification is based on subjugating, dominating, and humiliating another person, which leads to suffering and fear in the victim. These acts of sadism may even include sexual violence, but violence itself is not always enough to satisfy the sadist's sexual arousal. Sadists are also characterised by a deviant sexual preference for violence, as they experience sexual pleasure in controlling another person through humiliation and suffering. For a sadist, it is not only the violence itself that is important, but also the emotional subjugation and domination of the victim, which gives him a sense of power and sexual arousal. Thus, sadistic acts of a sexual nature are a serious threat to society and require a comprehensive understanding and counteraction (Chopin, Beauregard 2022, 358; Reale et al. 2022).

There are four main strategies used by criminals to find potential victims of sexual offences. Among them, the most common is the type of offender who can be classified as a "poacher". These individuals tend to commit sexual violence against adult victims that they do not know and may use physical force to achieve their goals. On the other hand, criminals who can be categorised as "trollers" specifically seek out potential victims in concrete locations, and their victims tend to be younger. The "trapper" type does not actively seek out victims in specific locations, but instead targets victims in places that they know and that are well-known. The "hunter" type describes individuals who have acquaintances with potential victims and whose attacks are less random than those of other types of offenders (Ahn et al. 2023).

Historically, law enforcement agencies have often linked crimes based on certain characteristics found in the behaviour of the offender and other aspects of the crime. This approach, commonly known as *modus operandi*, is considered as the way in which a particular offender commits a crime, either used or demonstrated by a concrete offender. The ritual aspects of a sexual offence usually stem from the internal psychology of the perpetrator, which stands in contrast to the situational requirements of the crime. This means that the manner in which a crime is committed, and its ritualistic aspects, often reflects the offender's inner motives and fantasies, as well as his personality traits. The signature left

at a crime scene can be considered as an expression of a highly individualised combination of habitual aspects of criminal behaviour with the imagination and motivation that underpin a series of crimes committed by the same offender. In some cases, psychology and forensic experts may use a signature as an additional element to confirm that a series of crimes, often occurring at different times and in different locations, were committed by the same offender. They analyse various aspects of the signature, such as the style of the crime, the materials used, or specific details that may indicate the uniqueness of the signature of a particular criminal (Hazelwood, Warren 2016). Thus, the concept of *modus operandi* and the ritual aspects of sexual offences are important for understanding the internal motivations and psychological characteristics of offenders, as well as for maintaining law and order by identifying and prosecuting serial offenders.

In some countries, including the USA, Canada, Germany, and England, sexual homicide does not have its own separate status in the judicial system. Instead, the sexual aspect of murder is considered an aggravating circumstance in a murder case. Establishing the sexual nature of the murder is not a priority in the investigations. According to the Federal Bureau of Investigation in the United States, sexual homicide is defined by the presence of at least one of the following characteristics: the victim's clothing or lack thereof; the exposure of the victim's genitals; the position of the victim's body indicating the sexual nature of the attack; the insertion of foreign objects into the victim's body cavities; the evidence of sexual intercourse (oral, anal, vaginal); and the evidence of substitute sexual activity, interests, or sadistic fantasies. Serial sex offenders are distinguished by the fact that they commit three or more separate murders with a certain time interval between them, when their emotions recede. Murderers of this type tend to think about their crimes in advance, often creating fantasies and planning every aspect of the murder (James, Proulx 2014, 602–604).

In the cases of serial criminals, the formation of a search portrait is of particular importance. In order to create search portraits of serial murderers, it is important to consider the time of the attack on the victim and analyse the day of the week and its features, such as a working day, weekend, or holiday. Furthermore, it is crucial to establish a possible link between the time of the crime and the working hours of the place in question: whether it is the end of school or business hours, and whether the number of people in the place increases or decreases. There is a need to consider aspects such as the weather conditions at the time of the crime, which includes analysing the presence of rain, atmospheric pressure, moon phase, and other weather factors. It is also important to pay attention to the victim's route before the attack, as well as the perpetrator's route, if such information is available. Furthermore, it is recommended to pay attention to the specific features of the offender's contact with the victim. This includes assessing the degree of the nudity of the victim and possible sexual encounters. It is also important to analyse the features of the scene, such as the possibility of access, the availability of bus

stops, and the type of transport used by the population (Husar 2020, 113). The creation of search portraits of serial criminals is complex and requires careful analysis of a range of factors. To effectively investigate such crimes, it is important to factor in many aspects and use them to predict the location of the future crime. Operational officers should be attentive to these details when arresting suspects of such crimes in order to ensure a successful investigation and prosecution.

Some studies confirm the fact that a small proportion of serial sex offenders eventually stop their criminal activity, which can be described as the "natural abandonment" of a life of crime with ageing (Nolan et al. 2023, 249–252; Lindegren 2024). This group has a significant criminal history, including sexual and other offences. However, the majority of offenders explain their refusal by means of cognitive transformations or changes in the way they think. The onset of cognitive transformations can be the result of a variety of factors, such as maturity, experience, social environment, and the availability of psychological or psychiatric support. Such transformations can occur under the influence of individual experiences and internal conflicts of the offender regarding their criminal activity. This indicates a complex and individualised process of abandonment among serial sex offenders and points to the potential effectiveness of psychological and psychiatric support for those seeking to transition to a healthier and more responsible lifestyle.

In Ukraine, there are several forms of sexual crimes, each of which is defined by a different degree of coercion and the nature of the acts involved. Rape is non-consensual sexual intercourse, usually involving the use of force, threats, or violence against the victim. Sexual violence, on the other hand, covers a broader range of non-consensual sexual acts, including unwanted touching or harassment, which are not always related to sexual intercourse but still constitute a serious violation of personal autonomy. Coercion to engage in sexual intercourse includes situations where the victim is manipulated, pressured, or blackmailed into sexual activity without the use of physical force, relying instead on psychological manipulation or threats. Although all of these crimes involve a breach of consent, they differ in the methods and specific ways in which victims are coerced or forced to perform sexual acts.

Ukraine, like most countries, faces the problem of sexual crimes, including serial crimes. There is no special legislation in Ukraine that would concretely define serial sexual offences. However, there are a range of laws and regulations that govern the area of combating sexual offences in general. The Criminal Code of Ukraine contains provisions on sexual offences such as rape, sexual violence, or insult to honour and dignity. These articles establish criminal liability for such actions.[2] However, the term "serial sexual offence" is not defined in the Criminal

[2] Responsibility for Committing Violence. 2024. https://1547.ukc.gov.ua/dovidkova-informatsiya/protydiya-nasylstva-za-oznakoyu-stati/vidpovidalnist-za-vchynennya-nasylstva/ (accessed: 18.09.2023).

Code. Furthermore, the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Violence is in force in Ukraine.[3] This Convention obliges the member states to take measures to prevent sexual offences and protect children from them. Combating sexual crimes, including serial crimes, is an important part of the legal system. The need to define and implement special legislation aimed at combating serial sexual offences in Ukraine is urgent, as this would improve the legal mechanism for combating this phenomenon. It is also important to strengthen educational campaigns in order to raise the awareness of the risks of sexual violence and implement effective strategies to prevent these crimes.

Serial sexual offences pose a serious threat to society and their victims, and can have far-reaching consequences. Understanding these implications is important for developing effective strategies to prevent and respond to such events. For victims of serial sexual offences, the consequences can be dramatic. First and foremost, these crimes leave profound psychological and emotional trauma, which can manifest itself in the form of post-traumatic stress disorder, depression, anxiety, and panic attacks. Victims may lose faith in themselves, feel guilty, ashamed, and helpless. This can have a serious impact on their mental stability and health. Attacks can also affect the physical health of victims, leading to injuries, sexual diseases, and other medical problems. They can also affect their relationships with their environment, family, and colleagues, breaking down trust and understanding.

For society, the consequences of serial sexual offences can also be serious. They can lead to a general increase in fear and mistrust, and a decrease in trust in security and justice. This can create an atmosphere of tension and instability in society, which can undermine mutual understanding. The effects of serial sexual offences can be felt over a long time. Victims may need long-term psychological support and therapy to recover from their traumatic experience. Furthermore, society may need to make considerable efforts to prevent analogous incidents in the future by improving legislation, enhancing victim support systems, and strengthening the security of public spaces.

Understanding the consequences of serial sexual offences is important for both victims and society as a whole. This helps to formulate effective strategies for preventing such crimes, as well as to provide adequate support and assistance to victims. One of the key strategies is to conduct public education campaigns to raise the awareness of the risks of sexual violence. These campaigns can cover a wide range of topics, from defining sexual violence to teaching safety skills and how to respond to potentially dangerous situations.

[3] Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Violence. 2012. https://zakon.rada.gov.ua/laws/show/994_927#Text (accessed: 17.09.2023).

The prevention of sexual crimes also involves the availability of psychological support programmes for potential victims. These programmes may include counselling, therapy, and other forms of support for individuals who may be or have been victims of sexual violence. Providing emotional support and assistance in recovering from traumatic experiences can help victims of crime cope with the consequences and restore their mental health. Another essential element is cooperation with NGOs and other stakeholders to develop and implement effective preventive measures. This can include joint projects with law enforcement agencies, developing programmes to improve safety in public spaces, and supporting civil society initiatives to combat sexual violence. Working together with different structures of society allows the creation of a comprehensive system of measures aimed at preventing sexual crimes as well as the ensuring of the safety of the community as a whole. Therefore, considering the recommendations of experts, the prevention of sexual crimes, including serial attacks, requires a comprehensive approach that includes education, psychological support, and cooperation between different segments of society. Only such an approach can help build a safe and harmonious environment for all its members.

4. DISCUSSION

A considerable number of researchers and scientists have investigated the problem of serial sexual offences, which creates the basis for further analysis and comparison of their approaches with the findings of the current study. It is important to investigate their positions and conclusions in detail in order to gain a better understanding of this issue. Such an analysis will allow the identification of common trends and differences between different studies, as well as of possible areas for further research.

According to R.E. Morgan and B.A. Oudekerk (2019), rape is one of the most underreported violent crimes. They indicate that the "factual" recidivism rate of sexual offences is likely to be much higher, as about two-thirds of all rapes are not reported to law enforcement. In criminal statistics, rape is one of the least reported criminal events. The researchers show that this may be due to the considerable number of cases that go undetected and unreported by law enforcement agencies. Given the findings of this study, this has serious implications for assessing the risk of repeated offences and developing effective prevention strategies. As noted in the previous section, the lack of research on rape can lead to an underestimation of the scale of the problem and insufficient measures to combat it. In the light of the study's findings, it is important to emphasise the need to increase attention to the problem of underreported and unrecorded rape, which may include improving statistical data collection procedures, raising public awareness of the importance of reporting crimes, and improving access to psychological and legal support for victims.

