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C O N T E N T S

PRAVO – teorija i praksa
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LEGAL STATUS OF COMPLIANCE OFFICERS – OPEN ISSUES

ABSTRACT: Legislators only sporadically regulate the compliance function within companies, primarily in the financial sector. The primary task of compliance officers (CO) is to ensure that the overall business operations comply with legal norms. When discussing the potential liability of compliance officers, it is necessary to analyze their legal position within the corporation. The liability of compliance officers should primarily be considered as the employee's responsibility towards the employer. From the perspective of corporate law, the theoretical background should focus on whether compliance officers have a distinct legal status within the company. The authors aim to contribute to the discussion on potential changes in corporate governance, where corporate officers such as compliance officers gain more influence, and to raise awareness of the precarious position of compliance officers under current solutions of both the Anglo-American and Continental European models.

Keywords: *compliance officers, corporate officers, legal status.*

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1. Introduction

The legal position and role of corporate officers became a focus of recent debates in judicial rulings and scholarly writings. This paper focuses on the corporate officers, which are internal employees of the companies, but which are not simultaneously members of the management and supervisory boards. Examples would be Chief Financial Officer, Chief Compliance Officer, Chief Marketing Officer and others. This paper shall elaborate on open issues of legal position and liability of corporate officers on the example of a compliance officer (further: CO). Legislators only sporadically regulate compliance in the company, mainly in the financial sector. In contrast, for other companies, the decision on the constitution and functioning of the compliance system is left to them. Compliance function has USA origins, with an increasing number of CO in companies, but there is still no unanimous definition of compliance in literature or legislation. Generally, compliance refers to a system of policies and controls that an organization puts in place to ensure that the overall conduct of business is in accordance with law (Baer, 2009, p. 958). There has been a debate over whether compliance is just about fulfilling legal obligations or does it also have to focus on ethics and corporate culture (Haugh, 2021, p. 6). Some argue that compliance means a broader duty to the common good, aiming to prevent the company from doing meaningful harm (Brener, 2019, p. 971). Besides the content, organization of compliance systems vary greatly throughout the companies. Some companies have compliance departments, and some employ only individual COs (Derenčinović Ruk, 2015, p. 710). The challenge is how to establish a standard for the compliance function and how to establish the legal status and liability of COs. The authors aim to clarify the latter by using the comparative legal method and draw conclusions from the American perspective, as a representative of Anglo-American countries on the one hand, and German and Croatian perspectives, as representatives of the Continental Europen model on the other hand. The authors aim to contribute to the discussion on the possible place of COs in the change of corporate governance of the companies. The analysis should demonstrate whether the current position of COs is satisfactory, and to point out troublesome development regarding the exposure of COs to both civil and criminal liability.

2. Who must set up the compliance system?

Only some joint-stock companies must set up a compliance system on the EU level. An example would be companies which conduct investment services under the application of MIFID regime (MIFID I in article 13/2,

MIFID II in article 16/2). From the American perspective, the compliance function is developing *ad hoc*, primarily due to criminal prosecutions for the companies and their officers (Baer, 2009, p. 964). Compliance was, for the first time, anchored in the USA legislation with the introduction of the Federal Sentencing Guidelines revision in 1991, which prescribed the possibility of imposing a milder sentence if the board of directors could prove the existence of a corporate compliance program. These guidelines expressly provided for the function of a "Chief Ethics Officer" or "Chief Compliance Officer". According to the US understanding, a CO was, therefore, a mandatory element of a compliance organization (Langenhahn, 2012, p. 28). Still, although it is never wrong to set up a compliance function, it is also not clear for the prevailing number of companies which must set up a compliance function. The answer can further depend on the applicable national law and the type of business activities of the company.

Who must set up the compliance system within the company? There is no explicit obligation for the managers to form a compliance system within the company. Still, there is a growing opinion in theory and practice that managers in two-tier and directors in one-tier board system could be held responsible for the organization of an adequate compliance system in order to ensure the legality of the company's actions, both with third parties and within the companies among various stakeholders (Fleischer, 2014, p. 322). In that regard, it has been argued that the compliance functions for managers and directors stem from their organizational duties towards the company (Hopt, 2023, p. 1).

From the American perspective, the crucial case was the Caremark case in 1996.[1] Under the Caremark case, it was found that directors have fiduciary duty to ensure that the company established a system in order to ensure the compliance with the law. Caremark case discussed some significant issues that continue to have an influence and significance in a contemporary law, among other things, how much to spend on compliance, and also the manner and time of drawing the management's attention to certain compliance issues (Langevoort, 2018, p. 730). Following the Caremark case, scholars debate that the task of board of directors is not only to ensure the existence of the compliance function, but also to ensure that it is actually performed functionally and successfully (Baer, 2021, p. 339).

[1] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

From the German perspective, a seminal case is the LG Munich I from 2013.[2] The German court ruled that the members of the management board are liable for damages due to the failure to set up a compliance system (for monitoring of employees) within the company. LG Munich I judgment provides an important reference point for further discussion on the scope of compliance obligations under (stock) company law. Although the LG Munich I did not determine the origin of compliance duties within the German Stock Corporation Act, scholars argue that this should be derived from § 76 (1) and § 93 (1) Stock Corporation Act (Fleischer, 2014, p. 323). § 76 (1) Stock Corporation Act provides that the management board manages the affairs of the company on its own responsibility and § 93 (1) Stock Corporation Act sets the standard of a prudent and conscientious manager diligence, coupled with the standard of business judgement rule for protecting managers from liability. The supplementary provision can be found in § 91 (2) Stock Corporation Act stating that one of managers' important obligations is to take suitable measures, in particular setting up a monitoring system in order to identify developments that endanger the continued existence of the company in time (Goette, Habersack & Kalls, 2023, §91 AktG, Rn 63).

Management board must make all fundamental decisions on the establishment of organizational compliance and regularly verify its effectiveness (organizational, systemic and supervisory responsibility) (Fleischer, 2014, p. 323). Apart from the management being able to decide on the internal division of tasks and work and to assign primary responsibility for the compliance task to a particular member, it may appoint a CO who establishes and further develops the compliance system (Hess, 2019, p. 8). It is the management's discretionary right to appoint a CO, but such organizational measures do not exempt him from overall supervision, which is especially actualized when he becomes aware of violations of the law and deficiencies in the compliance organization (Fleischer, 2014, p. 323–324). Also, it should be noted that the German Corporate Governance Code also sets the basis for the management board to ensure that the company is in compliance with all provisions of law and internal policies of the company (The German Corporate Governance Code, 2022, Principle 5).

From the Croatian perspective, the relevant norms for determining who must set up a compliance system would be Article 240 and Article 252 of

[2] LG München I, 10.12.2013 – 5 HK O 1387/10. Downloaded 2023, May 25 from https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=LG%20M%FCnchen%20I&Datum=10.12.2013&Aktenzeichen=5%20HKO%201387/10

the Croatian Companies Act (Grgić, 2014, p. 47), as the counterparts of the §76 and §93 of the German Stock Corporation Act. As in the German role model, the Croatian Companies Act in these articles sets the standard of due care that management board members must apply in managing the company. The same reasoning can be applied to Croatian joint-stock companies as in German scholarly writings, where compliance functions for managers stem from their organizational duties towards the company. Thus, the management board has a task to carefully select, instruct and supervise the compliance system and the COs, to ensure that the delegation of authority is carried out adequately (Grgić, 2014, p. 42). As in Germany, the authors support the same conclusion for Croatian companies, that the liability for company compliance ultimately rests with the company's management board (Derenčinović Ruk, 2015, p. 739). However, such a conclusion does not exclude potential CO's civil and criminal liability, which shall be further elaborated.

3. Legal status of Compliance Officers

Generally, corporate statutory law is a primary source for analysing the status and liability of various company stakeholders. Companies increasingly employ COs in all business areas. However, corporate laws do not regulate compliance functions or CO. Thus, the legal status of COs is an open issue. The authors shall find an answer to COs' status and consequent liability in analysing applicable national laws, primarily corporate and labour law, by comparing American law on the one hand with German and Croatian laws on the other.

3.1. The US perspective

Delaware, as the leading state for corporate law, has introduced one-tier board system having board of directors to manage and supervise company's business (8 Del. C. § 141.). According to Delaware Code, titles and duties of "officers" are left to bylaws and resolution of the board of directors (8 Del. C. § 142.). In practice, this positions could be, for example Chief Executive Officer (CEO) and Chief Compliance Officer. Thus, when a CO is recognised as an officer by the company's bylaws or resolutions of the board of directors, his/her position should be analysed as the position of the corporate officers, which enjoy a special legal status.

Generally, the status of non-director corporate officers in American law is somewhat unclear. It has been considered that those who hold the position

of corporate officers are accountable for a higher degree of duty towards the company than those who are employees only. In fact, it has been repeated that the officers owe the corporation the same fiduciary duties as directors (Sparks & Hamermesh, 1992, p. 217). This is due to the change in corporate governance of US companies where the board of directors, once considered to have the ultimate control and to act as the management body, transformed their position into a more supervisory body that constantly delegates more powers to various corporate officers (Shaner, 2014, p. 286). Corporate officers become the most important figures for the company's proper functioning, as they have the best access to relevant information and the power to act on them (Eisenberg, 1990, p. 949). Thus, it is no surprise that the same mechanism for control over directors is being introduced for control over officers – imposing fiduciary duties on officers that should ensure they conform with their duties towards the company (Johnson & Ricca, 2007, p. 665). However, surprisingly, only a few cases deal with the officer's fiduciary duties and liabilities. Consequently, the exact nature of their fiduciary duties and liability remains unclear.

The US gave birth to a corporate compliance function, so it is no surprise that we find the US at the head of possible change for the status of COs within the corporations. On January 25, 2023, the Delaware Court of Chancery delivered a ruling In re McDonald's case.[3] In that case, the defendant was a corporate officer with the title "Global chief People Officer". The plaintiffs allege that the defendant breached his duty of oversight by ignoring red flags about sexual harassment among the staff working in the company. It is crucial to note that in this case, the judge discussed corporate officers' status and duties, such as the company's CO and Human Resources Officer. The judge held that corporate officers owe the same fiduciary duties as directors, which includes a duty of oversight (McDonald's case, 2023, p. 2). It further explained that the difference between officers and directors is in the scope of the duty of oversight, where the director should have a significantly broader scope than officers in charge of a particular part of the company's business and organisation.

Such a decision could have a fundamental impact on the position of CO and other officers in the company as it is the first time that the judicial practice considered that the CO and Human Resources officers have a fiducial duty of oversight, *al pari* with the directors, although with different scope.

[3] In re McDonald's Corporation Stockholder Derivative Litigation, No. 2021-0324-JTL, 2023 WL 387292 (Del. -Ch. Jan. 25, 2023).

However, there are serious objections from the COs to hold them liable for company supervision. The prevailing standpoint taken by the COs is that they should encourage the company and its employees to conform with the law and behave ethically, but without having the liability for supervising others (Martin, 2015, p. 192). Such a standpoint was in accordance with Caremark case, under which the board of directors remain liable for establishing and for the efficacy of the compliance function in the company (DeMott, 2013, p. 64). It is yet to be seen how shall McDonald case shake these presumptions.

The liability of corporate officers, which stems from their fiduciary duties, shall be evaluated through the law of negligence (Eisenberg, 1990, p. 948). In other words, CO's liability shall depend on whether he/she acted negligently coupled with the requested degree of negligence (simple or gross negligence or intent) to trigger their liability towards stakeholders. The COs advocate that they should not bear liability for simple negligence but solely for gross negligence or intent (Pacella, 2020, p. 25). However, the issue remains unsettled in the US.

An additional challenge is how to determine criteria for CO's duties as compliance functions remain an unregulated profession. The consequence is that the lines are often blurred between compliance and other important functions in the company (Pacella, 2020, p. 25). After the McDonald case, authors argue that the question shall arise as to who is liable for supervising the company – directors or the COs? One thing is clear, the position of CO is getting more precarious as we witness the broadening of their duties and consequent liabilities.

3.2. German and Croatian perspective

There is a significant difference in the term "officer" meaning between American and German corporate law. Opposite to the American perspective, German corporate law does not recognize "officers". Germany has introduced a two-tier board system which distinguishes management and supervisory board and their members (§ 76 and § 95 Stock Corporation Act). The legal status of the members of these boards is heavily regulated and discussed. However, no one is designated as the "officer" within or outside these boards. Thus, German corporate law does not recognize "officers", so officers have no special legal status within the company.

Croatian corporate law differs from its German role model in the regard that the Croatian Companies Act allows the choice between two-tier (Management and Supervisory Board – Articles 239 and Article 254 of the

Croatian Companies Act) and one-tier board system (Board of Directors – Article 272a of the Croatian Companies Act) for managing the joint-stock companies. According to the one-tier board system, within the board of directors, the law recognizes the difference between the non-executive and executive directors (Article 272.l of the Croatian Companies Act), where the latter could be translated from the Croatian term „izvršni direktor" to American term "Chief Executive Officer" (CEO). The Croatian Companies Act regulates the legal status of the Croatian CEO. Still, the notion of CEO cannot be equalled with the term "officer", as the Croatian corporate law leaves no room for establishing any other "officer" within the corporate structure of the joint-stock company. Thus, although Croatian corporate law has some elements of the American approach, regarding the possible legal status of COs, the conclusion aligns with German corporate law. More precisely, the CO cannot enjoy a special legal status within the company, as can the "officers" in American law.