M. Farmer and colleagues (2015, 326–328) have found out that as the perpetrators of sexual offences are ageing, the level of the evasion of responsibility increases. According to the researchers, as sex offenders grow older, there is a tendency to avoid or evade punishment, which may be due to a range of factors, including reduced physical activity, changes in social relationships, and the development of strategies to avoid detection of their criminal activity. The researchers also note that ageing can lead to a change in priorities in the lives of criminals, including a decrease in interest in committing crimes and a desire to lead a quiet and stable life. This can affect their ability to evade responsibility as well as the effectiveness of preventive measures and rehabilitation programmes. However, in comparison with the findings of the present study, it should be noted that not all sex offenders show a tendency to evade responsibility with ageing. The results described above have shown that some criminals may, on the contrary, become more confident and even try to implement their criminal intentions, using their experience and skills in a more balanced strategy. Thus, although ageing may influence the level of evasion in sex offenders, this process is ambiguous and may vary depending on the individual characteristics and circumstances of each case.

According to B. Fox and M. DeLisi (2019, 74), there is a variety of subtypes of homicide, including sexual, serial, and sadistic murder, which makes it difficult to identify the perpetrators and their motives. According to the researchers, sadistic murder is characterised by a desire to control, dominate, oppress, and inflict pain for the sadist's mental satisfaction and sexual arousal. Sexual homicide is defined as an act of murder during which the victim's body or genitals are exposed, touched, or put in a sexual position, as well as when foreign objects are inserted into the victim's body and/or any form of sexual activity or sexual intercourse with the victim takes place. Serial murder, according to their study, is a case where two or more murders are committed by one perpetrator, and there is a certain cooling-off period between these events. The latter type of murder causes fear and panic in society due to the nature and considerable risk of the recurrence of such crimes. Notably, according to the results above, different types of sexual offences are unique in nature and characterised by different aspects that reflect a variety of motivations, methods, and dynamics; they are extremely complex and may require appropriate investigation strategies and preventive measures.

According to K. Reale and colleagues (2020, 1770–1773), sadistic sexual offenders strategically choose places away from the flow of people to meet potential victims and abduct their bodies. This allows them to avoid visibility and overt interference during the execution of the crime. Research shows that these criminals use sophisticated methods to manipulate and control their victims as well as minimise the risk of detection. They show knowledge of forensic science, including strategies for hiding evidence and disguising their actions. Furthermore, the researchers point out that sadistic criminals actively use specific strategies

to avoid detection and apprehension. This may involve staging a crime scene or destroying any traces that may indicate their involvement. Their actions are carefully planned so that they can stay anonymous and avoid legal liability. The researchers note that this can include eliminating any evidence that could be used against them in court, as well as other security measures to avoid any possible investigations. The researchers point out that sadistic criminals often demonstrate a high level of erudition in planning and committing crimes. They may use a variety of methods and techniques to fulfil their criminal intentions, including those that are illegal or violent. This may include the skilful use of staging techniques, the manipulation of the psychological state of victims, and the destruction of traces that may help identify the perpetrator. As mentioned in the previous section, sadistic criminals demonstrate a prominent level of professionalism and efficiency in committing crimes, which makes it difficult for law enforcement agencies to detect and apprehend them.

According to D.K. Rossmo (2021, 257), the essence of criminal investigation of sexual violence can be questioned, since most of these crimes are not even recorded by the police, and only a third of cases are solved, and only a few of them lead to criminal liability. In the author's opinion, these systemic limitations raise the problem of investigating sexual crimes. The researcher argues that detectives could ensure greater public safety if their goal was not limited to solving crimes. In its concept, the researcher offers a comprehensive approach aimed at improving the quality of criminal investigations of sexual offences. One of the main components of this approach is to improve the research mindset of law enforcement agencies, which involves not only raising detectives' awareness of approaches to investigating sexual offences, but also developing their analytical and critical skills to effectively handle such cases. Furthermore, the researcher emphasises the importance of detecting serial crimes, which requires careful analysis of evidence, the use of modern methods of criminal analytics, and cooperation between law enforcement agencies and specialised research groups. In addition, the researcher recommends developing and implementing strategies to prevent such situations. The findings described above suggest that the prevention of sexual crimes, including serial crimes, may include public education campaigns to raise the awareness of the risks of sexual violence, as well as psychological support programmes for potential victims. Another crucial element is cooperation with NGOs and other stakeholders to develop and implement effective preventive measures.

Based on the analysis of researchers' studies and comparison with the findings of the present study, emphasis is placed on the importance of considering various aspects of serial sexual crimes that contribute to strategic planning and the evasion of responsibility. A low level of the registration of sexual offences is noted along with the need to improve statistical data collection and raise public awareness of the need to report crimes. The identified problems in the investigation of sexual

offences, including the lack of the registration and disclosure of such events, highlight the need to improve investigation methods and cooperation between law enforcement agencies and specialised research groups.

5. CONCLUSIONS

Based on the findings of this study, it can be concluded that serial sexual crimes can be classified by time and method of commission. The classification by method of commission divides perpetrators into "stranglers" and "butchers", who have different methods and motivations. It is also important to distinguish between four main types of sexual offenders, which reflect their motivations and psychological characteristics: "Power–Calming", "Power–Affirmation", "Anger–Vengeance", and "Anger–Arousal". The type of offender and their psychological characteristics determine the way they commit a crime and the choice of potential victims. Sadistic acts pose a serious threat, as this type of offender derives pleasure from the suffering and punishment of others. Understanding the strategies of criminals when searching for potential victims helps to effectively investigate and combat sexual crimes.

The *modus operandi* concept and the ritualistic aspects of sexual offences are important for understanding the motives and characteristics of perpetrators, as well as for identifying and prosecuting them. In some countries, such as the United States, Canada, Germany, and England, sexual homicide is considered an aggravating circumstance in a murder case rather than having a separate status. Serial sexual offenders are distinguished by the fact that they commit three or more murders with a certain time interval between them, often thinking about their crimes in advance and creating fantasies. For effective investigations of serial sexual offences, it is important to develop search portraits, considering various aspects such as the time and place of the crime, weather conditions, and the routes of victims and offenders. Studies show that some serial criminals eventually stop their criminal activity, which may be the result of cognitive transformations or changes in the way they think. Ukraine, like many other countries, has a problem with sexual crimes, including serial crimes. Currently, the Ukrainian legislation does not have a concrete definition for serial sexual offences, but there are laws regulating sexual offences in general. It is important to consider the need to introduce special legislation to combat this phenomenon and raise public awareness of the risks of sexual violence.

While the study sheds light on key patterns in serial sexual crimes, it is important to note that the results pertain only to those perpetrators who have been successfully identified and convicted, limiting the scope to a specific subset of offenders. This limitation calls for further research into undetected cases and the broader social, cultural, and economic factors contributing to serial sexual

offences. The study also highlights the need for more precise legal definitions in Ukrainian law to address serial sexual crimes effectively, and calls for a multifaceted approach to prevention, involving legal reform, psychological support, and public awareness.

Serial sexual offences have grave consequences for both victims and society as a whole. For victims, these crimes can lead to profound psychological and emotional trauma, physical and medical problems, and a disruption in relationships. For society, they can lead to a general increase in fear and mistrust, and a decrease in trust in security and justice. Understanding these consequences helps to develop effective strategies to prevent such crimes and provide adequate support for victims. Preventing sexual crimes, including serial attacks, requires a comprehensive approach that includes education, psychological support, and cooperation between different institutions and segments of society. Only such an approach can help build a safe and harmonious environment for all its members. Future researchers should pay attention to investigating the impact of the social, cultural, and economic environment on the development of serial sexual offences.

BIBLIOGRAPHY

Ahn, Jaekyung. Jeongsook Yoon. Yimoon Choi. 2023. "Victim Selection in Korean Sexual Crimes: A Latent Class Analysis." *Psychology, Crime & Law*. https://doi.org/10.1080/1068316X.2023.2228969

Aleksandrenko, Olena. Volodymyr Zhenuntii. 2020. "Forensic Support for the Investigation of Serial Sexual Murders." In *The XIII International Scientific-Practical Conference Social Function of Science, Teaching and Learning*. 179–183. Bordeaux: International Science Group.

Campbell, Rebecca. Heather Feeney. Rachel Goodman-Williams. 2020. "Connecting the Dots: Identifying Suspected Serial Sexual Offenders Through Forensic DNA Evidence." *Psychology of Violence* 10(3): 255–267. https://doi.org/10.1037/vio0000243

Chopin, Julien. Eric Beauregard. 2022. "Sexual Sadism: Its Role in the Crime-Commission Process of Sexual Homicide of Children." *Journal of Interpersonal Violence* 37(1–2): NP350–NP374. https://doi.org/10.1177/0886260520916844

Danyliv, Oleksandr. 2017. "Definition of Serial Murder and Distinguishing It from Other Related Phenomena." *Scientific Bulletin of the Uzhhorod National University, Series: Law* 2(43): 122–125.

Farmer, Mark. Anne-Marie McAlinden. Shadd Maruna. 2015. "Understanding Desistance from Sexual Offending: A Thematic Review of Research Findings." *Probation Journal* 62(4): 320–335. https://doi.org/10.1177/0264550515600545

Fox, Bryanna. Matt DeLisi. 2019. "Psychopathic Killers: A Meta-Analytic Review of the Psychopathy-Homicide Nexus." *Aggression and Violent Behavior* 44: 67–79. https://doi.org/10.1016/j.avb.2018.11.005

Hazelwood, Robert. Janet Warren. 2016. "Linkage Analysis: MO, Ritual, and Signature in Serial Sexual Crimes." In *Practical Aspects of Rape Investigation*. Boca Raton: CRC Press. https://www.taylorfrancis.com/chapters/edit/10.1201/9781315316369-10/linkage-analysis-robert-hazelwood-janet-warren

Husar, Lyudmyla. 2020. "Construction of a Search Portrait of a Serial Criminal." *Subcarpathian Law Herald* 33(4): 110–115.

James, Jonathan. Jean Proulx. 2014. "A Psychological and Developmental Profile of Sexual Murderers: A Systematic Review." *Aggression and Violent Behavior* 19(5): 592–607. https://doi.org/10.1016/j.avb.2014.08.003

Lindegren, Stina. 2024. "Participants' Experiences of Sex Offender Treatment: Searching for Desisting Narrative Identities." *International Journal of Offender Therapy and Comparative Criminology*. https://doi.org/10.1177/0306624X241228231

Lovell, Rachel. Wenxuan Huang. Laura Overman. Daniel Flannery. Joanna Klingenstein. 2020. "Offending Histories and Typologies of Suspected Sexual Offenders Identified via Untested Sexual Assault Kits." *Criminal Justice and Behavior* 47(4): 470–486. https://doi.org/10.1177/0093854819896385

Morgan, Rachel. Barbara Oudekerk. 2019. "Criminal Victimization, 2018." *OJP Bulletin*, https://bjs.ojp.gov/content/pub/pdf/cv18.pdf

Nolan, Thomas. Gwenda Willis. David Thornton. Sharon Kelley. Sarah Christofferson. 2023. "Attending to the Positive: A Retrospective Validation of the Structured Assessment of Protective Factors-Sexual Offence Version." *Sexual Abuse* 35(2): 241–260. https://doi.org/10.1177/10790632221098354

Page, Josefa. Kalliopi Tzani-Pepelasi. Helen Gavin. 2023. "Characteristics of Sexual Homicide Offenders Focusing on Child Victims: A Review of the Literature." *Trauma, Violence, & Abuse* 24(5): 2922–2935. https://doi.org/10.1177/15248380221119511

Petechel, Oleksiy. 2022. "Criminal Responsibility for Sexual Crimes During Wartime." *International Journal 'Law & Society'* 6: 161–165.

Politova, Anastasia. 2023. "The State of Scientific Development of the Problems of Criminal Liability for Gender-Based Violence in the Context of Armed Conflict (Martial Law) in Ukraine in 2012–2014." *Analytical and Comparative Jurisprudence* 4: 367–386. https://doi.org/10.24144/2788-6018.2023.04.61

Reale, Kylie. Éric Beauregard. Mélissa Martineau. 2020. "Is Investigative Awareness a Distinctive Feature of Sexual Sadism?" *Journal of Interpersonal Violence* 35(7–8): 1761–1778. https://doi.org/10.1177/0886260517698824

Reale, Kylie. Julien Chopin. Alexandre Gauthier. Eric Beauregard. 2022. "Sadistic Sexual Crimes Against Children: Comparing the Manifestation of Sexual Sadism and Crime-Commission Process." *International Journal of Offender Therapy and Comparative Criminology*. https://doi.org/10.1177/0306624X221132225

Rossmo, Kim. 2021. "Sexual Offense Investigations: Rethinking the Gateway to the Criminal Justice System." In *Criminal Investigations of Sexual Offenses: Techniques and Challenges*. 255–259. Cham: Springer. https://doi.org/10.1007/978-3-030-79968-7_17

Vasyuk, Konstantin. 2021. "Psychological Features of the Main Types of Serial Killers." In *Proceedings of the Scientific Conference of Professors and Teaching Staff, Researchers and Degree Holders Based on the Results of Research Work for the Period 2019–2020*. 135–137. Vinnytsia: Vasyl Stus Donetsk National University.

Legal documents

Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Violence. 2012. https://zakon.rada.gov.ua/laws/show/994_927#Text

Responsibility for Committing Violence. 2024. https://1547.ukc.gov.ua/dovidkova-informatsiya/protydiya-nasylstva-za-oznakoyu-stati/vidpovidalnist-za-vchynennya-nasylstva/

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.10

*Aiym Szajachmetova**

https://orcid.org/0000-0001-8223-2822

ZNACZENIE KODYFIKACJI POSTĘPOWANIA ADMINISTRACYJNEGO DLA OCHRONY PRAW JEDNOSTKI W KAZACHSTANIE

Streszczenie. Artykuł jest próbą oceny funkcjonowania w praktyce Kodeksu postępowania administracyjnego Republiki Kazachstanu z 2020 r. po 3 latach jego obowiązywania. Cechą charakterystyczną tego Kodeksu jest objęcie jego regulacją zarówno postępowania organów administracji, jak i postępowania przed sądami administracyjnymi, a jego celem – podniesienie poziomu jakości administracji publicznej, a także utrwalenie zasad sądowej kontroli administracji. Autorka zwraca uwagę na mocne strony tego aktu prawnego, tak istotnego w okresie intensywnej transformacji ustrojowej w Kazachstanie. Do najważniejszych jego zalet zalicza skodyfikowanie zasad ogólnych postępowania oraz zdefiniowanie podstawowych pojęć normatywnych. Wskazuje jednocześnie na szereg niedostatków regulacji prawnej. Za najważniejsze uważa pozostawienie niektórych sporów z zakresu prawa publicznego w ramach właściwości sądów powszechnych. Niedostateczny poziom ochrony prawnej dostrzega w szczególności w sprawach kar administracyjnych za wykroczenia administracyjne, które nie zostały objęte regulacją Kodeksu postępowania administracyjnego, mimo że mają administracyjną naturę.

Słowa kluczowe: koncepcja „państwa słuchającego", postępowanie administracyjne, sądowa kontrola administracji, zasady ogólne postępowania, kary administracyjne

THE IMPORTANCE OF CODIFICATION OF ADMINISTRATIVE PROCEDURE FOR THE PROTECTION OF INDIVIDUAL RIGHTS IN KAZAKHSTAN

Abstract. The article is an attempt to assess the functioning of the Code of Administrative Procedure of the Republic of Kazakhstan of 2020 in practice after 3 years of its application. A characteristic feature of this Code is that it covers both the proceedings of administrative bodies and proceedings before administrative courts, and its purpose is to raise the level of quality of public administration, as well as to consolidate the principles of judicial control of administration. The author draws attention to the strengths of this legal act, so important during the period of intensive systemic transformation in Kazakhstan. Its most important advantages include codification of general principles of procedure and definition of basic normative concepts. At the same time, she

* Sędzia Sądu Miejskiego w Astanie, Wydział Cywilny; shag.13@inbox.ru

Received: 28.11.2024. Verified: 3.12.2024. Revised: 2.01.2025. Accepted: 8.01.2025.

indicates a number of shortcomings of the legal regulation. She considers the most important to be the leaving of some disputes in the field of public law within the jurisdiction of ordinary courts. She sees an insufficient level of legal protection, in particular, in cases of administrative penalties for administrative offenses that have not been covered by the regulation of the Code of Administrative Procedure, despite their administrative nature.

Keywords: the concept of the „listening state", administrative procedure, judicial control of administration, general principles of procedure, administrative penalties

1. Republika Kazachstanu na obecnym etapie budowy państwa przeżywa okres intensywnej transformacji ustrojowej. Istotnym elementem tego procesu było podpisanie w dniu 29 czerwca 2020 r. przez Prezydenta Republiki Kazachstanu ustawy – Kodeks postępowania administracyjnego Republiki Kazachstanu (*Administrativno-protsessual'nyy kodeks Respubliki Kazakhstan* – dalej: APPK; https://adilet.zan.kz/kaz/docs/K2000000350/k17350_1.htm, dostęp 15.11.2024), która weszła w życie 1 lipca 2021 r. (Szajachmetova 2021, 207–220; 2022, 161–170). Mimo jej niedługiego, bo zaledwie trzyletniego funkcjonowania, można już sformułować pewne wnioski co do jej przystawalności do potrzeb praktyki i pożądanych kierunków jej rozwoju. Taki jest cel niniejszego opracowania.

Zgodnie z treścią art. 1 ust. 1 Konstytucji Republiki Kazachstanu z dnia 30 sierpnia 1995 r. (https://www.akorda.kz/kz/official_documents/constitution, dostęp: 15.11.2024), Kazachstan jest demokratycznym, świeckim, praworządnym i społecznym państwem, którego najwyższymi wartościami są człowiek, jego życie, prawa i wolności. Wprowadzenie sądownictwa administracyjnego było ważnym krokiem na drodze urzeczywistniania tych wartości. Przede wszystkim wpisuje się ono w koncepcję „państwa słuchającego", będącą koncepcją polityki publicznej, która kładzie nacisk na aktywne wysiłki władzy na rzecz nawiązania kontaktu z obywatelami i zrozumienia ich obaw i potrzeb. Koncepcja ta zakłada stworzenie kanałów otwartej i przejrzystej komunikacji pomiędzy władzą a społeczeństwem i ma na celu zapewnienie, że głosy obywateli zostaną usłyszane i uwzględnione w procesie rozwoju i podejmowania decyzji (Departament Analiz Strategicznych KazISS przy Prezydencie Republiki Kazachstanu 2023).

Wprowadzenie sądownictwa administracyjnego w Kazachstanie nie przebiegało bez przeszkód. Dyskusja na temat możliwości włączenia go w struktury władzy publicznej trwała długo, bo ponad 12 lat. Największy opór stawiali przedstawiciele władzy wykonawczej, obawiając się – nie bez powodu – roszczeń obywateli o przywrócenie im naruszonych praw w sferze administracyjno-prawnej. Sfera ta należy do najbardziej newralgicznych, gdzie do dziś prawa człowieka i obywatela są nagminnie łamane.

W celu przeciwdziałania temu stanowi rzeczy władza ustawodawcza Kazachstanu opowiedziała się za wprowadzeniem sądownictwa administracyjnego, czyniąc to na wzór niemieckiego modelu ochrony prawnej. Model ten zakłada istnienie, obok organów administracji publicznej i uregulowanego ustawowo sposobu

postępowania przed nimi, odrębnych od nich sądów administracyjnych z właściwą dla nich procedurą, regulującą zasady rozpatrywania sporów publicznoprawnych pomiędzy jednostką a organem administracji publicznej.

Znaczenie tej instytucji w budowie praworządnego państwa podkreślał Prezydent Kazachstanu Kasym-Jomart Tokajew w odezwach do narodu. Nie budzi żadnych wątpliwości, że władza sądownicza, obok innych władz publicznych, jest odpowiedzialna za harmonię społeczną, polityczną stabilność, rozwój gospodarczy i realizację innych, podstawowych zasad konstytucyjnych. W ramach koncepcji „państwa słuchającego" władze publiczne muszą w związku z tym prowadzić konstruktywny dialog, reagować na prośby obywateli, a społeczeństwo musi być z kolei włączane w proces decyzyjny, co daje szansę na budowę kraju silnego, stabilnego i rozwijającego się w sposób zrównoważony (Tokajew 2022a). Sądownictwo administracyjne ma więc fundamentalne znaczenie w ramach realizacji koncepcji „państwa słuchającego" dla jak najpełniejszej gwarancji sądowej ochrony praw obywateli i osób prawnych w stosunkach z urzędnikami państwowymi, a także dla zwiększenia dyscypliny aparatu państwowego. Postępowanie sądów administracyjnych przy rozpatrywaniu sporów publicznoprawnych ma się opierać na zasadach wykluczających formalizm i biurokrację, a rozpatrując roszczenia wobec organów rządowych mają one działać według zasady „domniemania winy organu państwowego" (Tokajew 2022b).