As previously stated, under German and Croatian company law, the duty to establish a compliance system in the company is upon the management board. The management board has extensive discretion in designing the compliance system, depending on the size of the business, available resources, number of employees and others (Hauschka, Moosmayer & Lösler, 2016, §36, Rn 16). In practice, members of the management board delegate this duty to one of them (horizontal delegation) or, which is more often, to a subordinate such as the Chief Compliance Officer (vertical delegation) (Gomer, 2020, p. 380). In both cases, the liability for establishing a compliance system and the duty to ensure the legality of the company's business remains with the entire management board (Goette, Habersack & Kalls, 2023, §91 AktG, Rn 85). Management board members should always monitor the effectiveness of the compliance system (Hauschka, Moosmayer & Lösler, 2016, §36, Rn 13). Thus, member of the management board cannot relinquish their liability due to the fact they delegated compliance duties to a CO.

Under German law, COs are more often connected to the company over an employment contract rather than any management function (Van der Elst, 2009, p. 244). Thus, when a company has organised an internal compliance system, the COs are usually seen as company employees (Giesen, 2009, p. 102). However, there is no universal compliance system or list of CO's duties, meaning that the actual content of employment contracts between CO's and companies can significantly vary (Fecker & Kinzl, 2010, p. 15). Consequently, the scope of CO's duties and liability shall depend upon the content of the employment contract in a particular case.

In cases where the employment contract provides no answer on the duties and liability of COs, as both German and Croatian corporate laws do not regulate COs, the authors argue that general labour law provisions should apply. The main issue is whether COs enjoy the same privilege as other employees of limiting their liability for performing duties towards the employer/company. Under German law, a person who intentionally or negligently infringes his obligations is liable for damages (§ 823 of the Civil Code). However, within the labour law, the court practice has developed a limited liability regime for employees, where the employees are liable for the entire damage only in cases of gross negligence and intent (Giesen, 2009, p. 103). On the other hand, they cannot be held liable for simple negligence in performing their job. The same solution is adopted in Croatian labour law (Article 107/1 of the Labour Act). However, in both legal systems, it is often hard to qualify in which category of negligence particular employees' actions fall in.

A specific issue arises regarding the independence of COs in relation to the management board. The authors emphasise that COs should always maintain professional independence, meaning that no company organ should be able to compel the CO to reach a certain result of the legal assessment (Hauschka, Moosmayer & Lösler, 2016, §36, Rn 48). Other than professional independence, a CO is due to follow instructions from his employer, represented by the senior officers of the company, usually members of the management or supervisory boards or the board of directors (Dieners & Lembeck, 2022, p. 59). If a decision made by the CO is based upon the employer's instruction, that would be a valid ground for avoiding civil liability of the employee towards the employer. If the level of independence of COs is higher, one could argue that they are entitled to invoke the business judgement rule to prove they applied appropriate duty of care (Fecker & Kinzl, 2010, p. 20). Further, it must be assessed if the CO has the authority to issue instructions and to effectively prevent legal violations within the company, as it can also contribute to his/her civil and criminal liability (Bürkle, 2010, p. 7).

Even if the CO is required to be independent of instructions by other company organs, the management board remains liable for the compliance of the company business with the law (Goette, Habersack & Kalls, 2023, §91 AktG, Rn 85). The level of independence in performing the tasks should not affect the right of the CO as an employee to limit his liability towards the employer (Giesen, 2009, p. 105). In this line, ESMA interprets for companies under the MiFID regime that in cooperation between the CO and the management, the management team "holds ultimate executive responsibility"

(ESMA Guidelines, 2021, p. 19). From this, one could conclude that even if the COs have a high degree of independence from the management boards in performing the compliance function, the management board retains the liability towards the company regarding the compliance function. However, an open issue remains how to recognise the level of independence of the CO in a particular case and the criteria for assessing if he/she applied an adequate duty of care.

Finally, following the BGH decision from 17.7.2009,[4] a new issue has been discussed – can CO be recognised as a guarantee under criminal law. Criminal law recognises a guarantee duty for crimes of omission (Martinović, 2015, p. 116). In that regard, can the CO be held liable for omission due to failure to prevent the company from criminal acts? The BGH stated that whether the CO can qualify as a guarantee depends on the scope of duties of the CO in particular cases. If the CO's job description is to prevent criminal offences by the company and its employees, then the qualification of the CO as a guarantee under criminal law becomes possible (Fecker & Kinzl, 2010, p. 14). This decision stirred a debate regarding the criminal liability of COs, without a conclusion, except that this standpoint exposes the CO to considerable criminal liability risks (Hauschka, Moosmayer & Lösler, 2016, p. 12).

In Croatian companies, the number of employed COs is constantly rising, which is in line with raising awareness of the importance of corporate culture (Čulinović-Herc & Madžarov Matijević, 2021, p. 453). As to the legal status of COs in Croatian companies, authors argue that the same reasoning as for COs under German theory and practice should apply. Additionaly, Croatian Compliance Guidelines were issued in 2021, containing basic principles for implementing compliance systems in the companies. Guidelines are a result of private initiative and represent a voluntary soft law source of additional information to companies and COs.

As it has been repeatedly stated, the relevant source of COs duties and possible liabilities is a contract, usually an employment contract, concluded between the CO as an employee, and the company, as the employer. We can argue that CO might have civil or criminal liability depending on the contract's wording. Thus, the authors strongly recommend that both companies and COs carefully draft their contracts, with a special focus on the exact duties of COs and protocols towards managing bodies of the company for reporting any questionable activity.

[4] BGH, Decision from 17.7.2009 – 5 StR 394/08 (LG Berlin).

4. Conclusion

There are crucial differences regarding the legal status of COs in American law on the one hand from German and Croatian corporate law on the other. Under American law, led by Delaware corporate law, if a CO has the status of a corporate officer under the company's bylaws or resolutions of the board of directors, the CO has a distinguished role in the company. Its duties and liability surpass that of the employee, and it has been confirmed in court practice that the officer has fiduciary duties towards the company, as do the directors. After the McDonald case from January 2023, corporate officers, which includes COs, have the duty of oversight *al pari* with the directors, solely in a narrower scope depending on the particular organisation of the company. On the other hand, from German and Croatian perspectives, COs are primarily seen as the company's employees. COs do not have a special status within the company, as the term officer does not have a meaning within corporate law as it has under American law. However, although there are fundamental differences regarding the legal status of COs, all legislations in question face the same challenge – how to determine the exact duties of the COs within the company's organisation and how to set criteria for what should constitute negligent behaviour. The practice constantly highlights that the number of COs in companies rises in divergent business areas. Still, they are not recognised as a profession, so their role in the companies is often blurred and intertwined with other important functions. It leaves COs in a precarious position. The authors are of the opinion that the contract concluded between the CO and the company is a focal point for determining CO's position within the company. In that contract, it is strongly advisable that the COs negotiate the inclusion of clauses which limit their liability or the obligation to pay damages, such as indemnification clauses (Braut Filipović, 2022, p. 215). Also, the contract should clearly state their duties within the company, including their relationship with the management and supervisory board or with the board of directors. Such a clause should determine especially the duties of COs to inform directors/managers of information relevant to the company's lawful conduct. Likewise, for further liability issues, it is crucial to determine the level of independence of COs regarding managers/directors in the company's day-to-day business. To conclude, the authors consider that corporate law witnesses a shift in corporate governance, where various officers in the company, besides managers and directors, are gaining more power. It calls for rethinking the traditional management and supervision structure in the companies. If the time came to introduce new factors into the

corporate governance structures, authors argue that their role and consequent liability should be further analysed and discussed. The goal of this article was to highlight current challenges in the change of this paradigm on the example of COs, where on one hand, the issue of COs exposure becomes worrying, while on the other hand, the shift of power questions the adequacy of current control mechanisms in the companies.

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PRAVNI STATUS SLUŽBENIKA ZA USAGLAŠENOST – OTVORENA PITANJA

APSTRAKT: Zakonodavci samo sporadično regulišu funkciju usklađenosti u kompaniji, uglavnom u finansijskom sektoru. Primarni zadatak službenika za usklađenost je da obezbede da je celokupno poslovanje u skladu sa pravnim normama. Kada se diskutuje o potencijalnoj odgovornosti službenika za usklađenost, mora se analizirati njihov pravni položaj unutar korporacije. Odgovornost službenika za usklađenost bi trebalo prvenstveno razmatrati kao odgovornost zaposlenog prema poslodavcu. Sa stanovišta korporativnog prava, teorijska pozadina treba da bude da li službenika za usklađenost ima poseban pravni status u kompaniji. Autori imaju za cilj da doprinesu diskusiji o mogućoj promeni u korporativnom upravljanju gde korporativni službenici kao što je službenika za usklađenost stiču više uticaja i da podignu svest o nesigurnom položaju službenik za usklađenost prema aktuelnim rešenjima kako anglo-američkog tako i kontinentalno-evropskog modela.

Ključne reči*: službenici za usklađenost, korporativni službenici, pravni status.*

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References

1. Aktiengesetz vom 6. September 1965 (*BGBl*. I S. 1089), das zuletzt durch Artikel 7 des Gesetzes vom 7. August 2021 (*BGBl*. I Nr. 3311) geändert worden ist [Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 7 of the Act of 7 August 2021 (Federal Law Gazette I p. 3311) has been changed]
2. Armour, J., Hansmann, H., Kraakman, R. & Pargendler, M. (2017). What is Corporate Law. In: Kraakman R., J. et al. (eds.), *The Anatomy of Corporate Law* (pp. 1–28). Oxford, UK: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198739630.003.0001
3. Baer, M. (2009). Governing corporate compliance. *Boston College Law Review*, *50*(4), pp. 949–1020
4. Baer, M. (2021). Personhood, Procedure and the Endurance of Corporate Compliance. In: Pollman, E. & Thompson, R.B. (eds.), *Research Handbook on Corporate Purpose and Personhood* (pp. 320–343). Cheltenham, UK: Edward Elgar Publishing Ltd. https://doi.org/10.4337/9781789902914.00026
5. Braut Filipović, M. (2022). How Can Shareholders' Agreements Shape Corporate Governance and Directors' Liability? *InterEULawEast: Journal for International and European Law, 9*(2), pp. 193–222. https://doi.org/10.22598/iele.2022.9.2.7
6. Brener, A. (2019). The Role of Compliance as a 'Gate-Keeper' Function in Financial Services: Reality vs Regulatory Conception. *European Business Law Review*, *30*(6), pp. 965–984. https://doi.org/10.54648/eulr2019042
7. Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (*BGBl*. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 14. März 2023 (*BGBl*. 2023 I Nr. 72) geändert worden ist [Civil Code in the version published on January 2, 2002 (BGBl. I p. 42, 2909; 2003 I p. 738), which was last amended by Article 1 of the law of March 14, 2023 (BGBl. 2023 I no. 72) has been changed]
8. Bürkle, J. (2010). Grenzen der strafrechtlichen Garantenstellung des Compliance-Officers [Limits of the Compliance Officer's Position as a

Guarantor under Criminal Law]. *Corporate Compliance Zeitschrift*, *1*, pp. 4–12
9. Hauschka, C.E., Moosmayer, K., & Lösler, T. (eds), (2016). *Corporate Compliance, Handbuch der Haftungsvermeidung im Unternehmen* [*Corporate compliance, Handbook of liability avoidance in Companies*]. München, Deutschland: C. H. Beck
10. Croatian Compliance Guidelines (2021). Downloaded 2023, June 21 from https://institute-compliance.eu/upload/documents/croatian-compliance-guidelines-eng.pdf
11. Čulinović-Herc, E. & Madžarov Matijević, S. (2021). Companies in the Blockchain Era – The Importance of Corporate Culture. In: Sander, G.G., Pošćić, A., & Martinović, A. (eds.), *Exploring the Social Dimension of Europe, Essays in Honour of Nada Bodiroga-Vukobrat*. (pp. 443–487). Hamburg: Verlag dr. Kovač.
12. The Delaware Code, Title 8 – Corporations, enacted as of June 09, 2023, up to and including 84 Del. Laws, c. 45. Downloaded 2023, May 16 from https://delcode.delaware.gov/title8/title8.pdf
13. DeMott, D. A. (2013). The Crucial But (Potentially) Precarious Position of the Chief Compliance Officer, *Brooklyn Journal of Corporate, Financial, & Commercial Law 8*, pp. 56–79
14. Derenčinović Ruk, M. (2015). Usklađenost (compliance) i sukob interesa na tržištu kapitala – teorijski i praktični pregled s osvrtom na propise "fondovske industrije" [Compliance and conflict of interest on the capital market – theoretical and practical review with reference to fund industry regulation]. *Pravo u gospodarstvu*, *4*, pp. 709–741
15. Dieners, P. & Lembeck, U. (2022). *Handbuch Compliance im Gesundheitswesen* (4. Auflage) [*Handbook for Healthcare compliance* (4th Edition)]. Munchen, Deutschland: C.H. Beck
16. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1–44 (MIFID I)
17. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) Text with EEA relevance, OJ L 173, 12.6.2014, p. 349–496 (MIFID II)
18. Eisenberg, M. A. (1990). The Duty of Care of Corporate Directors and Officers'. *University of Pittsburgh Law Review*, *51*(4), pp. 945–972