Nie można jednak tracić z pola widzenia nie do końca pozytywnych ocen metody unormowania wspomnianych kwestii. Jak słusznie zauważył R.A. Podoprigora, „Kiedy ukazał się ostateczny tekst ustawy, pojawiły się pytania, dlaczego wybrano taki rodzaj ustawy, jak APPK Republiki Kazachstanu. Prawo administracyjne doczekało się kolejnego skodyfikowanego aktu, jednak wybór tej formy stanowienia prawa i systematyzacji ustawodawstwa budzi kontrowersje. Połączenie dwóch naprawdę ważnych instytucji w jeden akt i to w okrojonej formie, bez odniesienia się do całości ustawodawstwa, nie oznacza kodyfikacji. Sam Kodeks pod względem przedmiotowym okazał się jednym z najmniejszych spośród innych skodyfikowanych aktów prawnych" (Podoprigora 2021, 139).

2. Głównym celem APPK było podniesienie poziomu jakości administracji publicznej, a także zapewnienie stabilności praktyki sądowej. Znalazło to odzwierciedlenie w treści art. 5 Kodeksu, w którym określono główne zadania postępowania administracyjnego i sądowej kontroli administracji. I tak, celem postępowania administracyjnego jest: pełna realizacja publicznych praw, wolności i interesów osób fizycznych i prawnych; osiągnięcie stanu równowagi między interesami prywatnym i publicznym w stosunkach prawa publicznego; zapewnienie skutecznej i przejrzystej administracji publicznej, w tym poprzez udział jednostek w podejmowaniu decyzji; cyfrowa transformacja administracji publicznej; wzmocnienie praworządności w sferze prawa publicznego. Z kolei zadaniem sądowej kontroli administracji jest sprawiedliwe, bezstronne

i terminowe rozstrzyganie sporów administracyjnych w celu skutecznej ochrony i przywrócenia naruszonych lub spornych praw, wolności i uzasadnionych interesów jednostek, praw i uzasadnionych interesów osób prawnych w stosunkach publicznoprawnych.

Niewątpliwą zaletą APPK jest skodyfikowanie nieujętych dotąd w ramy prawne katalogu zasad postępowania w postaci: ochrony zaufania, proporcjonalności w ramach uznania administracyjnego, domniemania autentyczności, aktywnej roli sądu czy zakazu nadużywania wymogów formalnych. Powyższe zasady postępowania administracyjnego mają na celu zapewnienie obywatelowi równych szans w sporze z organem administracji. Sprzyja temu także obciążenie organu administracji ciężarem udowodnienia legalności działania (bezczynności) administracji, w tym wydania aktu administracyjnego. Naruszenie tych zasad może być podstawą uznania aktu administracyjnego za niezgodny z prawem. Oprócz wskazanych wyżej zasad do istotnych w kazachskim systemie prawnym nowości należy: zdefiniowanie w APPK pojęcia organu administracji (organem tym może być nie tylko organ państwowy, organ samorządu terytorialnego, ale także państwowa osoba prawna oraz inna organizacja wyposażona w kompetencję do wydania aktu administracyjnego lub dokonania czynności lub ich zaniechania – bezczynności); normatywne określenie pojęcia aktu administracyjnego i czynności administracyjnej oraz bezczynności organu (przez akt administracyjny rozumie się decyzję podjętą przez organ administracji lub urzędnika w sferze stosunków publicznoprawnych, wydaną w celu konkretyzacji praw i obowiązków określonej osoby lub indywidualnie określonego kręgu osób, a czynność administracyjna i jej przeciwieństwo – bezczynność – to czynność lub bezczynność organu administracji lub urzędnika w stosunkach publicznoprawnych, niebędąca aktem administracyjnym); wprowadzenie podziału aktów administracyjnych na uprawniające (akt przyznający uprawnienie uczestnikowi postępowania administracyjnego lub znoszący nałożony nań obowiązek, a także w inny sposób polepszający jego sytuację) i obciążające (akt odmawiający uprawnień lub je ograniczający, wygaszający prawa uczestnika postępowania administracyjnego albo nakładający na niego obowiązek, a także w inny sposób pogarszający jego sytuację); regulacja dotycząca aktu administracyjnego (co do formy, obligatoryjnych jego elementów, doręczenia uczestnikowi postępowania, wejścia w życie, wykonania i wygaśnięcia); ustalenie podstaw uchylenia zgodnych z prawem i z nim niezgodnych aktów administracyjnych (podstawy uchylenia związane są z ochroną zaufania – adresat aktu administracyjnego ma prawo oczekiwać, że niezgodny z prawem akt administracyjny nie zostanie uchylony, jeśli naruszałoby to zasadę ochrony zaufania). Kodeks wymienia przy tym przypadki, w których zasada ochrony zaufania nie wchodzi w grę: w razie niekonstytucyjności aktu prawnego, na podstawie którego wydano akt administracyjny, umyślnej nierzetelności dokumentu lub informacji przekazanej przez uczestnika postępowania administracyjnego lub dopuszczenia się przez niego działań niezgodnych z prawem, a także zagrożenia dla interesów

państwa lub społeczeństwa (Podoprigora 2021, 141). Wprawdzie ostatnie z tych rozwiązań, dotyczące pozostawienia w obrocie prawnym niezgodnych z prawem aktów administracyjnych, nawet jeśli naruszałoby to zasadę ochrony zaufania, wywoływało wiele kontrowersji, jednak ostatecznie przeważył pogląd opowiadający się za takim sposobem rozstrzygnięcia kolizji zasad legalności i ochrony zaufania (Podoprigora 2021, 141).

3. W ramach przepisów APPK dotyczących sądowej kontroli administracji wskazać należy na nową, nieznaną dotąd kazachskiemu ustawodawstwu zasadę w postaci aktywnej roli sądu. Jak wynika z art. 16 Kodeksu, postępowanie sądowoadministracyjne prowadzone jest w oparciu o czynną rolę sądu. Sąd nie ogranicza się do wyjaśnień, oświadczeń, wniosków uczestników procesu administracyjnego czy przedstawionych przez nich dowodów, lecz kompleksowo i obiektywnie bada wszystkie okoliczności faktyczne, które są istotne dla prawidłowego rozstrzygnięcia sprawy administracyjnej. Sędzia ma prawo wyrazić wstępną opinię prawną na podstawie prawnej związanej ze stanem faktycznym i (lub) prawnym sprawy administracyjnej. Sąd z urzędu lub na uzasadniony wniosek uczestników procesu gromadzi dodatkowe materiały i dowody, a także dokonuje innych czynności mających na celu wyjaśnienie okoliczności sprawy.

Istotne w kazachskim ustawodawstwie *novum* stanowi także przeniesienie ciężaru dowodu na organ administracji w przypadku skarg składanych na podstawie APPK. Obowiązek ten nazywa się powszechnie „zasadą domniemania winy organu państwowego". Przepisy te przekładają się na stale rosnącą liczbę skarg na działania administracji. Z analizy statystyk z działalności orzeczniczej Sądu Najwyższego za rok 2024 wynika, że według stanu na czerwiec 2024 r. było ich już ponad 30 tys. Najwięcej skarg dotyczy działań organów administracji rządowej (spory mieszkaniowe, podatkowe i gruntowe). W ciągu ostatnich trzech lat liczba skarg uwzględnionych kształtowała się na poziome 60% (Sąd Najwyższy Republiki Kazachstanu 2022). Wynika to niestety z problemów z respektowaniem przez organy administracji zasad postępowania administracyjnego i innych norm krajowego ustawodawstwa.

Za problematyczne należy uznać także pozostawienie niektórych sporów z zakresu prawa publicznego w ramach właściwości sądów powszechnych. W przepisach Kodeksu postępowania cywilnego uregulowane są np. postępowania w sprawach przymusowej hospitalizacji osoby z zaburzeniami psychicznymi, zaburzeniami zachowania (chorobą) wywołanymi używaniem środków psychoaktywnych, w sprawach skarg na czynności notarialne lub odmowy ich dokonania, w sprawach wydalenia cudzoziemca lub bezpaństwowca w związku z naruszeniem ustawodawstwa Republiki Kazachstanu, a także w sprawach legalności normatywnego aktu prawnego. Jak należy przyjąć, bardziej właściwe byłoby poddanie tych spraw reżimowi APPK, co umożliwiłoby wyrównanie procesowej pozycji obywateli, przedsiębiorców i przedstawicieli aparatu państwowego. Sprzeciwia się

temu jednak część przedstawicieli nauki, prezentując pogląd, że sąd administracyjny może rozstrzygać spory administracyjne jedynie na skutek skargi obywatela, tymczasem postępowania we wskazanych wyżej sprawach są inicjowane przez państwo (Zelentsov 2015, 173–174). Zapatrywaniu temu nie sposób odmówić racji, gdyż istotnie większość sporów przed sądami administracyjnymi jest uruchamiana na skutek skarg osób prywatnych. Nie można jednak wykluczyć przypadków dopuszczalności zainicjowania postępowania przed sądem również przez organy władzy publicznej (Zelentsov 2015, 173–174).

Na szczególną w tym kontekście aprobatę zasługują propozycje Ministerstwa Sprawiedliwości Republiki Kazachstanu z 2024 r. sformułowane w ramach 24 kroków reformy wymiaru sprawiedliwości, zmierzające do wprowadzenia instytucji „arbitrażu rządowego". Obecnie istnieją tysiące przypadków, w których organy rządowe pozywają się nawzajem. Przykładowo w 2023 r. inspekcja gruntów Turkiestanu złożyła 93 pozwy przeciwko wyższemu Akimowi, żądając uchylenia jego decyzji. W Kyzyłordzie państwowa kontrola pozwała Wydział Zamówień Publicznych miasta. W okresie trwania postępowania wstrzymano budowę czterech obiektów wodociągowo-kanalizacyjnych, co spowodowało naruszenie praw zwykłych obywateli. Biorąc pod uwagę doświadczenia innych państw, należy się opowiedzieć za powierzeniom rozstrzygania sporów resortowych organom władzy wykonawczej, tak jak uczyniono to np. w Wielkiej Brytanii. Proponowany mechanizm arbitrażu rządowego powinien przyczynić się do szybkiego rozstrzygania sporów pomiędzy organami rządowymi, agencjami rządowymi i podmiotami sektora *quasi*-publicznego bez udziału sądu.

Na uwagę i aprobatę zasługuje też inicjatywa rządowa zmierzająca do przyjęcia przy ocenie funkcjonowania organów państwowych nowego wskaźnika w postaci liczby skarg na działania poszczególnych organów państwowych i ilości spraw wygranych i przegranych. Powinno to przyczynić się do rewizji metod działania i ogólnego usprawnienia pracy organów władzy wykonawczej na szczeblu centralnym i samorządowym.