19. ESMA Guidelines on certain aspects of the MiFID II compliance function requirements, 06/04/2021. Downloaded 2023, May 9 from https://www.esma.europa.eu/sites/default/files/library/guidelines_on_certain_aspects_of_mifid_ii_compliance_function_requirements.pdf
20. Fecker, J. & Kinzl U. P. (2010). Ausgestaltung der arbeitsrechtlichen Stellung des Compliance-Officers Schlussfolgerungen aus der BSR-Entscheidung des BGH [Structure of the Employment Law position of the Compliance Officer Conclusions from the BSR Decision of the Federal Court of Justice]. *Corporate Compliance Zeitschrift*, *1*, pp. 13–20
21. Fleischer, H. (2014). Aktienrechtliche Compliance-Pflichten im Praxistest: Das Siemens/Neubürger-Urteil des LG München I [Compliance obligations under Stock Corporation Law in a practical test: The Siemens/Neubürger judgment of the LG Munich I]. *Neue Zeitschrift für Gesellschaftsrecht*, *9*, pp. 321–329
22. The German Corporate Governance Code, 28 April 2022. Downloaded 2023, June 2 from https://www.dcgk.de//files/dcgk/usercontent/en/download/code/220627_German_Corporate_Governance_Code_2022.pdf
23. Giesen, T. (2009). Die Haftung des Compliance-Officers gegenüber seinem Arbeitgeber – Haftungsprivilegierung bei innerbetrieblichem Schadensausgleich? [The liability of the Compliance Officer towards his Employer – Liability Privilege in the case of Internal Damages Compensation?]. *Corporate Compliance Zeitschrift*, *3*, pp. 102–106
24. Gomer, M. (2020). *Die Delegation von Compliance-Zuständigkeit des Vorstands einer Aktiengesellschaft* [*The delegation of Compliance Responsibility to the Board of Directors of a Stock Corporation*]. Berlin, Deutschland: Duncker&Humblot
25. Grgić, M. (2014). Zahtjevi europskog zakonodavca glede uspostave ključnih funkcija u sektoru osiguranja s posebnim osvrtom na „funkciju praćenja usklađenosti" [Requirements of the European Legislator Regarding the Establishment of Key Functions in the Insurance Sector with Special Focus on the "Compliance Monitoring Function"]. *Zagrebačka pravna revija*, *3*(1), pp. 29–51
26. Haugh, T. (2021). Understanding the Role of Power Distributions in Compliance. *Kelley School of Business Research Paper No.* 2021-37, Downloaded 2023, June 2 from https://ssrn.com/abstract=3818430
27. Hess, D. (2019). Chipping Away at Compliance: How Compliance Programs Lose Legitimacy and its Impact on Unethical Behavior.

Brooklyn Journal of Corporate, Financial & Commercial Law, *14*(1), pp. 5–21
28. Hopt, K. J. (2021). Internal Investigations, Whistleblowing and External Monitoring: Compartive Experiences, Economic Insights, Findings from Corporate Practice. *European Corporate Governance Institute – Law Working Paper No. 574*, pp. 1–38
29. Iljkić, D. (2017). Criminal compliance – instrument urednog gospodarskog poslovanja [Criminal compliance – an instrument of neat business]. *FIP – Financije i pravo*, *5*(2), pp. 35–69
30. Johnson, L.P.Q. & Ricca, R. V. (2007). (Not) Advising Corporate Officers About Fiduciary Duties. *Wake Forest Law Review*, *42*, pp. 663–696
31. Langenhahn, S. (2012). Die strafrechtliche Verantworlichkeit des Compliance officers im Deutsch-Österreichsen Rechtsvergleich – Doktorarbeit [The Criminal Liability of the Compliance Officer in the German-Austrian legal comparison – doctoral thesis]. Salzburg, Österreich: Der Paris – London Universität Salzburg
32. Langevoort, D. (2018). Caremark and Compliance: A Twenty Year Lookback. *Temple Law Review*, *90*, pp. 727–742
33. LG München I, 10.12.2013 – 5 HK O 1387/10. Downloaded 2023, May 25 from https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=LG%20M%FCnchen%20I&Datum=10.12.2013&Aktenzeichen=5%20HKO%201387/10
34. Martin, S. L. (2015). Compliance Officers: More Jobs, More Responsibility, More Liability. *Notre Dame Journal of Law, Ethics & Public Policy*, *29*(1), pp. 169–198
35. Martinović, I. (2015). O kriteriju razlikovanja pravih i nepravih kaznenih djela nečinjenja [On the Criterion for distinguishing Genuine and Non-Genuine Acts of Ommission]. *Zbornik Pravnog fakulteta u Zagrebu*, *65*(1), pp. 115–135
36. Pacella, J. M. (2020). Compliance Officers: Personal Liability, Protections, and Posture. *Brooklyn Journal of Corporate, Financial & Commercial Law*, *14*(1), pp. 23–37
37. Shaner, M. W. (2014). The (Un)Enforcement of Corporate Officers' Duties. *UC Davis Law Review*, *48*(1), pp. 271–336
38. Sparks, A. & Hamermesh, L. A. (1992). Common law duties of non-director corporate officers. *Business Lawyer (ABA)*, *48*(1), pp. 215–238
39. Goette, W., Habersack, M., & Kalls, S. eds. (2023). *Münchener Kommentar zum Aktiengesetz* (6. Auflage), München, Deutschland: Verlag C.H.Beck

40. Van der Elst, C. (2009). Internalizing Corporate Law or Externalizing Labour Law. *'Editorial'. European Company Law*, 6, pp. 244–245
41. Zakon o radu [The Labour Act]. *Narodne Novine,* Nos 93/14, 127/17, 98/19, 151/22, 64/23
42. Zakon o trgovačkim društvima [The Companies Act]. *Narodne Novine*, Nos 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23

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IMPLEMENTATION OF FOOD SAFETY POLICY IN THE EUROPEAN UNION – GUIDANCE, VARIETY, AND RESOLUTION OF CHALLENGES

ABSTRACT: The paper explores the intricate landscape of implementing food safety policies within the European Union (EU) context. Through an examination of key themes, including discretion and enforcement of policies, the EU's problem-resolution strategies, and the concept of individualization that surpasses mere adherence to laws, the paper sheds light on the complexities and nuances inherent in ensuring food safety across the diverse member states. The paper scrutinizes the role of discretion in the enforcement of food safety policies within the EU. It delves into how regulatory bodies exercise judgment in interpreting and applying policies, taking into account the varying contexts and challenges faced by member states. The discussion highlights the need for a balanced approach that considers both uniformity in enforcement and flexibility to address specific regional or sectoral requirements. Further, the paper focuses on the EU's problem-resolution strategies concerning food safety policies. It explores the mechanisms in place for identifying and

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addressing challenges that arise during the implementation phase. This includes an analysis of coordination among member states, collaboration with stakeholders, and the role of regulatory bodies in mitigating issues and fostering a harmonized approach to problem-solving. In the end, the paper introduces the concept of individualization, emphasizing how a diverse range of policies and practices exists beyond mere adherence to overarching laws. This section explores the unique approaches taken by member states in tailoring food safety policies to suit their specific circumstances. It investigates the benefits and potential challenges associated with such individualization, considering its impact on overall policy effectiveness and coherence.

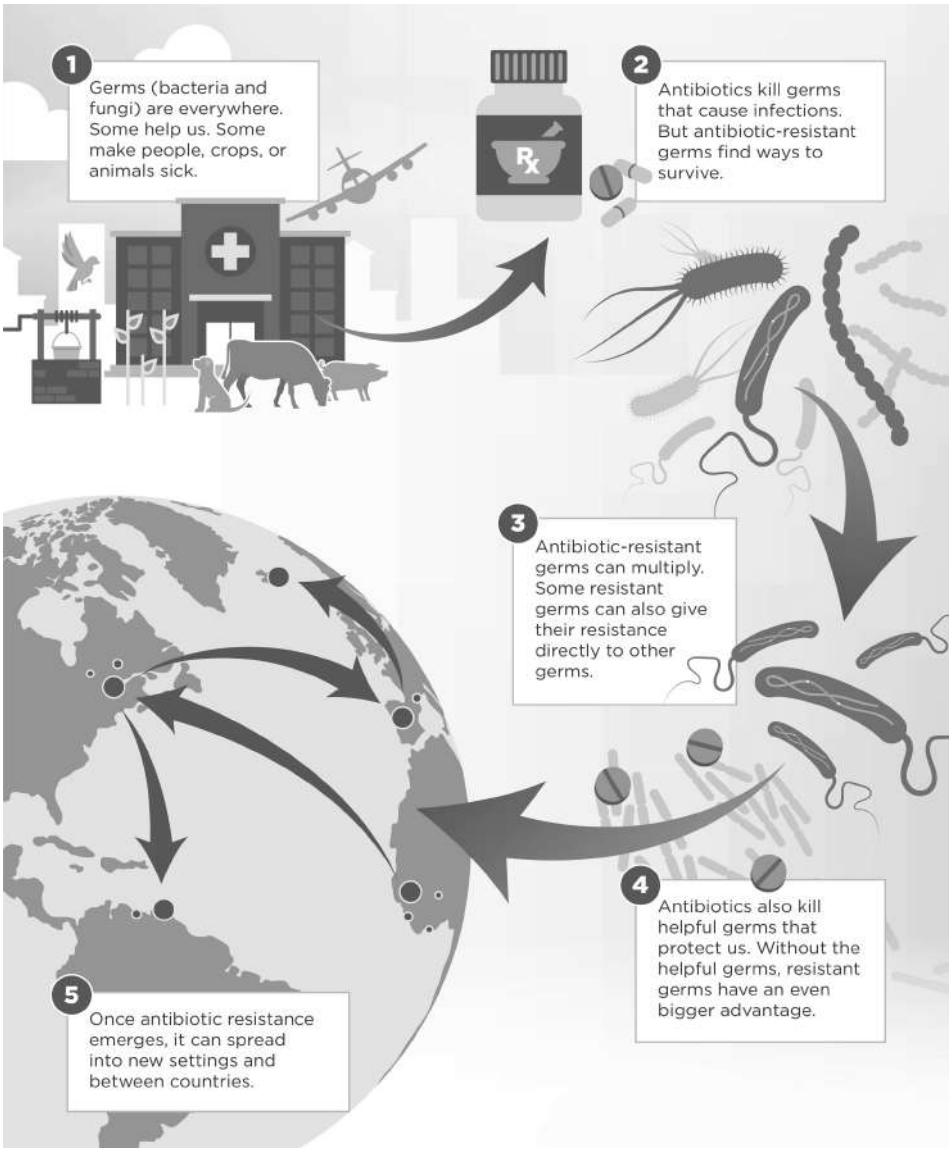
***Keywords**: European Union*, *food safety, European policy, guidelines, regulations, directives.*

1. Introduction

If we do not take urgent, coordinated action involving all stakeholders, the world is at risk of entering a postantibiotic era, where common infections and minor injuries that have been treatable for decades can become fatal, due to greater resistance to antibiotics (Puvača & de Llanos Frutos, 2021). When too many antibiotics are fed to livestock in intensive farming, one significant source of antibiotic resistance emerges and spreads to human consumers (Vidovic & Vidovic, 2020) (Figure 1).

The European Union (EU) has taken many initiatives to address this issue in the European food market (Hazards et al., 2021). The EU, for example, limits the amount of antibiotics provided to animals to the amount required for one treatment (De Briyne, Atkinskon, Borriello & Pokludova, 2014; Puvača & Britt, 2020). However, different countries interpreted this law in startlingly different ways. Antibiotic use was limited to seven days in Germany (Rennings et al., 2015), one month in Austria (Hinteregger, Janzek-Hawlat & Reichardt, 2016), and France and the United Kingdom (UK) simply copied the EU wording without defining a time limit (Stam et al., 2012). As a result, depending on how the rule is read, eating meat or eggs may be more or less safe. This study examines and evaluates the results of the interpretative process, termed as customization, by employing the case study of food safety regulations in Western European nations. Cooperation between Switzerland and the EU in the European veterinary domain dates back to 2009. With the recent contractual commitments to the EU, Swiss authorities engaged a diverse team

Figure 1. Spread of antibiotic resistance



Source: (CDC, 2023).

of researchers from the University of Bern with the objective of determining the alignment of Swiss veterinary regulations with pertinent EU legislation (Duina & Zhou, 2022). It was imperative to outline the implementation of regulations in four member states akin to Switzerland and to elucidate the

discussions and challenges surrounding their execution. Although no instances of non-compliance with EU law were identified, the variations in veterinary drugs regulations among the few countries were so significant that establishing a cohesive concept of a European veterinary space proved complex. This prompted the exploration for a systematic method to compare domestic regulations with the EU standard. Drawing from diverse strands of literature encompassing policy implementation, Europeanization, regulatory dynamics, and policy formulation and assessment, the inception of the research was marked by the concept of customization. This article delves into how nations exercise their discretion to tailor EU Directives to domestic contexts during transposition, the reasons underlying such adaptations, and their implications for policy outcomes. Motivated by a desire to comprehend the evolution of regulations during implementation and a pragmatic interest in how this impacts the resolution of policy challenges, the study seeks to unravel the dynamics of regulatory transformation (Flynn, Nyhan & Reifler, 2017). Put differently, this is a comparative examination of how food safety policies are executed across the EU, crafted partially with the lens of a policy evaluator. Through this lens, the narrative will elucidate the significance of adopting this perspective for at least three compelling reasons. Firstly, discretion in policy implementation serves as the cornerstone of policy achievement, encompassing effectiveness, efficiency, and resilience (Mukherjee & Bali, 2019). Nevertheless, the function of discretion remains a subject of debate among both academics and practitioners. Secondly, certain member states leverage the implementation phase to influence distant EU decisions. The significance of discretion in achieving policy objectives thus becomes notably pronounced when considering the EU as a collaborative governance entity addressing intricate, transnational policy challenges (Engl & Evrard, 2020; Vapa Tankosić, Puvača, Giannenas, Tufarelli & Ignjatijević, 2022). Thirdly, comprehending this significance requires moving beyond mere considerations of non-compliance and instead acknowledging the nuanced variations in implementation (Scholten, 2018). Failing to do so would overlook a crucial aspect of the situation. This paper will delve into various perspectives on discretion, compliance, and performance within implementation theory.

2. Discretion and enforcement of policies

Public policies are intended to address a variety of societal issues, such as guaranteeing food safety (Vapa Tankosić et al., 2022). Policy academics frequently consider the policy process to be a cycle with various stages extending broadly from problem characterization, agenda formulation, and

policymaking to implementation and assessment (Wegrich & Kai, 2007). Although it serves as a heuristic, this perspective serves as a poignant reminder that, much like how the strength of a chain hinges on its weakest link, the effectiveness of any policy hinges solely on its execution. Hence, policy implementation delineates the post-legislative phase, wherein a bill transitions into actionable measures—a process often likened to the transformation of policy into tangible actions (O'Toole & Jr, 2000).

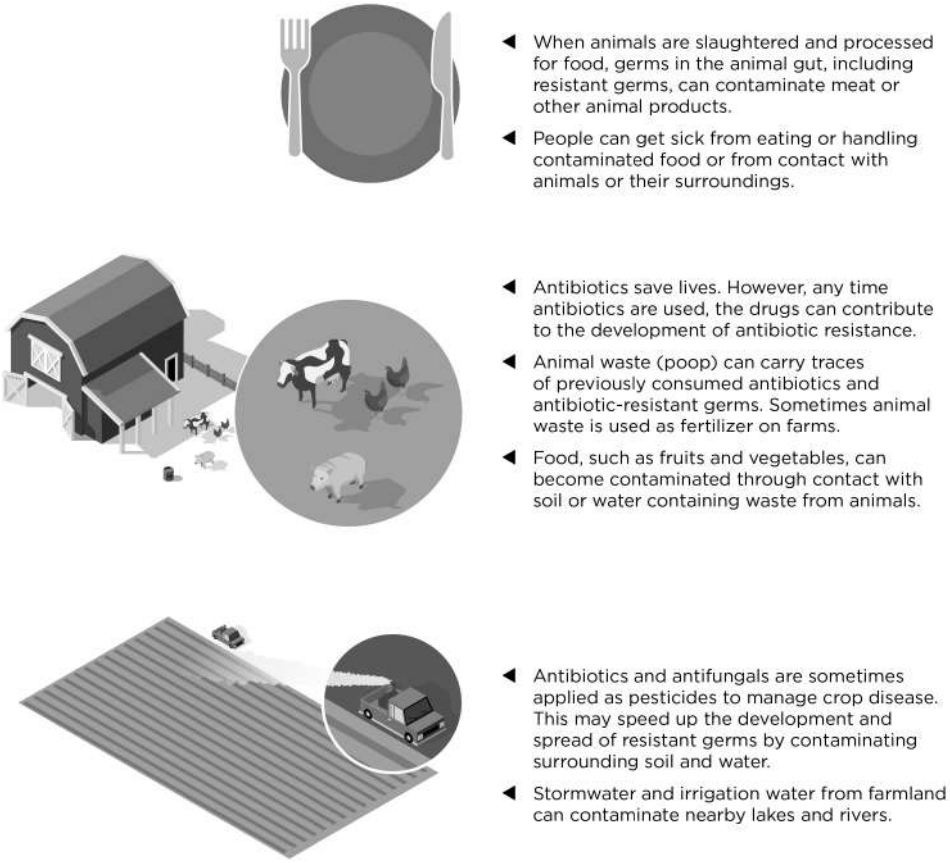
A policy on paper discusses goals and plans for resolving an issue, whereas a policy in action discusses how the problem was resolved (Đurić, Lukač Bulatović, Tomaš Simin & Glavaš Trbić, 2023; Vapa Tankosić, 2023).

The realm of policy implementation perpetually gives rise to dilemmas regarding discretion and diversity. The implementation journey comprises several distinct stages, each fraught with its own complexities. Take, for instance, the intricate multilevel structures characteristic of entities like the EU, where a policy originating from a central authority undergoes an initial phase of transposition by member states, residing as mere words on paper. It is subsequently brought to life through the concerted efforts of administrative entities, exemplified here by food safety inspectors, and societal stakeholders, including food producers, thereby navigating a labyrinth of actors and processes before fruition (Steunenberg & Rhinard, 2010) (Figure 2). Throughout these stages, the policymaking continuum remains active and dynamic. Inherent within policy implementation is the presence of discretion among implementers, granting them a degree of autonomy in their actions. Consequently, the executed policy often diverges from its written form, particularly in contexts characterized by multi-stage and multilevel implementation processes.

Researchers and practitioners of policy implementation agree that typical policy issues can only be adequately addressed if policies are implemented (Mercer et al., 2007). Yet, conflicting perspectives have persistently shaped opinions regarding the significance and appropriateness of discretion in policy implementation. Individuals encountering policy implementation for the first time tend to instinctively gravitate towards a top-down outlook, perceiving it primarily as a technical endeavor intended to adhere closely to the original policy directives established by democratically sanctioned actors (Craddock, O'Halloran, McPherson, Hean & Hammick, 2013). From these top-down vantage points, discretionary adjustments are perceived as presenting a control dilemma, potentially yielding undesirable implementation outcomes. According to this perspective, granting greater latitude to policy implementers increases the likelihood of their prioritizing personal interests over the

overarching policy objectives. The primary apprehension with the top-down paradigm revolves around issues of compliance, which hinges on the extent to which the recipients of the norm adhere to its stipulations. Consequently, adherence-based implementation evaluates the extent to which the centrally prescribed blueprint is faithfully executed from the upper echelons down to the grassroots level (Fischer, Imgrund, Janiesch & Winkelmann, 2020

Figure 2. A complex web: Everything is connected food, farms, and animals



Source: (CDC, 2023).

Top-down approaches have been criticized because policy execution requires judgment (Pissourios, 2014). Bottom-up implementation is viewed as decentralized problem-solving (Imperial, 2021). This perspective redirects attention away from mere adherence to rules and towards the individuals tasked with executing policies in real-world settings, underscoring their

pivotal role in tackling policy challenges. Bottom-up implementation theory accentuates the significance of implementing actors' proximity to the root of the policy issue, recognizing that this closeness bolsters their capacity to enhance policies through adaptation to diverse contexts and incorporation of local policy perspectives (Estensoro & Larrea, 2016). In this perspective, discretion serves as a tool enabling implementers to be attuned to the nuances of their contexts, rectify policy shortcomings, and fulfill their duties effectively. Tailoring implementation to specific country contexts can facilitate the development of policies that are not only effective but also widely embraced, particularly where the issue at hand is most acute. Evaluating performance implementation involves assessing whether a policy effectively addresses the initial problem it was intended to resolve, thus gauging its overall efficacy.

Modern policy implementation research has traditionally favored hybrid approaches that recognize the interaction between discretion and control (Christensen & Lægreid, 2011). Policy implementation in practice embodies a hybrid nature: comprehending it theoretically and empirically mandates addressing the challenges of both top-down, centralized control, and bottom-up, decentralized flexibility, as well as their interplay. The empirical inquiry into whether policy deviations beyond legal mandates enhance policy outcomes is context-dependent. The focus now shifts from whether policy implementation ought to entail discretion to determining the optimal methods for leveraging discretion to effectively realize policy objectives (Tummers & Bekkers, 2014).

However, whenever policy issues are managed, a fundamental tension arises between granting and limiting discretion (Pritchett & Woolcock, 2004). Consequently, the choice of effective governance methods by various stakeholders implicitly embodies both top-down and bottom-up perspectives (Fromhold-Eisebith & Eisebith, 2005). For instance, the design of federal systems often reflects the belief that member states possess the capacity to devise optimal solutions to policy challenges, customized to their unique contexts. While this approach may foster the acceptance of centralized policies and potentially encourage compliance among member states, it may also introduce trade-offs in terms of efficient and effective problem-solving, as well as distributive justice. However, the intricacies and implications of these tensions are not yet fully comprehended.

3. The European Union's approach to problem resolution

There has been a recurring assertion that conducting comparative studies on federalism and establishing a more explicit connection with the broader literature on (multilevel) policy implementation can significantly aid research on EU policy implementation (Irepoglu Carreras, 2019). Certainly, the tension between discretion and control becomes particularly prominent within the framework of the European Union (Mendes, 2017). Broadly speaking, the processes of economic modernization and globalization are compounding the complexity of public policy challenges. Food safety policy serves as a prime illustration of this phenomenon. With food production and trade now operating on a grand scale, characterized by rationalization and integration into regional and global single markets, ensuring food safety demands transboundary and cross-sectoral solutions (Vapa Tankosić et al., 2022). Efforts to address such challenges within resource constraints have given rise to the regulatory state paradigm, wherein the state takes on a steering role while delegating the implementation tasks to various social, corporate, and political entities. The European Union stands out as a remarkable exemplar of a supranational regulatory state, representing a multilevel governance framework endeavoring to formulate collective responses to common policy issues.

In this context, European integration entails member states relinquishing a portion of their sovereignty to a shared institutional framework for the implementation of collective policies. Numerous EU Directives, such as those regulating the use of veterinary medications in animals to safeguard food safety and prevent antibiotic resistance, exemplify this collaborative approach (Ferri, Ranucci, Romagnoli & Giaccone, 2017; Okocha, Olatoye & Adedeji, 2018; Puvača, Vapa Tankosić, Ignjatijević Carić & Prodanović, 2022). Subsequently, the EU delegates certain decision-making processes to member countries responsible for transposing EU policies into national and sub-national laws and implementing them. Functioning as a regulatory state, the EU endeavors to harmonize integration with respect for legitimate national preferences. The repercussions on domestic policies are scrutinized by Europeanization scholars, who perceive transposition as a conduit through which EU legislation influences domestic regulations (Drahn, 2020). Europeanization, in broad terms, encompasses the process of adjustment to and the domestic ramifications of European governance within countries both within and outside the European Union.

In the enduring tradition of EU policy implementation research, considerable attention has been directed towards assessing the extent

of compliance or non-compliance with EU Directives, the promptness and accuracy of transposition efforts, the prevalence of non-compliance instances, and the pace of transposition (Tallberg, 2002). This emphasis on legal compliance is particularly significant due to the multi-level governance structure of the EU, which encompasses supranational, regional, national, and local levels, as well as multiple stages of implementation. Furthermore, the EU inherently faces limitations in controlling implementation. Instances of non-compliance, such as the asylum crisis in 2016–2017, the European debt crisis, and the Dieselgate scandal, often strengthen calls for more coordinated efforts in EU policy implementation.

However, at present, the concept of uniformity, central to the Europeanization process, is facing challenges. The perception of diminishing sovereignty and control over national policies is increasingly linked to European integration. This sentiment is reflected in the rise of Euroskepticism, exemplified by the United Kingdom's decision to exit the EU in pursuit of reclaiming national authority (Dickson, 2023).

4. Individualization: variety surpassing adherence to laws

Despite the array of diverse and intricate concepts and explanations proposed for EU policy implementation outcomes, they predominantly center on the process of transposition. These frameworks primarily focus on legal compliance, specifically assessing whether the translation of EU Directives into domestic legislation adheres to the stipulations outlined in the directives. As a result, research on policy implementation within the EU exhibits a noticeable bias towards evaluating legislative compliance (Zbiral, Prince & Smekal, 2023). This approach places significant emphasis on evaluating the extent of (non-) compliance with EU Directives, the punctuality and accuracy of transposition efforts, the frequency of non-compliance instances, and the pace of transposition. The issue of legal compliance reflects a hierarchical perspective on implementation, where the EU's centralized decisions are expected to directly shape national outcomes. However, some argue that this focus fails to adequately acknowledge the complexities inherent in member states' participation within a multilevel organization. Despite its significance, this approach tends to overstate the EU's role as the primary driver of domestic change. The preoccupation with legal conformity has constrained EU researchers from delving deeper into the implementation process and unpacking the intricacies of EU legislation in action. Mere adherence to procedural obligations by member states or local implementers

does not necessarily indicate the extent to which they effectively implement EU policies (Casula, 2022).