Uregulowane w przepisach APPK postępowanie pojednawcze, uruchamiane – jak wiadomo – tylko w sprawach poddanych reżimowi Kodeksu, jest dość często wykorzystywane w praktyce, mimo że regulacja prawna w tym zakresie pozostawia wiele do życzenia. Do rozpowszechnienia tego mechanizmu przyczynia się niewątpliwie aktywna rola sądów administracyjnych, zachęcających organy administracji do udziału w tych postępowaniach i czynnie się w nie angażujących.

4. Problemem, którego nie można pominąć w niniejszych rozważaniach, jest kwestia jurysdykcji sądowej w sprawach wykroczeń administracyjnych. W Kazachstanie sankcjonowanie takich wykroczeń unormowano w Kodeksie wykroczeń administracyjnych Republiki Kazachstanu z dnia 5 lipca 2014 r. nr 235-V (https://adilet.zan.kz/rus/docs/K1400000235, dostęp: 15.11.2024). Jego regulacją objęto ponad 1500 wykroczeń, stanowiących zarówno czyny zabronione

w stosunku do innych osób, jak i w stosunku do porządku publicznego, a ponadto całą grupę wykroczeń mających ściśle administracyjną naturę, które powinny być poddane reżimowi APPK. W związku z tym konieczne jest rozróżnienie wykroczeń na takie, które mają charakter karny i takie, które są wynikiem naruszenia przepisów administracyjnych. Przy ustalaniu zasad odpowiedzialności administracyjno-karnej można i należy czerpać z doświadczeń innych państw i standardów międzynarodowych, by wypracować kryteria odróżnienia odpowiedzialności administracyjnej od innych rodzajów odpowiedzialności prawnej. Niezbędne jest zbadanie różnych zasad ustalania odpowiedzialności administracyjnej i przyjęcie w tym zakresie skutecznych i przejrzystych kryteriów, w tym wypracowanie mechanizmu wyjścia określonych ich kategorii spod reżimu Kodeksu wykroczeń administracyjnych i poddania ich regulacji APPK (Baymoldina 2013, 58).

Można założyć, że rozwój sądowej kontroli administracji zapewni w Kazachstanie dobry grunt dla reformy karania za wykroczenia administracyjne. Obecnie zasadnicza ich większość obejmuje wykroczenia polegające na naruszeniu przepisów regulujących stosunki między obywatelem a państwowym organem regulacyjnym (np. naruszenie terminów, instrukcji i innych przewidzianych prawem wymagań). Przewidziane za to sankcje w postaci np. odebrania licencji, zawieszenia działalności czy kar pieniężnych to kary, które obok agencji rządowych często wymierzane są także przez sądy.

Zgodnie z art. 25 Kodeksu wykroczeń administracyjnych, wykroczenie takie to bezprawne, zawinione działanie lub bierność osoby fizycznej lub niezgodne z prawem działanie lub bierność osoby prawnej, za które Kodeks przewiduje odpowiedzialność administracyjną. Jak wynika z kolei art. 4 APPK, postępowanie administracyjne to czynności organu administracyjnego lub urzędnika przy rozpatrywaniu sprawy administracyjnej, podejmowaniu i wykonywaniu decyzji w tej sprawie, prowadzone na skutek wniosku lub z urzędu, a także czynności podejmowane w trybie uproszczonej procedury administracyjnej. Jak należy przyjąć, postępowanie sprawach odpowiedzialności za wykroczenia administracyjne, sankcjonowane pozbawieniem uprawnień, cofnięciem zezwolenia lub ograniczeniem jego ważności, zawieszeniem lub zakazem wykonywania działalności, nadaje się do objęcia postępowaniem administracyjnym, stąd powinny być one poddane regulacji APPK.

Zdaniem części przedstawicieli nauki, należy uwzględnić uregulowanie rodzajów sankcji administracyjnych w poszczególnych regulacjach sektorowych i przyjąć konsekwentną formułę, że organ, który wydał koncesję lub inne zezwolenie, musi mieć uprawnienia do jego cofnięcia (Borisov, Pudelka 2012). Nic nie stoi na przeszkodzie, by zostały one objęte reżimem APPK, z możliwością zaskarżania aktów administracyjnych w tych sprawach do sądu administracyjnego.

5. Wprowadzone niedawno w Kazachstanie sądownictwo administracyjne, choć jeszcze „młode", niewątpliwie przyczynia się do wzmocnienia ochrony praw człowieka w sporach z administracją. Jest ono także istotnym czynnikiem aktywizacji

obywateli i ich włączania w proces podejmowania decyzji administracyjnych. Nie bez powodu zatem, jak pokazują doświadczenia innych państw, sądownictwo administracyjne cieszy się niezmiennie wysokim poziomem zaufania społecznego.

Pomimo licznych jeszcze w Kazachstanie niedostatków legislacyjnych rola sądownictwa administracyjnego na polu ochrony praw człowieka rośnie. Jak można zakładać, tendencja ta, zapoczątkowana uchwaleniem APPK, zostanie utrzymana, dzięki czemu realne jest osiągnięcie celu ustawy w postaci podniesienia jakości administracji publicznej i zapewnienia wysokiego poziomu ochrony praw jednostki.

BIBLIOGRAFIA

Baymoldina, Zauresh. 2013. *Administrativnaya yustitsiya v Respublike Kazakhstan: sovremennoye sostoyaniye i perspektivy formirovaniya. Voprosy teorii i praktiki primeneniya administrativnoy yustitsii v yevropeyskikh stranakh i stranakh Tsentral'noy Azii: Materialy III mezhdunarodnodnoy shkoly administrativnogo prava*. Astana: GU: Institut zakonodatel'stva Respubliki Kazakhstan, 58. [*Sprawiedliwość administracyjna w Republice Kazachstanu: stan obecny i perspektywy powstania. Zagadnienia teorii i praktyki stosowania sądownictwa administracyjnego w krajach europejskich i krajach Azji Centralnej: Materiały III Międzynarodowej Szkoły Prawa Administracyjnego*. Astana: Instytucja Państwowa: Instytut Legislacji Republiki Kazachstanu, 58].

Borisov, Vladimir. Yorg Pudelka. 2012. *Sbornik zakonodatel'nykh aktov otdel'nykh gosudarstv po administrativnoy yustitsii.* Almaty [*Zbiór aktów prawnych poszczególnych państw dotyczących sądownictwa administracyjnego*. Ałmaty]. https://www.soros.kz/ru/compendium_of_laws_of_some_countries/ (dostęp 15.11.2024).

Departament Analiz Strategicznych KazISS przy Prezydencie Republiki Kazachstanu. 2023. *Wdrożenie koncepcji „państwa słuchającego" w Kazachstanie*. https://kisi.kz/ru/realizachiya-konchepchii-slyshashhego-gosudarstva-v-kazahstane/ (dostęp 15.11.2024).

Podoprigora, Roman Anatolijewicz. 2021. „Razvitiye administrativnogo zakonodatel'stva v Respublike Kazakhstan: novyy kodeks". *Vestnik VGU. Seriya: Pravo* 1: 137–146. [„Rozwój ustawodawstwa administracyjnego w Republice Kazachstanu: nowy kodeks". *Biuletyn VSU. Seria: Prawo* 1: 137–146]. https://doi.org/10.17308/vsu.proc.law.2021.1/3314

Sąd Najwyższy Republiki Kazachstanu. 2022. *Analiz otpravleniia pravosýdiia sýdamı Respýblıkı po admınıstratıvnym delam za 12 mesıatsev (s razbıvkoı na polýgodiia)* [*Analiza sprawowania wymiaru sprawiedliwości przez sądy Republiki w sprawach administracyjnych za 12 miesięcy (w podziale na sześć miesięcy)*]. http://sud.gov.kz/rus/content/appk-v-deystvii (dostęp 15.11.2024).

Szajachmetova, Aiym. 2021. „Reforma postępowania administracyjnego i sądowej kontroli administracji w Kazachstanie". *Zeszyty Naukowe Sądownictwa Administracyjnego* 5: 107–220.

Szajachmetova, Aiym. 2022. „Reforma sądownictwa administracyjnego w Kazachstanie". *Acta Universitatis Lodziensis. Folia Iuridica* 98: 161–170. https://doi.org/10.18778/0208-6069.98.11

Tokajew, Kasym-Żomart. 2022a. *Odezwa do Narodu z dnia 1 września 2020 r.: „Kazachstan w nowej rzeczywistości. Czas na działanie"*. https://kazembassy.ru/rus/press_centr/novosti/?cid=0&rid=4179 (dostęp 15.11.2024).

Tokajew, Kasym-Żomart. 2022b. *Odezwa do Narodu z dnia 1 września 2022 r. „Uczciwe Państwo. Jeden Naród. Prospołeczne Społeczeństwo"*. https://kazembassy.ru/rus/press_centr/novosti/?cid=0&rid=5116 (dostęp 15.11.2024).

Zelentsov, Aleksander Borysowicz. 2015. *Administrativnaya yustitsiya. Obshchaya chast'. Teoriya sudebnogo administrativnogo prava*. Moskva: Unity [*Sprawiedliwość administracyjna. Część ogólna. Teoria sądowego prawa administracyjnego*. Moskwa: Unity].

ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 110, 2025

https://doi.org/10.18778/0208-6069.110.11

Piotr Eckhardt[*]
https://orcid.org/0000-0003-3761-3241
Rafał Mańko[**]
https://orcid.org/0000-0003-0927-2662

CONCEPTUALISING THE CONTINUITY OF LEGAL SYSTEMS AND CULTURES: INTERNATIONAL WORKSHOP ON "LEGAL SURVIVALS IN CENTRAL AND EASTERN EUROPE: SOCIO-LEGAL PERSPECTIVES ON PUBLIC AND PRIVATE LAW" (RIGA GRADUATE SCHOOL OF LAW, RIGA, 15–16 JUNE 2024)

Abstract. The paper describes the debates which took place during the International Workshop on "Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law" (Riga, 15–16 June 2024). The aim of the workshop was to share case studies of legal institutions that have survived despite a socio-economic and political transformation. In the context of Central and Eastern Europe, two transformations in each of the countries in the 20th century are most significant, namely the transition from (authoritarian) capitalism to state communism in the 1940s and the transition back from state communism to capitalism, but this time coupled with democracy and rule of law at the turn of the 1980s and the 1990s. There is certainly a need to analyse legal survivals in the context of Central and Eastern Europe and its transformations which have generally favoured a discontinuity of legal culture, therefore making any continuity in a sense paradoxical and in need of explanation.

Keywords: legal survivals, continuity of law, Central and Eastern Europe

[*] Ignatianum University in Cracow; piotr.eckhardt@gmail.com
[**] Central European University, Democracy Institute; MankoR@ceu.edu.
All views expressed in this conference report are purely personal.