The practical implementation of EU policies may unfold through entirely different dynamics than formal conformity, with profound implications for policy outcomes. There is mounting evidence suggesting that mere legal compliance with EU law may bear little correlation with its actual application in practice. This underscores the critical importance of robust oversight and monitoring mechanisms at both EU and national levels. Given that levels of legal compliance offer limited insights into the operationalization of centralized laws, they often fail to reflect how common policy challenges are ultimately addressed.

Moreover, the equilibrium of variations within the constraints set by EU Directives remains an underexplored outcome of transposition efforts. The fixation on compliance overlooks the flexibility inherent in much of EU law, which permits member states to diverge from EU requirements to facilitate context-sensitive problem-solving. For instance, provisions for market-correcting measures grant member states the latitude to surpass the EU's minimum standards. Indeed, Europeanization research has tended to overlook the fact that the implementation of EU policies yields diverse national outcomes (Havlík, 2023). Even in cases where member states exhibit compliance with EU law, significant nuanced distinctions persist in the implementation of EU regulations from one country to another. These variations coexist alongside the incentives prompting national authorities to adhere to EU Directives. Embracing this legitimate diversity is pivotal in understanding the European experience, a facet often overlooked when emphasis is solely placed on compliance and negative integration.

The concept of customization shifts the focus within EU policy implementation towards these fine-grained disparities. Customization acknowledges the reality that EU laws undergo a process of vertical regulatory evolution throughout the implementation process, yielding a spectrum of bespoke domestic approaches to comparable policy issues (Pech & Vrchota, 2022). In the process of transposition, nations exercise their discretion to interpret EU policies and tailor them to suit local conditions. Customization specifically examines a particular facet of this adaptation process, namely the degree to which certain member states augment or diminish the number and strictness of corresponding regulations when implementing them (Teixeira & Tavares-Lehmann, 2022). The concept of customization introduces a fresh perspective for conceptualizing and evaluating the extent to which European law shapes national policymaking. It encapsulates the level of Europeanization

within domestic legislation, shifting the focus from merely quantifying the proportion of Europeanized domestic laws to assessing the depth of influence exerted by European legal norms on national policy frameworks (Cinar, Benneworth & Coenen, 2023; Abrantes et al., 2023).

5. Conclusion

The implementation of food safety policies in the European Union represents a complex and multifaceted endeavor. This paper has delved into the various aspects of this process, examining the guidance provided, the diverse range of policies in place, and the challenges encountered during implementation. As the European Union continues to evolve, it is evident that the commitment to ensuring the safety of the food supply remains a top priority. The variety of policies in existence reflects the nuanced nature of the food industry and the need for tailored approaches to different sectors.

Despite the progress made, challenges persist, ranging from coordination issues among member states to the dynamic nature of emerging risks. Policymakers, stakeholders, and regulatory bodies must collaborate closely, adapting strategies to effectively address these challenges. Furthermore, ongoing efforts to enhance transparency, communication, and risk management strategies are essential for the successful implementation and continuous improvement of food safety policies.

As the European Union navigates the intricacies of the globalized food market, the resolution of challenges requires a proactive and adaptive approach. By fostering a culture of continuous improvement, embracing technological advancements, and maintaining a robust regulatory framework, the European Union can further strengthen its position as a leader in ensuring the safety and quality of the food supply. Ultimately, the successful implementation of safety food policies not only safeguards public health but also contributes to building consumer trust and sustaining a resilient and secure food system for future generations.

In conclusion, the paper underscores the multifaceted nature of implementing safe food policies in the EU. It advocates for a balanced approach that embraces both uniformity and flexibility, emphasizes effective problem-resolution strategies, and recognizes the significance of individualization. By navigating these complexities, the EU can continue to strengthen its commitment to ensuring the safety and quality of the food supply, fostering resilience and adaptability in the face of evolving challenges.

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IMPLEMENTACIJA POLITIKE BEZBEDNOSTI HRANE U EVROPSKOJ UNIJI – UPUTSTVA, RAZNOVRSNOST I REŠAVANJE IZAZOVA

APSTRAKT: Ovaj rad istražuje složene implementacije politika bezbednosti hrane unutar konteksta Evropske unije (EU). Kroz analizu ključnih tema, uključujući diskreciju i sprovođenje politika, strategije EU za rešavanje problema i koncept individualizacije koji prevazilazi prosto poštovanje zakona, rad osvetljava složenosti i nijanse inherentne u obezbeđivanju bezbednosti hrane širom zemalja članica. Rad detaljno ispituje ulogu diskrecije u sprovođenju politika bezbednosti hrane unutar EU. Zalazi u to kako regulatorna tela vrše sudski postupak u tumačenju i primeni politika, uzimajući u obzir različite kontekste i izazove sa kojima se suočavaju zemlje članice. Diskusija ističe potrebu za uravnoteženim pristupom koji uzima u obzir i uniformnost u sprovođenju i fleksibilnost u rešavanju specifičnih regionalnih ili sektorskih zahteva. Dodatno, rad se fokusira na strategije EU za rešavanje problema u vezi sa politikama bezbednosti hrane. Istražuje mehanizme koji postoje za identifikaciju i rešavanje izazova koji se javljaju tokom faze implementacije. Ovo uključuje analizu koordinacije među zemljama članicama, saradnje sa zainteresovanim stranama i uloge regulatornih tela u ublažavanju

problema i promovisanju harmonizovanog pristupa rešavanju problema. Na kraju, rad uvodi koncept individualizacije, naglašavajući kako postoji raznovrsnost politika i praksi koja prevazilazi prosto poštovanje opštih zakona. Rad istražuje jedinstvene pristupe koje zemlje članice preduzimaju prilikom prilagođavanja politika bezbednosti hrane svojim specifičnim okolnostima. Takođe, ispituje prednosti i potencijalne izazove povezane sa ovakvom individualizacijom, uzimajući u obzir njen uticaj na ukupnu efikasnost i koherentnost politika.

Ključne reči: *Evropska unija, bezbednost hrane, evropska politika, smernice, propisi, direktive.*

References

1. Abrantes, D., Ferreira, M. C., Costa, P. D., Hora, J., Felício, S., Dias, T. G., & Coimbra, M. (2023). A New Perspective on Supporting Vulnerable Road Users' Safety, Security and Comfort through Personalized Route Planning. *International Journal of Environmental Research and Public Health*, *20*(4), 3027. https://doi.org/10.3390/ijerph20043027
2. Casula, M. (2022). How different multilevel and multi-actor arrangements impact policy implementation: Evidence from EU regional policy. *Territory, Politics, Governance*, 1–25. https://doi.org/10.1080/21622671.2022.2061590
3. CDC. *The Latest on Antimicrobial Resistance*. Centers for Disease Control and Prevention. Downloaded 2023, November 09 from https://www.cdc.gov/drugresistance/resources/fact-sheets.html
4. Christensen, T., & Lægreid, P. (2011). Complexity and Hybrid Public Administration—Theoretical and Empirical Challenges. *Public Organization Review*, *11*(4), 407–423. https://doi.org/10.1007/s11115-010-0141-4
5. Cinar, R., Benneworth, P., & Coenen, L. (2023). Changing conceptualization of innovation in the European Union and its impact on universities: Critical junctures and evolving institutional demands. *Research Evaluation*, pp. 1–15. https://doi.org/10.1093/reseval/rvad006
6. Craddock, D., O'Halloran, C., McPherson, K., Hean, S., & Hammick, M. (2013). A top-down approach impedes the use of theory? Interprofessional educational leaders' approaches to curriculum development and the use of learning theory. *Journal of Interprofessional Care*, *27*(1), 65–72. https://doi.org/10.3109/13561820.2012.736888

7. De Briyne, N., Atkinson, J., Borriello, S. P., & Pokludová, L. (2014). Antibiotics used most commonly to treat animals in Europe. *Veterinary Record*, *175*(13), pp. 325–325. https://doi.org/10.1136/vr.102462
8. Dickson, B. (2023). The United Kingdom: The constitutional consequences of ambivalence towards European integration. In: *EU Law and National Constitutions*. (pp. 148–171), The United Kingdom: Routledge
9. Drahn, P. (2020). Theoretical Explanations for the Domestic Impact of EU Law. In: P. Drahn (ed.), *Adoption of EU Business and Human Rights Policy: The Use of Discretion in the National Transposition of EU Directives* (pp. 49–96). Cham: Springer International Publishing. https://doi.org/10.1007/978-3-030-46935-1_3
10. Đurić, K., Lukač Bulatović, M., Tomaš Simin, M., & Glavaš-Trbić, D. (2023). Monitoring and Evaluation as a Mechanism for Agricultural Policy Management. *Journal of Agronomy, Technology and Engineering Management (JATEM)*, *6*(5), pp. 934–943. https://doi.org/10.55817/XETH8265
11. Engl, A., & Evrard, E. (2020). Agenda-setting dynamics in the post-2020 cohesion policy reform: The pathway towards the European cross-border mechanism as possible policy change. *Journal of European Integration*, *42*(7), pp. 917–935. https://doi.org/10.1080/07036337.2019.1689969
12. Estensoro, M., & Larrea, M. (2016). Overcoming policy making problems in smart specialization strategies: Engaging subregional governments. *European Planning Studies*, *24*(7), pp. 1319–1335. https://doi.org/10.1080/09654313.2016.1174670
13. Ferri, M., Ranucci, E., Romagnoli, P., & Giaccone, V. (2017). Antimicrobial resistance: A global emerging threat to public health systems. *Critical Reviews in Food Science and Nutrition*, *57*(13), pp. 2857–2876. https://doi.org/10.1080/10408398.2015.1077192
14. Fischer, M., Imgrund, F., Janiesch, C., & Winkelmann, A. (2020). Strategy archetypes for digital transformation: Defining meta objectives using business process management. *Information & Management*, *57*(5), 103262. https://doi.org/10.1016/j.im.2019.103262
15. Flynn, D. J., Nyhan, B., & Reifler, J. (2017). The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics. *Political Psychology*, *38*(S1), pp. 127–150. https://doi.org/10.1111/pops.12394
16. Fromhold-Eisebith, M., & Eisebith, G. (2005). How to institutionalize innovative clusters? Comparing explicit top-down and implicit bottom-up

approaches. *Research Policy*, *34*(8), pp. 1250–1268. https://doi.org/10.1016/j.respol.2005.02.008

17. Havlík, V. (2023). The Europeanization of territoriality and its limits: The territorial dimension of EU cohesion policy and its varying implementation. *European Planning Studies*, *31*(4), pp. 802–821. https://doi.org/10.1080/09654313.2022.2091407
18. Hazards (BIOHAZ), E. P. on B., Koutsoumanis, K., Allende, A., Álvarez-Ordóñez, A., Bolton, D., Bover-Cid, S., Chemaly, M., Davies, R., De Cesare, A., Herman, L., Hilbert, F., Lindqvist, R., Nauta, M., Ru, G., Simmons, M., Skandamis, P., Suffredini, E., Argüello, H., Berendonk, T., … Peixe, L. (2021). Role played by the environment in the emergence and spread of antimicrobial resistance (AMR) through the food chain. *EFSA Journal*, *19*(6), e06651. https://doi.org/10.2903/j.efsa.2021.6651
19. Hinteregger, M., Janzek-Hawlat, S., & Reichardt, B. (2016). Seasonal Variations of Outpatient Antibiotic use in Austria. *Value in Health*, *19*(7), A421. https://doi.org/10.1016/j.jval.2016.09.432
20. Imperial, M. T. (2021). Implementation Structures: The Use of Top-Down and Bottom-Up Approaches to Policy Implementation. In: *Oxford Research Encyclopedia of Politics*. Oxford, https://doi.org/10.1093/acrefore/9780190228637.013.1750
21. Irepoglu Carreras, Y. (2019). Problem-Solving Across Literatures: Comparative Federalism and Multi-Level Governance in Climate Change Action. *European Policy Analysis*, *5*(1), pp. 117–134. https://doi.org/10.1002/epa2.1066
22. Mendes, J. (2017). Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU. *The Modern Law Review*, *80*(3), pp. 443–472. https://doi.org/10.1111/1468-2230.12265
23. Mercer, S. L., DeVinney, B. J., Fine, L. J., Green, L. W., & Dougherty, D. (2007). Study Designs for Effectiveness and Translation Research: Identifying Trade-offs. *American Journal of Preventive Medicine*, *33*(2), pp. 139–154. https://doi.org/10.1016/j.amepre.2007.04.005
24. Mukherjee, I., & Bali, A. S. (2019). Policy effectiveness and capacity: Two sides of the design coin. *Policy Design and Practice*, *2*(2), pp. 103–114. https://doi.org/10.1080/25741292.2019.1632616
25. Okocha, R. C., Olatoye, I. O., & Adedeji, O. B. (2018). Food safety impacts of antimicrobial use and their residues in aquaculture. *Public Health Reviews*, *39*(1), 21. https://doi.org/10.1186/s40985-018-0099-2

26. O'Toole, L.,J., Jr. (2000). Research on Policy Implementation: Assessment and Prospects. *Journal of Public Administration Research and Theory*, *10*(2), pp. 263–288. https://doi.org/10.1093/oxfordjournals.jpart.a024270
27. Pech, M., & Vrchota, J. (2022). The Product Customization Process in Relation to Industry 4.0 and Digitalization. *Processes*, *10*(3). https://doi.org/10.3390/pr10030539
28. Pissourios, I. (2014). Top-Down and Bottom-up Urban and Regional Planning: Towards a Framework for the Use of Planning Standards. *European Spatial Research and Policy*, *21*(1), pp. 83–99
29. Pritchett, L., & Woolcock, M. (2004). Solutions When the Solution is the Problem: Arraying the Disarray in Development. *World Development*, *32*(2), pp. 191–212. https://doi.org/10.1016/j.worlddev.2003.08.009
30. Puvača, N., & Britt, C. (2020). Welfare and legal aspects of making decisions on medical treatments of pet animals. *Pravo – teorija i praksa*, *37*(4), pp. 55–64. https://doi.org/10.5937/ptp2004055P
31. Puvača, N., & de Llanos Frutos, R. (2021). Antimicrobial Resistance in Escherichia coli Strains Isolated from Humans and Pet Animals. *Antibiotics*, *10*(1), p. 69. https://doi.org/10.3390/antibiotics10010069
32. Puvača, N., Vapa Tankosić, J., Ignjatijević, S., Carić, M., & Prodanović, R. (2022). Antimicrobial Resistance in the Environment: Review of the Selected Resistance Drivers and Public Health Concerns. *Journal of Agronomy, Technology and Engineering Management*, *5*(5), pp. 793–802. https://doi.org/10.55817/CSCQ3326
33. Rennings, L. van, Münchhausen, C. von, Ottilie, H., Hartmann, M., Merle, R., Honscha, W., Käsbohrer, A., & Kreienbrock, L. (2015). Cross-Sectional Study on Antibiotic Usage in Pigs in Germany. *PLOS ONE*, *10*(3), e0119114. https://doi.org/10.1371/journal.pone.0119114
34. Scholten, M. (2018). Mind the trend! Enforcement of EU law has been moving to 'Brussels'. In: *Innovative Approaches to EU Multilevel Implementation*. (pp. 96–114), The United Kingdom: Routledge
35. Stam, J., van Stuijvenberg, M., Grüber, C., Mosca, F., Arslanoglu, S., Chirico, G., Braegger, C. P., Riedler, J., Boehm, G., Sauer, P. J., & Group, for the M. I. P. S. 1 (MIPS 1) S. (2012). Antibiotic use in infants in the first year of life in five European countries. *Acta Paediatrica*, *101*(9), pp. 929–934. https://doi.org/10.1111/j.1651-2227.2012.02728.x
36. Steunenberg, B., & Rhinard, M. (2010). The transposition of European law in EU member states: Between process and politics. *European Political Science Review*, *2*(3), pp. 495–520. https://doi.org/10.1017/S1755773910000196

37. Tallberg, J. (2002). Paths to Compliance: Enforcement, Management, and the European Union. *International Organization*, *56*(3), pp. 609–643. https://doi.org/10.1162/002081802760199908
38. Teixeira, J. E., & Tavares-Lehmann, A. T. C. P. (2022). Industry 4.0 in the European union: Policies and national strategies. *Technological Forecasting and Social Change*, *180*, 121664. https://doi.org/10.1016/j.techfore.2022.121664
39. Tummers, L., & Bekkers, V. (2014). Policy Implementation, Street-level Bureaucracy, and the Importance of Discretion. *Public Management Review*, *16*(4), pp. 527–547. https://doi.org/10.1080/14719037.2013.841978
40. Vapa Tankosić, J. (2023). Agri-environmental Climate Measures in the Serbian Agricultural Policy in Relation to the Common Agricultural Policy. *Journal of Agronomy, Technology and Engineering Management (JATEM)*, *6*(6), pp. 958–964. https://doi.org/10.55817/HBNT7451
41. Vapa Tankosić, J., Puvača, N., Giannenas, I., Tufarelli, V., & Ignjatijević, S. (2022). Food Safety Policy in the European Union. *Journal of Agronomy, Technology and Engineering Management (JATEM)*, *5*(2), pp. 712–717. https://doi.org/10.55817/EMRK6646
42. Vidovic, N., & Vidovic, S. (2020). Antimicrobial Resistance and Food Animals: Influence of Livestock Environment on the Emergence and Dissemination of Antimicrobial Resistance. *Antibiotics*, *9*(2). https://doi.org/10.3390/antibiotics9020052
43. Wegrich, W., & Kai, J. (2007). Theories of the Policy Cycle. In: *Handbook of Public Policy Analysis*. (pp. 43–62). The United Kingdom: Routledge
44. Zbiral, R., Princen, S., & Smekal, H. (2023). Differentiation through flexibility in implementation: Strategic and substantive uses of discretion in EU directives. *European Union Politics*, *24*(1), pp. 102–120. https://doi.org/10.1177/14651165221126072
45. Duina, F., & Zhou, H. X. (2022). Brussels Under Pressure: Compliance, the Single Market, and National Purpose in the EU. In: *Economies, Institutions and Territories* (pp. 117–134). The United Kingdom: Routledge

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PROVISIONS OF MAŽURANIĆ'S ACT ON THE ORGANIZATION OF PUBLIC SCHOOLS AND TEACHER TRAINING SCHOOLS AND LEGISLATIVE FRAMEWORKS FOR ENCOURAGING CREATIVITY IN EDUCATION

ABSTRACT: Ivan Mažuranić, a Croatian Ban who reigned from 1873 to 1880, implemented significant reforms in education, administration, and judiciary as part of his political program aimed at providing a modern legal framework for Croatian autonomy. During the second year of his reign, on August 19, 1874, Ban Mažuranić proposed the draft Act on the organisation of public schools and teacher training schools, which was adopted and confirmed by the Austrian Emperor and Hungarian-Croatian King Francis Joseph I on October 14, 1874. This Act is considered to be the first Croatian autonomous school law and one of the most liberal school laws in Europe, establishing schools as secular institutions. While many provisions of that Act remain applicable in

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today's Croatian educational system, they sparked some serious debates and protests across social classes at the time. A qualitative comparative analysis of this Act and the current Act on education in primary and secondary schools will compare the legislative frameworks for encouraging creativity in education and enabling the autonomous work of teachers. By enacting this law, Ban Mažuranić demonstrated his commitment to fulfilling his election promises. Along with other laws enforced in judiciary and administration, this Act paved the way for the modernization of the former Croatian state, aligning it with European standards of a modern civil state.

***Keywords**: Ivan Mažuranić, reforms, education, judiciary, creativity.*

1. Introduction

The division of the judiciary and administration and the reform of education in Croatia in 1874 was one of the fundamental interventions undertaken during the period of Ban Ivan Mažuranić (1873–880). The ultimate goal of Ban Mažuranić's policy was the construction of a modern legal infrastructure of Croatian autonomy and the rapid return of the Military Frontier to the motherland (Čepulo, 1999, p. 227). In his inaugural speech at the installation ceremony as Ban in the Croatian Parliament on 30th September 1873, Mažuranić, in addition to reviewing his previous work, also presented short programmatic guidelines for future work, which, we can freely say, he later tried to consistently adhere to. As a politician with great experience, he knew how to assess what was most important for the interests of Croatia in the period to come, but in this regard, he did not promise anything more than "what can be done", so he acted as a realistic politician and statesman. Addressing the members of the Parliament (Sabor) on the occasion of his installation, said: "*...Gentlemen, as for these steps that should be taken in our country, Mr. President outlined them very well. We need reforms in the judiciary, we need reforms in teaching and education, we need reforms in administration, and legislation, in every profession. Gentlemen, my greatest concern will be to do in all these professions what can be done, and what my power may not be able to do, gentlemen, I think that you will support me with your advice and voice; I think that in every place, both in the people and in the parliament, you will support what seems to me to serve the benefit of our country. You, gentlemen, will always find me on the path of the law...*" (Milušić, 1994, pp. 44–45). We can conclude from the speech that reforms in education were not without reason at the beginning of his speech because they, along with the reform of the judiciary and administration, were nevertheless the most important step of

modernization as well as the most important reforms within the implementation plan. As he promised, Mažuranić immediately after coming to the position quickly approached the adoption of the appropriate law in the field of education.

2. Mažuranić's Act and legislative frameworks for encouraging creativity in education

On 19th August 1874, Ban Ivan Mažuranić proposed to the Parliament a draft Act on the organisation of public schools and teacher training schools in the Kingdoms of Croatia and Slavonia (The Act on the organization of popish schools and preparations for popish teaching in the Kingdoms of Croatia and Slavonia), which was voted on and already on 14th October 1874, received the confirmation of the Austrian Emperor and the Hungarian-Croatian King Francis Joseph I. The Act was considered one of the most liberal in Europe at that time, and many novelties and legal articles showed great social sensitivity (e.g., § 17, § 41, and § 42). However, what is perhaps the most important in the law itself, which makes it different from other European laws of that time, are the legal articles that (in) directly encourage creativity in education. It is important to emphasize that this law made elementary (folk) school compulsory, and a mandatory weekly class schedule was prescribed, which could not last less than 20 hours, nor more than 25 hours per week, not counting gymnastics, singing, and practical exercises (§ 15).

The most important innovation is the introduction of teaching subjects that were almost revolutionary at the time, and today, according to the positive regulations of the Republic of Croatia and other countries, they are considered an integral part of the curriculum of all primary schools in Europe and the world. Act's § 54 states:

The subjects taught in the elementary school are as follows:

a) doctrine of faith,
b) mother tongue (§. 11), reading, writing, grammar, exercises in speech and written expression of thoughts,
c) accounting,
d) geography,
e) history,
f) physics,
g) natural history, based on reading books,
h) calligraphy,
i) geometric morphology,
j) singing,
k) gymnastics,

l) practical instruction in the most important professions of the economy.

In addition, for female children, female handicrafts and household instructions.

New subjects such as singing (today's musical culture), gymnastics (today's physical and health culture), and home economics certainly contributed to the maximum stimulation of children's creativity in terms of intellectual and physical capabilities. The Act included singing in the lesson plan, which gave teachers additional opportunities for creativity in education through musical expression. Also, the Act included gymnastics and thereby showed that it recognizes the importance of proper physical development of children from an early age. The issue of physical education is especially topical today, when children's activities are reduced to sitting next to electronic devices, both at school and at home. In addition, the Law provides for female children to be sent to the household, something that is considered extremely useful (not only for female children), which has been heatedly debated in recent times, and in the end, it was decided that the household should return to schools. The legislator has already shown with several subjects that he was far ahead of his time in the design of teaching in some segments, primarily due to the possibility of creativity when performing the aforementioned subjects and the very creative nature of the aforementioned subjects.

Today, the lesson plan and program are not regulated by law, but musical culture and physical and health culture are indispensable parts of the lesson, with the possibility of choosing additional sports content as optional activities. For children with an increased inclination towards music, there are various private schools where they can get additional education and develop their creative talents.

Another innovation in the Act that encourages creativity in education, and perhaps even pushes it to its limits, is the training of future teachers for teaching deaf and blind children (§. 83), which is a big step in the education of children with special needs, since the Act does not forget them and puts them on an equal footing with other students.

Perhaps one of the biggest legislative frameworks for encouraging creativity in education is the establishment of kindergartens (§ 76):

In addition to every preparatory school, there must be a general public school and a school workshop for practical training of future public school teachers.

Besides that, there must be a sufficiently spacious garden and an exercise alley for male trainees and a kindergarten next to female trainees.

The Act stipulates the establishment of a kindergarten next to every female teacher training school for the practical training of female students. It was the

first time in history that an institution for early-age children was mentioned in a legal document. Kindergartens are additionally justified by the Order on the Organization of Kindergartens (Order on the organization of kindergartens), which was passed in 1878 and clarifies the content, scope, and organization of the kindergartens themselves. The order states that any training in the school sense is excluded and clarifies the spatial arrangement of the entertainment venues themselves. By introducing kindergartens as a basic and mandatory institution for preschool children, the legislator devotes maximum attention to the upbringing and education of children from the earliest age and creates frameworks that maximally encourage creativity in the preschool education phase.

3. Comparison with leading European countries

The situation in Europe regarding modern laws and the organization of modern education varied, but in the vast majority of cases, Croatia (or Austria-Hungary) was in the lead. We will briefly describe the situations in the three leading European countries of that time: France, the United Kingdom, and Germany.

France

In France, until 1880, the elite of French society, who could pay for education, were mainly educated. It was not until the end of the nineteenth century that the education reform introduced compulsory and free education for all. The French state then created a network of secondary state schools. Public schools had uneven criteria regarding the amount of enrolment fees and school fees and the quality of teaching staff. Primary schools were under the administration of local authorities. The state allocated few funds for education, so education depended on the economic strength of the local community (Watson, 1966, pp. 85–87).