Received: 13.08.2024. Verified: 23.09.2024. Revised: 14.11.2024. Accepted: 15.01.2025.

PERSPEKTYWY BADAWCZE DOTYCZĄCE CIĄGŁOŚCI SYSTEMÓW I KULTUR PRAWNYCH: MIĘDZYNARODOWE WARSZTATY „RELIKTY PRAWNE W EUROPIE ŚRODKOWEJ I WSCHODNIEJ: SPOŁECZNO-PRAWNE PERSPEKTYWY BADAŃ NAD PRAWEM PUBLICZNYM I PRYWATNYM" (RIGA GRADUATE SCHOOL OF LAW, RYGA, 15–16 CZERWCA 2024 R.)

Streszczenie. W artykule opisano dyskusje, jakie odbyły się podczas międzynarodowych warsztatów „Relikty prawne w Europie Środkowej i Wschodniej: społeczno-prawne perspektywy badań nad prawem publicznym i prywatnym" [„Legal Survivals in Central and Eastern Europe: Socio--Legal Perspectives on Public and Private Law"] (Ryga, 15–16 czerwca 2024 r.). Celem warsztatów było podjęcie dyskusji nad studiami przypadków instytucji prawnych, które przetrwały pomimo transformacji społeczno-gospodarczej i politycznej. W kontekście Europy Środkowo-Wschodniej najbardziej znaczące są dwie transformacje w XX wieku, a mianowicie przejście od (autorytarnego) kapitalizmu do komunizmu państwowego w latach czterdziestych XX wieku oraz ponowne przejście od komunizmu państwowego do kapitalizmu, ale tym razem w połączeniu z demokracją i rządami prawa na przełomie lat 1980 i 1990. Z pewnością istnieje potrzeba przeanalizowania form prawnych, które przetrwały w kontekście Europy Środkowo-Wschodniej i jej przemian, które generalnie sprzyjały nieciągłości kultury prawnej, czyniąc tym samym wszelką ciągłość w pewnym sensie paradoksalną i wymagającą wyjaśnienia.

Słowa kluczowe: relikty prawne, ciągłość prawa, Europa Środkowa i Wschodnia

On 15–16 June 2024, the Riga Graduate School of Law (RGSL) (Riga, Latvia) hosted an International Workshop on Legal Survivals in Central and Eastern Europe, co-organised by the Centre for Legal Education and Social Theory (CLEST) at the University of Wrocław (Poland). The Workshop was organised by Dr Piotr Eckhardt (CLEST) and Dr hab. Rafał Mańko (Central European University, Democracy Institute) under the scientific patronage of Professor Adam Czarnota (Rector of the RGSL and Professor-Emeritus at the University of New South Wales, Sydney, Australia). The workshop was attended by fifteen participants and was divided into five sessions.

The workshop was opened by Professor Czarnota, who welcomed the participants and presented the organisers. The beginning of the conference provided an opportunity to briefly outline the history and the present of the RGSL, as well as to introduce the Centre for Legal Education and Social Theory (CLEST) operating at the University of Wrocław, with which all the organisers of this scientific meeting are associated in some way.

Following that, the organisers of the Workshop explained its main idea, namely the study of legal institutions that have survived despite a socio-economic and political transformation (Mańko 2015, 2023, 2024). In the context of Central and Eastern Europe, the two transformations of the countries in the 20th century are most significant, namely the transition from (authoritarian) capitalism to state communism in the 1940s, and the transition back from state communism to capitalism, but this

time coupled with democracy and rule of law at the turn of the 1980s and the 1990s (Mańko, Tacik, Cercel 2024; Czarnota, Krygier, Sadurski 2005). The concept of a legal survival can be traced back to the writings of Oliver Wendell Holmes (2009 [1881]) and Karl Renner (1907/1929[1976]) and has been analysed more recently in the works of Hugh Collins (1980). There is certainly a need to analyse legal survivals in the context of Central and Eastern Europe and its transformations which have generally favoured a discontinuity of legal culture, therefore making any continuity in a sense paradoxical and in need of explanation (Mańko 2016).

Session One, entitled "The Methodology of Research of Legal Survivals," was moderated by Dr Piotr Eckhardt (CLEST). The first speaker was Dr hab. Rafał Mańko, who presented a paper on "Legal Survivals at the Interstices of Legal History, Sociology of Law and Legal Philosophy: Theoretical Foundations of a New Research Method." This paper was meant as a methodological introduction to the whole workshop and focused on the need for integrating various disciplinary approaches when studying legal survivals. The speaker mentioned the need, first of all, to enable a meeting between the discourses of (comparative) legal history and (comparative) legal dogmatics, which usually turn their back on each other. Legal historians usually do not refer to contemporary law, whereas the approach of dogmaticians and comparatists to history is rather minimal and instrumental. They do not seek to understand the evolution of a legal institution as an ongoing process, but, rather, limit themselves to presenting an elementary historical background of contemporary law. Beyond such presentation, however, history does not play a major role as an *explanans* of dogmatic and comparative discourse. However, legal survivals *qua* research method are not only about the historicisation of dogmatics and comparative law, or about making legal historians more aware of what happened to the object of their study later on. A crucial methodological input is sought from the sociology of law, which can provide the tools necessary to answer the questions concerning the changing social functions of legal institutions and, more broadly, the relations between law and societal change, be it revolutionary or incremental. Additional input is also necessary from (analytical) legal theory, as it can help formulate precise concepts (e.g. the identity of a legal survival), as well as tools for evaluating the re-interpretation of legal institutions both within dogmatic discourse and the judicial interpretation and application of law. Finally, an overarching role should be assigned to the philosophy of law (in Artur Kozak's sense), especially as regards the formulation of general research questions and drawing conclusions relevant from the point of view of the concept of law and theory of its relations towards life (politics, economics, ideology, culture, etc.)

The second speaker was Professor Jānis Pleps, who presented the results of his research on "Influence of the Socialist Legal Tradition on the Application of the *Satversme*" (the Constitution of Latvia). The Latvian fundamental law was adopted on 15 February 1922, but after the 1934 Ulmanis's *coup d'état* the *Satversme* was

suspended. Of course, it was also not applied during the occupation of Latvia by the Soviet Union between 1940 and 1990. The fundamental principles of the *Satversme* were restored on 4 May 1990, and full restoration took place in 1993. Therefore, in Latvia, the constitution of the interwar period is in force nowadays. The application of this legal survival (or, more precisely – a legal revival)[1] by authorities influenced by the socialist legal tradition had a special peculiarity. The speaker highlighted the formalistic methods of interpretation, inherited from Soviet hyperpositivism, for the preservation of the powers of the Latvian parliament after the restitution of independence in the early 1990s.

Following the two papers, a discussion took place. Professor Czarnota asked about the length of time necessary to be able to speak of a legal survival – should it be the *longue durée* or a short period of time could be sufficient? Furthermore, he asked whether the concept of a legal survival should be limited to legal institutions or whether it could encompass any kinds of legal ideas, for instance the idea of the "rule of law" (*Rechtsstaat*). Answering to this question, Dr hab. Mańko emphasised that the required time should be evaluated *a casu ad casum*, depending on the circumstances, and, in particular, the dynamics of social change. For instance, the institutions created in the last years of People's Poland, such as the Constitutional Court (1986) or the Ombudsman (1987), should be treated as socialist legal survivals given the 1989 transformation. Concerning the second question, the speaker emphasised that the legal institution, understood as a set of functionally interrelated legal norms, remains the paradigm of the concept of a legal survival (comparable to that of a "legal transplant" in comparative law), but this does not exclude analysing individual legal norms, legal concepts, legal principles, or any other kinds of legal ideas, such as methods of interpretation.

As regards Professor Pleps' paper, Dr hab. Mańko asked about the methods of interpretation used by the Latvian Constitutional Court (LCC), and about the *ius-lex* distinction in Latvian legal language. Professor Pleps explained that the LCC embraced a teleological method of interpretation, typical of many other constitutional courts. Concerning the *ius-lex* distinction, it is also known to Latvian legal language (*likums* vs *tiesibas*), although the term *likums* can cover both the entirety of positive law as such and a concrete legislative act.

Session Two on "Private Law," chaired by Professor Sanita Osipova (University of Latvia; Judge at the Latvian Supreme Court, former President of the Latvian Constitutional Court), was the most extensive session of the workshop, as it consisted of as many as four presentations. The first speaker was Dr Ivan Tot (University of Zagreb). He presented to the workshop participants "A Law that Stood the Test of Time: The Perseverance of the Yugoslav Law on Obligations and Legal Survivals in Croatian Law, with a Focus on Termination for Breach of Contract." The Law on Obligations adopted in the Socialist Federal Republic

[1] For the newly introduced notion of a "legal revival," see Mańko (2024).

of Yugoslavia in 1978 was not strongly influenced by the socialist legal tradition. Instead, a lot of amalgamated elements from both Germanic and Romanistic legal families can be found there. Therefore, these regulations, being legal transplants, proved more durable than Yugoslavia itself. They survived its brutal break-up and have become legal survivals in all newly formed states. In Croatia, the new Law on Obligations of 2005 maintained continuity with the Yugoslav Law on Obligations by borrowing almost its entire content, albeit with restructuring and minor amendments, which is an example of a legal survival by "transfiguration" (the replication of legal form in a new legislative act, but essentially preserving the contents of the old law), according to the conceptual framework proposed by Mańko (2023). As a case study for this historical process, Dr Tot discussed in detail the general framework for termination for breach of contract, which blends influences from the ULIS (*Uniform Law on the International Sale of Goods*), the BGB (*Bürgerliches Gesetzbuch* – German civil code), and the French *code civil*.

The second presenter in this session was Dr Radosveta Vassileva (Middlesex University), who interested the workshop participants with the story of "A 75-Year-Old Mystery: Understanding the Dark Secrets of Bulgaria's Law on Obligations and Contracts of 1950 in Context." Among Bulgarian scholars, there is a popular belief that the 1950 Bulgarian Law on Obligations and Contracts (which survives to this day with minor amendments) is an original local creation. However, research conducted by the presenter (Vassileva 2019, 2022) has shown that this legislation is, in fact, a creative compilation heavily based on the relevant sections on obligations of the Italian *Codice civile* of 1942, enacted during the fascist era. It appeared that a country building a communist legal order after 1944 sought inspiration in a country professing a rival ideology (fascism). Dr Vassileva also described the practice of judges applying doctrine from communist times to interpret the law on Obligations and Contracts even post-1989 while not overtly admitting so (i.e. without citing the original sources of the doctrine).