Changes in French education at the end of the 19th century took place in moments of great economic and political turmoil, the collapse of the Paris Commune on 28th May 1871, and the birth of the Third Republic in 1875. Significant acts from that period for education are primarily the Act from 1878, which obliges communes to form their own primary schools, the Act from 1881 on free primary education, the Act from 1882 on compulsory attendance at primary schools, and the Act from 1904 according to which priests and religious organizations were forbidden to teach anything (Puljiz, 1997, p. 164).

None of the aforementioned laws have the elements of innovation that we find in the Mažuranić's Act.

United Kingdom

At the end of the 19th century, the United Kingdom struggled to maintain its position as a leading maritime and colonial power. Thanks to the expansion of the economy and numerous technological innovations, industrial production is growing, and the English economy is arguably the strongest in the world.

Industrial production has led to a great demand for labour, which has resulted in the employment of children in construction, factories, and mines. Working hours used to last up to sixteen hours a day, and it was not until the laws of 1847 and 1850 that the working hours for women and children under the age of eighteen were limited to ten hours a day. Such employment of children resulted in the fact that in 1860, only slightly more than 20% of children between the ages of 5 and 15 in London were educated in day or Sunday schools, while the rest of the children were not educated (Black, 2004, p. 266).

It was not until 1833 that the British Government allocated funds for the promotion of education in schools for the first time in history. In the same year, it passed a law requiring children employed in factories to attend school for at least two hours a day. Contribution to the education of the poorest children was also the foundation of the Ragged Union of Schools in 1844 as well as the Public Schools Act of 1868 which brought about the long-awaited reform of the public school system in Britain by establishing basic requirements for children.

The year 1870, when state schools were introduced, and 1891, when free primary education was introduced, are significant for the education system of Britain (Puljiz, 1997, p. 165).

Comparing the British laws with the Croatian Act on the organisation of public schools and teacher training schools in the Kingdoms of Croatia and Slavonia from 1874, we can see that the Croatian Act is ahead of the British Act in almost all segments.

Germany

After the unification in 1871, Germany became a strong industrial country. The data that speak in favour of this is the sudden growth of the urban population (in 1870, Germany had 36% of the urban population, and already in 1910, almost 60% of the urban population lived in cities). In steel production, which is a clear indicator of economic strength, Germany surpassed France already in 1875 (2 million versus 1.5 million tons of steel produced), and Great Britain in the first decade of the 20th century. Germany was the cradle of the second industrial revolution, characterized by the large use of electricity and internal combustion engines (Puljiz, 1995, pp. 243–244).

While the industrial revolution created the need for the establishment of technical schools, a spiritual movement called Neohumanism made significant changes in the curriculum of German high schools of the time, as well as changes in the curricula of elementary schools. Elementary schooling was extremely developed, compulsory, and under state administration, but it still did not have the characteristics of mass education.

During 1892, three types of secondary schools were introduced: classical high school, real high school, and upper real high school. Upon completion of these schools, one could enrol in a university.

Due to the needs of industrialization, the so-called incomplete secondary schools where education lasted for six years and from which it was possible to transfer to complete secondary schools. These incomplete "secondary schools" were supposed to provide working youth with higher education (Puljiz, 1995, p. 245).

At the end of the 19th century, an eight-year compulsory schooling was introduced. The schools were partly religious and partly mixed, and they were financed from municipal funds, as were complete secondary schools.

Elementary and upper elementary schools were mostly attended by children of poorer parents, while the ruling classes sent their children to grammar school preparatory classes or taught them privately, at home. Extension schools were also intended for poor children, which developed strongly at the beginning of the 20th century and in some cases became mandatory for young artisans (Žlebnik, 1970, p. 178).

Analysing the reforms of the educational system in Germany, we can say that the German legislation of that time was developed and perhaps the most modern in all of Europe at that time.

4. Conclusion

The time of Ivan Mažuranić as Ban was accompanied by numerous successful reforms of the administration and the judiciary, but also of education, which was precisely thanks to Ban Mažuranić and his Act on organisation of public schools and teacher training schools in the Kingdoms of Croatia and Slavonia, which experienced a real flourishing. As the first Croatian autonomous school law, we have the opportunity to see how the liberal legal provisions enabled the realization of creativity in education, primarily through innovative programs such as physical and musical education or home economics, which is really very necessary for today's students, and perhaps the biggest innovation, the introduction of kindergartens.

By comparing the other laws of that time, we have the opportunity to see how much larger countries than Croatia were scrambling for modern educational legislation and began to introduce reforms in education only at the end of the 19th and the beginning of the 20th century.

Following all of the above, we can clearly say that Mažuranić's The Act on the organization of popish schools and preparations for popish teaching in the Kingdoms of Croatia and Slavonia provided a prerequisite for the creative, but also autonomous work of teachers, and opened the way for the modernization of Croatia and its faster approach to European standards of a modern civil state, which we can see in the current Act on education in primary and secondary schools, which was designed in the spirit of Mažuranić's Act and on whose foundations today's education rests.

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ODREDBE MAŽURANIĆEVOG ZAKONA O OSNIVANJU NARODNIH ŠKOLA I PRIPREMA ZA NARODNE UČITELJE U KRALJEVINAMA HRVATSKOJ I SLAVONIJI I ZAKONODAVNI OKVIRI ZA PODSTICANJE STVARALAŠTVA U OBRAZOVANJU

APSTRAKT: Za vreme banovanja Ivana Mažuranića (1873–1880) sprovedene su brojne reforme u prosveti, upravi i sudstvu, budući da je politički program njegovog banovanja bio zasnovan na izgradnji moderne pravne infrastrukture hrvatske autonomije. Već druge godine svog banovanja Ivan Mažuranić je predložio Saboru 19. avgusta 1874. godine

nacrt *Zakona ob ustroju pučkih školah i preparandijah za pučko učiteljstvo u kraljevinah Hrvatskoj i Slavoniji*, koji je izglasan i već 14. oktobra 1874. dobio potvrdu austrijskog cara i ugarsko-hrvatskog kralja Franje Josipa I. Zakon se smatra prvim hrvatskim autonomnim školskim zakonom, ali i jednim od najliberalnijih školskih zakona u Evropi, budući da od ovog Zakona škole postaju sekularne institucije. Mnoge odredbe ovog Zakona i dalje su aktuelne i primenjive u modernom hrvatskom obrazovanju, ali su pre stupanja na snagu izazvale ozbiljne rasprave i proteste svih slojeva društva. U kvalitativnoj uporednoj analizi *Zakona ob ustroju pučkih školah i preparandijah* te aktuelnog *Zakona o odgoju i obrazovanju u osnovnoj i srednjoj školi* poredit će se zakonodavni okviri za podsticanje kreativnosti u obrazovanju koji obezbeđuju pretpostavke za kreativan i samostalan rad nastavnika. Usvajanjem ovog Zakona, ban Mažuranić je već u prvoj godini svoje vladavine stavio do znanja da planira da održi izborna obećanja i njime, uz druge zakone iz oblasti pravosuđa i uprave, otvorio put modernizaciji banske Hrvatske i njenom bržem približavanju evropskim standardima moderne građanske države.

***Ključne reči**: Ivan Mažuranić, reforme, školstvo, sudstvo, stvaralaštvo.*

References

1. Black, J. (2004). *Povijest britanskih otoka* [*History of the British Isles*]. Zagreb: Grapa
2. Čepulo, D. (1999). Dioba sudstva i uprave u Hrvatskoj 1874. godine [The division of the judiciary and administration in Croatia in 1874]. *Hrvatska javna uprava*, *1*(2), pp. 227–259
3. Milušić, A. (1994). Mažuranićeve reforme u hrvatskom sudstvu i modernizacija sudskog procesnog prava [Mažuranić's reforms in the Croatian judiciary and the modernization of judicial procedural law]. *Pravni vjesnik, 10*(1–4), pp. 44–45
4. Naredba ob ustrojstvu zabavišta Kr. hrv.-slav.-dalm. zemaljske vlade, Odjel za bogoštovje i nastavu (1878) [Order on the organization of kindergartens of the Royal Croatian-Slav.-Dalm. Land Government, Department of Worship and Teachings (1878)]. *Anali za povijest odgoja, 15/16*(39–40), pp. 143–149
5. Pravilnik o osnovnoškolskom i srednjoškolskom odgoju i obrazovanju učenika s teškoćama u razvoju [Rulebook on elementary and high school education of students with developmental disabilities]. *Narodne novine* 24/2015

6. Puljiz V. (1995). Bismarckove socijalne reforme [Bismarck's social reforms]. *Revija za socijalnu politiku*, *2*(3), pp. 243–245
7. Puljiz V. (1997). Kronologija socijalne politike Zapada (Od srednjeg vijeka do sredine dvadesetog stoljeća) [Chronology of the social policy of the West (From the Middle Ages to the middle of the twentieth century)]. *Revija za socijalnu politiku*, *4*(2), pp. 164–165
8. Raguž M. (2010). Zakon od 14. listopada 1874. ob ustroju pučkih škola i preparandija za pučko učiteljstvo u kraljevinah Hrvatskoj i Slavoniji [The Act from 14th October 1874 on the organisation of public schools and preparatory schools for folk teachers in the kingdoms of Croatia and Slavonia] *Senjski zbornik: prilozi za geografiju, etnologiju, gospodarstvo, povijest i kulturu*, *37*(1), pp. 87–97
9. Watson, D.R., (1966). The politics of Educational Reform in France during the Thrid Republic 1900–1940, *Past & Present*, *34*(1), pp. 85–87
10. Zakon ob ustroju pučkih školah i preparandijah za pučko učiteljstvo u kraljevinah Hrvatskoj i Slavoniji (1874). [The Act on the organization of popish schools and preparations for popish teaching in the Kingdoms of Croatia and Slavonia]. *Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju, 49*, pp. 1–852.
11. Zakon o odgoju i obrazovanju u osnovnoj i srednjoj školi [The Act on education in elementary and high schools]. *Narodne novine* 87/08, 86/09, 92/10, 105/10, 90/11, 5/12, 16/12, 86/12, 126/12, 94/13, 152/14, 07/17, 68/18, 98/19, 64/20, 151/22
12. Žlebnik L. (1970). *Opšta historija školstva i pedagoških ideja* [*General history of education and pedagogical ideas*]. Beograd: Naučna knjiga

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INFLUENCE OF BIO-CLIMATIC CONDITIONS OF MOUNT ZLATIBOR ON HEALTH TOURISM

APSTRACT: Introduction: Bioclimatic conditions are of great importance for all forms of tourism, especially for health tourism, as they should encompass therapeutic and prophylactic characteristics. Over the last three decades, tourism in Zlatibor has been continuously growing in terms of tourist numbers and the development of tourist infrastructure. This paper presents the bioclimatic and climatic conditions on Mount Zlatibor from the perspective of their impact on tourism. More precisely, it examines their influence on tourist movements on this mountain and their significance for the development of health tourism. **Materials and Methods:** Research data were obtained through the analysis of temperature, air pressure, humidity, insolation, and precipitation levels. Based on these data, physiological equivalent temperature (PET) values and the universal thermal climate index (UTCI) were calculated. **Results:** The obtained results of bioclimatic indices (PET and UTCI) indicate potential stress due to extreme cold in the mornings and evenings from late October to the second decade of March. Pleasant warmth prevails during the summer months in the mornings and evenings. In terms of health, the climate of Zlatibor is suitable for maintaining health, as well as for treating various lung diseases, anemia, heart and blood

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vessel disorders, especially thyroid disorders. Bioclimatic conditions closely correlate with tourist movements on Zlatibor, as evidenced by climate data and the results obtained from PET and UTCI calculations. **Conclusion:** Comparing tourist numbers over a five-year period reveals that bioclimatic conditions significantly influence Zlatibor's peak tourist season, which occurs during the summer months. This period offers the most favorable bioclimatic conditions, attracting the highest number of visitors to the mountain, especially those seeking health and recreational activities.