The next, third presentation in this session was delivered by Dr Aleksandrs Fillers, LL.M., an Associate Professor at the Riga Graduate School of Law, which hosted our workshop. Dr Fillers introduced the participants to "A Relic of Days Gone By: The Latvian Civil Law in Contemporary Latvia." In the period of political transformation and reforms of the legal systems after 1989, Latvia followed a different path from the other countries in the region. Instead of creating a new civil code based on modern western models, the country decided to renew the pre-war Latvian *Civillikums* (Civil Law). The intention was to emphasise the continuity of the state, whilst it had been considered to be quite a modern piece of legislation for its era. However, it turned out that the *Civillikums* was, in fact, an abridged and marginally updated version of the 19th-century Baltic Private Law Act that had been in force in the Baltic provinces of the Russian Empire. Hence, in reality, Latvia reenacted a legal instrument that to a significant degree contained private law rules of the 19th century. Dr Fillers described the problems encountered

by Latvian legal doctrine and practitioners in applying regulations dating from such a distant era.

The last presenter in Session Two was Wiktor Walewski (University of Białystok), who made an attempt to answer the question "Is the Institution of Incapacitation an Example of Polish Private Law's Survival?" The legal institution investigated by Wiktor Walewski was present in the regulations inherited by Poland from the partitioning states after regaining independence in 1918 and was repeated in subsequent legal acts without fundamental changes. It has, therefore, remained in the Polish legal system for more than a century. In a more inclusive and equal world, where attitudes towards people with special needs have completely changed, incapacitation is causing increasing problems. One of the most significant problems appears in the context of the implementation of Article 12 of the Convention on the Rights of Persons with Disabilities in the Polish legal system. However, the development of new solutions has been prolonging.

After the presentations, the workshop participants moved on to the discussion. On reflection of Dr Ivan Tot's paper, the particular necessity of conducting comparative legal research was acknowledged in the case of legal survivals coming from the legal systems of states that had broken up into more state organisms with independent legislation (precisely Yugoslavia, but also the Soviet Union or Czechoslovakia). On the basis of the presentation by Dr Vassileva, the discussion concluded with the need to study the genealogy of the laws that became legal survivals as well as their political-ideological context, especially in contrast to the sources their creators were inspired by. The example of the Latvian *Civillikums* discussed by Dr Fillers was termed by Dr hab. Mańko as a legal revival, indicating that such legal institutions that have been revived after a prolonged period may constitute a separate subject of study (cf. Mańko 2024). The institution described by Wiktor Walewski has been identified as an example of a dysfunctional legal survival (cf. Preshova, Markovikj 2024, 130), which is widely criticised and considered unsuitable for today's times, but still remains in the legal system due to the indecisiveness of politicians and the slowness of the legislative process.

Session Three on "Legal Professions" was chaired by Dr. hab. Dorota Miller (University of Augsburg). The first speaker, Professor Sanita Osipova, covered the exceptionally long-lasting legal survival that is the "Notarial System as Legal Survival in Latvia – Built in 1889, Improved in 1937, Renewed in Force in 1993." Professor Osipova explained that the notarial regulations introduced in the Russian Empire survived the emergence of independent Latvia in the interwar period. The new regulations dating from 1937 were an evolutionary improvement of the existing system. However, this is not the end of an eventful story. The inter-war legislation was reintroduced after the collapse of the Soviet Union and the restoration of Latvian independence. This legal survival can therefore be called a legal revival as well.

The second participant of that session, Kamil Zyzik (Jagiellonian University), presented the results of his research: "Fading Socialist Lawyering in Poland: About the Advocate Units." The young scholar from Kraków depicted the increasingly less common, but still occurring in Poland, social practice of operating in the competitive market of legal services within the framework of so-called advocate units. These were institutions created during state socialism, replacing lawyers' ability to operate in the framework of commercial law partnerships. The advocate units situated the legal profession between the spheres of public service and private enterprise. After the 1989 transition, the latter option became accessible and common, but the former one was not removed from the legal system. Kamil Zyzik reviewed the tensions around this quasi-cooperative vision of legal practice within contemporary privatised legal landscape.

A discussion followed the two presentations. The workshop participants debated whether advocate units in Poland have any future, can provide a useful alternative to commercial law, or are rather doomed to a slow extinction. Dr hab. Rafał Mańko pointed to the methodological difference between legal survival and legal revival, and the need to delineate the scope relations between these concepts.

Following Session Three, a roundtable discussion took place and focused on the forthcoming book on *Ideology and Private Law: Polish Experiences in the Long 20th Century*, co-authored by Professor Anna Machnikowska (University of Gdańsk), Professor Michał Gałędek (University of Gdańsk), and Dr hab. Rafał Mańko.[2] The concept of the book was first presented by Professor Gałędek, who emphasised its approach as a new synthesis of legal history, based on the ideological currents that formed the basis for legal developments. Following that, Dr hab. Mańko presented conceptual analyses concerning the relations of law and ideology, with particular emphasis on the interplay between political and juristic ideologies (cf. Mańko 2020a). Following that, the discussants – Professor Pleps and Dr Eckhardt – presented their views. Professor Pleps highlighted the importance of the forthcoming book for the study of the historical entanglements of law and ideology, and expressed the wish that such research will be undertaken also with regard to other legal systems. Dr Eckhardt formulated the hypothesis that public law falls more easily under the external influence of political ideology and is more easily instrumentalised, whereas private law is primarily influenced by juridical ideology. Or at least this was the case of the Polish state socialism.

The conference resumed on Sunday, 16 June, with Session Four, titled "Between Public and Private Law" and moderated by Dr Eckhardt. The session began with a presentation by Dr Dace Šulmane and Professor Linards Muciņš, both from Turība University. The researchers presented the complex history of ownership transformations in the area of housing after the collapse of the Soviet Union and the restoration of Latvia's independence. Two processes took place in parallel in the 1990s: reprivatisation, whereby the legal successors of the pre-war

[2] Machnikowska, Gałędek, Mańko (2024).

owners regained the land properties, and privatisation, through which the residents of blocks of flats built on these properties during the Soviet period were able to buy the rights to their dwellings. This has resulted in an unusual legal situation in which one private person owns the land itself, but other persons are co-owners of the building situated on that land – something contrary to the principle of *superficies solo cedit*. This leads to the need for so-called compulsory leases so that a legal relationship between the land owner and the apartment owners can be provided for. The Latvian Civil Law does not cope very well with this legacy of the transition period.

The second paper in that session was presented by Dr hab. Mańko and was devoted to "Fault-Based and Punitive Divorce as a Socialist Legal Innovation in People's Poland and Its Survival After 1989." The speaker first provided a detailed historical introduction into Polish divorce law prior to its unification in 1945, noting the differences of models provided for in German, Austrian, Hungarian, Franco-Polono-Russian, and Russian laws in force prior to unification. He then showed the evolution of the model of Polish divorce law from the unification under the Marriage Law Decree of 1945, through the Family Code of 1950, right down to the Family and Guardianship Code of 1964, in force until today. Dr hab. Mańko emphasised the hybrid nature of the institution of divorce in Poland, which is based on the mixture of the breakdown principles with the principle of fault. The latter is, in practice, understood in a way which closely resembles the model of relative grounds for divorce, meaning that parties normally plead concrete events (such as infidelity, violence, etc.) that lead to the breakdown, and divorce courts investigate these facts in order to ascribe fault for the breakdown. Furthermore, the Polish institution of divorce as it stands now is, in fact, a *double legal survival*, i.e. on the one hand, the socialist divorce as codified in the times of Władysław Gomułka still survives despite deep ideological and cultural changes, affecting people's lifestyles and world-views, but on the other hand, within that Gomułka epoch, the model of divorce that one can find is *a deeper legal survival*, dating back to the model of divorce present in the original text of the BGB, the ABGB, or *code civil*, where specific grounds for divorce were required which not only determined the possibility of dissolving the marriage but also were decisive for ascribing fault and, as a consequences, various sanctions, such as notably punitive maintenance of the former spouse.

The third presentation in this session was delivered by Dr hab. Miller, who introduced the issue of "Succession Rights for Unmarried Partners in Ex-Yugoslavia: Historical Context and Modern Implications." The first measures of this type appeared in Yugoslavia after World War II due to the hardship of many widows who could not document their marriage. The Federal Supreme Court of Yugoslavia granted widow's pensions also to those who could document just cohabitation with the deceased. In the 1970s, Yugoslav republics gained autonomy over, *inter alia*, family and succession law. One of the new developments that was adopted, among others, in Slovenia, was the equalisation of the succession-law

rights of cohabitating partners living in lasting relationships with those of married couples. It was a response to a growing number of unmarried partnerships. This groundbreaking law has persisted through economic, ideological, and social transformations, and spread over other countries (e.g. Croatia in 2003).

Session Four also concluded with a discussion. In the context of the presentation by Dr Šulmane and Professor Muciņš, the need was acknowledged to distinguish legal survivals from the legacy of the post-1989 political transformation period, which is another layer of the legal system. This is a rather separate but very important and under-addressed topic of legal research. Dr Eckhardt identified another significant research area from Dr hab. Mańko's presentation. Namely, he indicated that the moral conservatism of state socialism in People's Poland and its manifestations in the legal system should be better explained, not only in the context of divorce. The conclusions of Dr hab. Miller's paper provided another opportunity to emphasise the purposefulness of comparative research on legal survivals, once again drawing on the case of the various countries of the former Yugoslavia.

The last session was Session Five on "Public Law" chaired by Dr Šulmane. It began with a presentation by Dr Eckhardt, who, based on his research on law and ideology in housing, construction, and spatial planning in socialist Poland (Eckhardt 2024), described the phenomenon of the "Housing Cooperatives Perceived as Public Administration Bodies Rather Than Independent Organisations as a Legacy of Socialist Regulations? The Case of Poland." Dr Eckhardt described how the communist authorities of People's Poland took control of housing cooperatives (established before World War II as independent non-governmental organisations) without nationalising their assets in the sense of civil law. Instead, there was the centralisation of the cooperative movement and the hierarchical subordination of cooperatives forcibly affiliated to unions, whose authorities were staffed with trusted communists. As a consequence, housing cooperatives began to play the role of organs of the local housing administration – they were large and highly bureaucratic. Designated cooperatives had a monopoly in particular areas. After 1989, the provisions on centralisation and subordination were abolished, but the structure of Polish housing cooperatives as large, bureaucratic "mammoths" has remained to this day.

The second presentation was delivered by Michał Stokowski (University of Białystok), who drew on the post-war period, discussing the topic of "August Decree Today: Is It Still Necessary?" The researcher presented the history of regulations commonly referred to as the "August Decree," which dealt with the punishment of World-War-II criminals and those who collaborated with the German occupier. The last trial based on them took place in 2002. For obvious reasons related to the passage of time, no further cases are expected. This raises doubts about the legitimacy of the continued validity of the discussed decree.

The final presentation in this session and in the entire workshop was given by Professor Piotr Szymaniec (Angelus Silesius University of Applied Sciences in Wałbrzych), who explained the issue of "Prosecutor's Participation in Administrative Proceedings: A Guarantee of the Rule of Law or a Relic of the Law of *Real Socialism*?" The scholar presented the prosecutor's competence to participate in administrative proceedings as a typical model for almost all (except Yugoslavia) countries of state socialism, which replaced the administrative judiciary that did not exist there. Professor Szymaniec pointed out that such prosecutorial powers survived primarily in Poland and Slovakia. On the basis of an analysis of the Polish case law, he discussed examples of their use by the prosecution service after 1989.

As with all the previous sessions, the last one also concluded with a discussion. In the context of Dr Eckhardt's presentation, it was noted that it is necessary to distinguish between legal survivals as particular legal institutions and social institutions that still exist despite the fact that the regulations that made their emergence possible have passed into history. Michał Stokowski's presentation was a trigger to discuss the desirability of keeping certain provisions in the legal system (even if only for symbolic reasons) despite the fact that they will most likely never be applied again. Professor Szymaniec's presentation sparked a discussion about the role of the prosecution service in a constitutional democracy and the purposefulness of maintaining the prosecutor's powers to participate in administrative proceedings when there are ombudsmen and administrative courts.

The workshop ended with the presentation of the idea of a common publication that will be the first attempt to systematically explore the presence of legal survivals in the legal systems and legal cultures of Central and Eastern Europe.

* * *

The conference papers and discussions made it possible to address a number of horizontal issues. The first one was the question of the *scope of the notion of a legal survival*. Some participants, like Professor Czarnota, argued for a narrow scope, linked to the socio-economic transition from state socialism to democratic capitalism. Others, like Dr Tot, were in favour of a broader approach, but still with the element of an adverse environment, *in spite of which* the legal survival continues to exist. Yet others, like Professor Gałędek, argued in favour of a broad approach which would encompass any form of long-term continuity of a legal institution, which would allow to highlight the importance of legal tradition as a legitimising factor in legal discourse. In the discussion, Dr hab. Mańko highlighted the utility of Adolf Reinach's phenomenological ontology of law (Reinach 2012[1913]) – recently popularised by the late Professor Tomasz Bekrycht (2009) – for the conceptualisation of legal survivals. In fact, if we consider,

following Reinach, that legal ideas – be they norms, institutions, concepts, or principles – can be treated as mental beings and constitute the object of ontological research (as was clearly emphasised by Artur Kozak),[3] then the notion of a legal survival gains a hard ontological basis in the intersubjective consciousness of the legal community.

Secondly, the issue of the *substance of a legal survival* was also discussed. Here, Professor Czarnota proposed to consider a broad approach, which would include not only a legal institution or norm, but also a legal idea. Dr hab. Mańko's methodological paper that opened the conference emphasised the importance of legal survivals understood – akin to legal transplants – essentially as legal institutions, but he conceded the importance of other forms of survivals. The individual papers took different approaches. Professor Pleps presented the survival of certain methods of interpretation in the Latvian legal culture, whereas Professor Osipova focused on the survival and evolution of the legal profession of a notary and its organisation.

Thirdly, the papers revealed interesting features regarding *the complexity and hybridity of legal survivals*. Most of the institutions presented in the papers had various layers of continuity – for instance, in the case of Latvian notaries (Professor Osipova's paper), there was a continuity of Russian Imperial elements, upon which the traditions of independent Latvia and then socialist Soviet traditions were imposed. In the papers concerning Bulgarian and Croatian private law (papers by Dr Vassileva and Dr Tot, respectively), the continuity of older legal systems (such as the ABGB), was visible, upon which the continuity of socialist law was imposed. Thus, legal survivals have indeed the structure of a palimpsest (Mańko 2023), whereby various layers are imposed upon each other and influence each other. The same observations can be applied to examples from family law – the paper on inheritance of non-married partners in the countries of former Yugoslavia showed how the layers were imposed upon each other. In the paper on divorce in Polish law (Mańko), the layers of old, purely fault-based divorce founded on specific absolute grounds are still visible in the socialist codification of 1964, which in itself is a survival in today's Poland. Finally, in Dr Eckhardt's paper on housing cooperatives, the socialist legislator used a legal form existing in the capitalist Second Republic in order to mould it for its own purposes of centrally managing the cooperatives. Today, the socialist legal form of a large, bureaucratic housing cooperative survives, but within these legal survivals also earlier layers of legal culture are visible.

[3] Kozak (2009, 84): "It is highly probable that for lawyers analysing legal phenomena from an internal point of view the basic method (…) are enunciations predicating existence, not meaning (…) From the point of view of an internal, autonomous theory, in this behaviour of lawyers we find the presence of an intra-institutional world (…). [S]uch a world cannot be questioned. It can only be analysed." Cf. Mańko (2020b); Kozak (2010).

Whereas these three horizontal issues undoubtedly require more theoretical research and its confrontation with the results of historical, dogmatic, and sociological research – as the convenors of the workshop and editors of the future monograph concluded based on its outcomes – we consider it useful to propose certain working solutions.

Firstly, as regards the *scope ratione temporis* of a legal survival, we consider that it is not possible to give a one-size-fits-all answer concerning the time that a legal survival should exist for it to be considered a survival. Undoubtedly, legal institutions which survived transformations, transitions, or a revolution are the core of the concept, but an institution which exists very, very long – even if its environment did not change adversely – could also be included in the concept.

Secondly, as regards the *substance* of the concept of a legal survival, we consider that the broad approach, advocated by Professor Czarnota, and theoretically grounded in the phenomenological philosophy of law developed by Reinach and Bekrycht, is an optimal approach, as it makes it possible to include various kinds of legal ideas. Even if the legal institution remains the core example of a legal survival, the practice of including legal concepts, principles, methods of interpretation, and other legal ideas of various kinds (including even juristic ideology) will make it possible to survey the entire breadth of legal culture in search of continuity.

A crucial element of legal survivals that should definitely be addressed in the future edited volume is the question of their *multi-layered character and hybridity*, or – to put it in metaphorical terms – their nature of a palimpsest. In this way, the analysis of legal survivals will enable the formulation of more general claims about the nature of the law, its internal structure, and its relation to the changing and often hostile social environment.

BIBLIOGRAPHY

Bekrycht, Tomasz. 2009. *Aprioryczność prawa. Ontologia prawa w fenomenologii Adolfa Reinacha*. Warszawa: Wolters Kluwer.

Collins, Hugh. 1980. *Marxism and Law*. Oxford: Oxford University Press.

Czarnota, Adam. Martin Krygier. Wojciech Sadurski. 2005. *Rethinking the Rule of Law after Communism*. Budapest: Central European University Press. https://doi.org/10.1515/9786155053627

Eckhardt, Piotr. 2024. *Socialism under Construction. Law and Ideology in Housing, Construction and Spatial Planning in Poland 1944–1989*. Warszawa: Wydawnictwo Naukowe Scholar.

Holmes, Oliver Wendell. 2009 [1881]. *The Common Law*. Harvard: Harvard University Press.

Kozak, Artur. 2010. *Myślenie analityczne w nauce prawa i praktyce prawniczej*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Machnikowska, Anna. Michał Gałędek. Rafał Mańko. 2024. *Ideology and Private Law: Polish Experiences in the Long 20th Century*. Leiden: Brill (forthcoming). https://doi.org/10.1163/9789004730021

Mańko, Rafał. 2015. "Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture." In *Tiesību efektivitāte postmodernā sabiedrībā*. Edited by Jānis Rozenfelds et al. 17–27. Rīga: LU Akadēmiskais apgāds.

Mańko, Rafał. 2016. "Towards a Typology of Dimensions of the Continuity and Discontinuity of Law: The Perspective of Polish Private Law after the 1989 Transformation." *Wroclaw Review of Law, Administration & Economics* 6(2): 108–120. https://doi.org/10.1515/wrlae-2018-0007

Mańko, Rafał. 2020a. "Legal Form, Ideology and the Political." In *Legal Scholarship and the Political: In Search of a New Paradigm*. Edited by Adam Sulikowski, Rafał Mańko, Jakub Łakomy. 17–40. Warszawa: C.H.Beck.

Mańko, Rafał. 2020b. "Artur Kozak's Juriscentrist Concept of Law: A Central European Legal Innovation." *Review of Central and East European Law* 45(2–3): 334–375. https://doi.org/10.1163/15730352-bja04502003

Mańko, Rafał. 2023. "Legal Survivals and the Resilience of Juridical Form." *Law and Critique.* https://doi.org/10.1007/s10978-023-09357-2

Mańko, Rafał. 2024. "Legal Transplants, Legal Survivals, and Legal Revivals: Towards a Reconceptualisation of the Circulation of Legal Forms in Time and Space." *Acta Universitatis Lodziensis. Folia Iuridica* 109: 93–117. https://doi.org/10.18778/0208-6069.109.06

Mańko, Rafał. Przemysław Tacik. Cosmin Cercel. 2024. "Introduction: Law, Populism, and the Political in Semi-Peripheral Central and Eastern Europe." In *Law, Populism and the Political in Central and Eastern Europe*. Edited by Rafał Mańko, Adam Sulikowski, Przemysław Tacik. Cosmin Cercel. 1–23. Abingdon: Routledge. https://doi.org/10.4324/9781032624464-1

Preshova, Denis. Nenad Markovikj. 2024. "Old Patterns Die Hard – The Idiosyncrasies of the Yugoslav Socialist Legal Tradition and the Problem of Continuity in the Western Balkans." In *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*. Edited by Cosmin Cercel, Alexandra Mercescu and Mirosław Michał Sadowski. 119–136. Abingdon–New York: Routledge. https://doi.org/10.4324/9781003346890-8

Reinach, Adolf. 2012 [1913]. *The Apriori Foundations of the Civil Law*. Translated by John F. Crosby. Berlin: De Gruyter. https://doi.org/10.1515/9783110329803

Renner, Karl. 1904/1929 [1976]. *The Institutions of Private Law and Their Social Functions.* London–Boston: Routledge and Kegan Paul. [1st German edition 1904, 2nd German edition 1929].

Vassileva, Radosveta. 2019. "Shattering Myths: The Curious History of the Bulgarian Law of Obligations." *Studia Iuridica* 82: 309–327. https://doi.org/10.5604/01.3001.0013.9793

Vassileva, Radosveta. 2022. *Bulgarian Private Law at Crossroads.* Antwerp: Intersentia. https://doi.org/10.1017/9781839702969

TABLE OF CONTENTS

VARIA