***Keywords*:** *Zlatibor, bioclimatic conditions, health, tourism.*

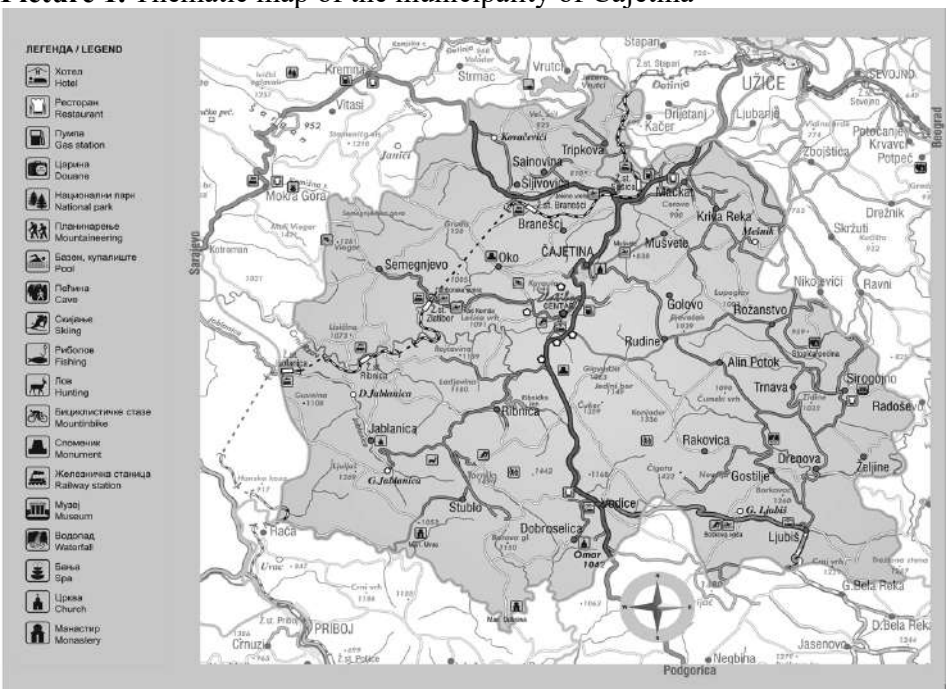
1. Introduction

Tourism is an economic branch that experienced rapid development in the second half of the twentieth century. The influence of nature on the human organism has been very significant throughout the history of the development of civilization, and one of the most important natural factors is the climate. As we progressed technologically, we managed to mitigate climate impacts, but we still remained dependent on nature. There is a well-known quote from the ancient philosopher Hippocrates, "The human organism behaves differently in certain periods of atmospheric weather. Mountain Zlatibor, situated in the southwestern part of Serbia, represents one of the jewels of natural beauty and richness of this region. Besides its distinctive cultural heritage and authentic rural legacy, Zlatibor is often explored as a destination in the context of health and medical tourism. What makes this mountain exceptional is its specific bioclimatic profile, which includes a combination of air composition, microclimatic factors, solar radiation, and other elements that influence the health and general well-being of visitors.

This paper aims to analyze how the bioclimatic conditions of Zlatibor affect health and medical tourism, exploring the benefits that this mountain provides for therapeutic purposes. Understanding how natural factors such as clean air, specific flora and fauna, as well as geographical location, affect human health, provides deeper insight into the potential benefit that visitors can derive from staying in Zlatibor. Through the analysis of available data, the research will examine how these bioclimatic conditions are used for therapeutic purposes, including treatments for respiratory diseases, stress recovery, and improvement of overall health conditions. The role of the local community and medical institutions in promoting this specific type of tourism will also be considered, as well as how they have adapted to meet the needs of guests who come in search of health and rejuvenation.

Through this research, we will strive to provide a comprehensive overview of the impact of bioclimatic factors on tourism that significantly influences the health and medical well-being of visitors to the mountain Zlatibor. The year 1893 is considered the beginning of health tourism on Zlatibor, when the king of that time period Aleksandar Obrenović approved the establishment of an air spa on Zlatibor. Later research confirms that Zlatibor's climate has very favorable effects on healthy people and excellent characteristics for the treatment of psychosomatic diseases such as regulating the work of the thyroid gland, metabolic diseases, lung and heart diseases, improving the blood count and the like. Zlatibor is one of the most visited tourist destinations in Serbia. Knowledge of the bioclimatic characteristics of an area can also help the tourism industry by offering alternative facilities to guests in certain parts of the year that can extend the season and the stay of tourists (Stojićević, 2016). The aim of this work is to connect the bioclimatic conditions of Zlatibor as a tourist destination with the impact on health and movement of people.

Picture 1. Thematic map of the municipality of Čajetina



Source: Tourist organization Zlatibor

2. Bioclimate indexes

Bioclimatic indices PET and UTCI were used as basic methods for obtaining information about the bioclimate of Zlatibor, in the period from 1992 to 2013. The use of the bioclimatic index PET allows a person to experience the thermal component of time on his own example. It is actually an index that describes the thermal environment according to thermal-physiological conditions. It is easier to imagine what a room air temperature of 30°C means thermally than to know that a clear sky, moderate wind and an air temperature of 20°C are expected. Then a person can, from his own experience, determine for himself how to dress and what type of activity would be appropriate for such conditions (Höppe, 1999). Table 1 shows the comfort sensation scale according to the physiological equivalent temperature.

Table 1. Classification of the feeling of comfort according to physiological equivalent temperature (PET)

PET (°C)	The feeling of comfort
< 4	very cold
4–8	cold
8–13	fresh
13–18	pleasantly fresh
18–23	pleasant
23–29	Pleasantly warm
29–35	warm
35–41	hot
> 41	very hot

Source: Matzarakis & Mayer, (1996)., p 8.

UTCI – Universal Thermal Climate Index represents the ratio of the air temperature of the reference environment that causes the same model responses as real conditions. UTCI can be understood as the air temperature that would lead to the same heat stress as the actual conditions in the conditions of the reference environment.

Table 2. UTCI table for measuring heat stress

UTCI (°C)	EVALUATION OF PHYSIOLOGICAL STRESS
below -40	Extreme cold stress
-40 to -27	Very strong cold stress
-27 to -13	Strong cold stress
-13 to 0	Medium cold stress
0 to 9	Pleasantly cold stress
9 to 26	No heat stress
26 to 32	Medium warm stress
23 to 29	Pleasantly warm stress
32 to 38	Strong warm stress
38 to 46	Very strong warm stress
above 46	Extreme hot stress

Source: Błażejczyk & Błażejczyk, (2012)., p 70.

Daily data from the meteorological station on Zlatibor for the period from 1992 to 2013 were the basis for calculating the PET and UTCI bioclimatic indices. RayMan software was used to calculate PET, and BioKlima program was used to calculate UTCI (Błażejczyk, 2006). RayMan is a software developed by Professor Andreas Matzarakis (Matzarakis, Rutz & Mayer, 2007).

The research used the example of a bioclimatic leaflet for the mountain Zlatibor. The leaflet was used to obtain data on the annual course of average temperatures, relative humidity, recognition of days with extreme temperature values, precipitation and wind (Stojićević, 2016). Important data on air pollution were collected based on the monitoring of allergenic pollen for all important places in Serbia.

3. Research results

The results of the analysis of the climatic elements of Zlatibor point to the therapeutic values of the climate, which gives this mountain the characteristics of a climatic health resort. For the above reason, the analysis of bioclimatic conditions is also necessary.

Air temperature

The most frequent temperatures ranging from 25 °C to 30 °C were recorded in July and August. The coldest days can be observed from the middle of October until the beginning of April. In December and January, over 50% of days have temperatures between -10 °C and 0 °C. Very low temperatures (below -10 °C) are rare and mostly occur in the third decade of January and early February (Republički hidrometeorološki zavod – RHMZ).

Air humidity

The characteristics of air humidity are high variability with an atypical annual cycle. RH in the range of 85 to 95 and over 95% occurs during the winter months, i.e. in December, January and February with values over 50% (RHMZ).

Precipitation

During the observed period, the average number of days with precipitation was 178. Rain can be expected 187 days a year, while days with precipitation above 5 mm can be recorded for 72 days a year. Heavy rainfall is most common in late spring and during the summer months. Snow up to 1 cm high can occur on Zlatibor from the first half of October to the second half of April (RHMZ).

Wind

Wind directions change during the day. Before noon, the southwest wind is dominant, but in the middle of the day, northerly directions become predominant. Wind speeds are between 1 and 3 m/s (RHMZ).

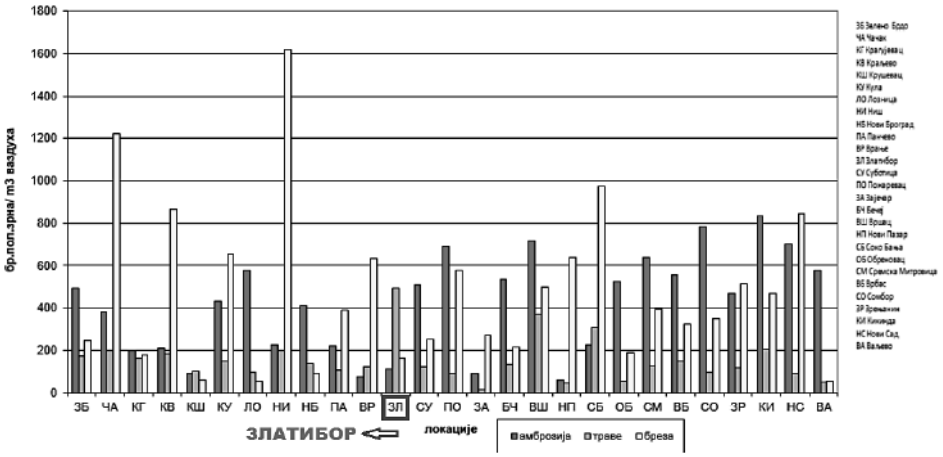
Bioclimatic conditions

The average values of PET on Zlatibor for the decades between 1992 and 2013 show the possibility of extreme cold stress in the morning and evening hours from the end of October until the second decade in March. In the afternoon, there is less stress due to extreme cold. Better conditions for thermal comfort are during spring and autumn. PET values that are pleasant throughout the day are represented from the second half of April, then during May, September and the first half of October. During the summer months (June, July, and August), the morning and evening hours have pleasant thermal conditions, but also the heat stress in the afternoon hours. UTCI has a similar movement during the year as PET. Extreme cold stress is present throughout the day in November, December, January, February, and also occurs in March. From the second decade of April until the end of September, pleasant thermal conditions prevail throughout the day.

Air pollution

In recent decades, air pollution has become an increasingly important problem for human health. Zlatibor becomes an excellent place to get through the summer months with the most pronounced influence of ambrosia. Evidence for these claims can be found in the results of the monitoring of allergenic pollen, where it is clearly seen that Zlatibor is in the rank of places where the maximum daily concentration of ragweed pollen grains is at the lowest level (diagram 1), and based on the report for the maximum daily concentration of pollen grains at all stations in the Republic of Serbia in 2021 (Environmental Protection Agency)

Diagram 1. Maximum daily concentrations of pollen grains at all stations in the Republic of Serbia in 2021.



Source: Annual report on the state of air quality in the Republic of Serbia for 2021. Environmental Protection Agency.

Comparing the total number of tourists on Zlatibor in the period from 2016 to 2020, it can be noted that the largest number of tourists is present during the summer (289,162) and the smallest number during the spring (222,546). These data indicate the connection of climatic factors with the decision of tourists when choosing a tourist season, because it is precisely in the periods with the highest number of visits that the conditions for health tourism and recreation are very favorable. Of course, a more detailed analysis could lead to conclusions that can somewhat disprove the claim that the climate is the main reason for such a large number of tourists in the summer season, given that most employees have the opportunity to take annual vacations at that time, which

is one of the prerequisites for tourist movements (Vuletić, 2022). Comparative bioclimatological analyzes were also made by Błażejczyk during 2021, who, using the example of Zlatibor, came to similar regularities in the tourist movement on this mountain, as in the above statement (Błażejczyk, 2021). Pecelj also claims that during the summer months in the big cities of Serbia, "strong and moderate heat stress" is most present, while in the same period in Zlatibor, "moderate heat stress" dominates (Pecelj, et al., 2017), which is one of the important drivers for tourist movements towards this mountain.

4. Discussion

The results of this study showed that the used climatological indices reflect the state of climatological elements. The climate of Zlatibor is suitable for maintaining health, as well as for the treatment of various lung diseases, anemia, disorders of the heart and blood vessels, and especially disorders of the thyroid gland, which is why it was declared a climatic health resort (Novaković-Kostić, 2015, p. 50). Bearing in mind that the atmospheric pressure on Zlatibor is extremely favorable, staying on this mountain has a favorable effect on the improvement of the blood count, above all on the increase in the percentage of hemoglobin in the blood and the increase in the number of red blood cells. Considering the above, Zlatibor represents a therapeutic area for all acute and chronic diseases of the respiratory organs, thyroid gland and anemia of all forms. The results of the research conducted by the Ministry of Health of the Republic of Serbia in 2013 indicated an increasing trend of obesity among the population of Serbia (Lešović, Smiljanić & Ševkušić, 2018, p. 8). Therefore, it is no coincidence that the Specialized Hospital for Hyperthyroidism was founded in Zlatibor back in 1964, which in 1997 grew into the Institute for Thyroid Gland and Metabolism. When planning the site for the Institute, many experts were consulted, especially doctors, climatologists and architects. In this regard, the favorable bioclimatic conditions on Zlatibor help the ultimate goal of obesity treatment, which is a permanent reduction of body mass (Lešović, Smiljanić & Ševkušić, 2018, p. 11).

5. Conclusion

Zlatibor is an exceptionally desirable destination for visitors seeking to preserve and improve their health. The results clearly indicate the benefits provided by the specific bioclimatic conditions of this mountain. Clean air, rich

flora and fauna, as well as beneficial microclimate, have proven to be key factors contributing to the overall well-being of visitors. Specific treatments for respiratory problems, stress reduction, and recovery after illness are just some of the ways these natural resources can be utilized for therapeutic purposes.

It is also important to emphasize the role of the local community and medical institutions in promoting this type of tourism. Their commitment to providing high-quality health services plays a crucial role in building trust among visitors and enabling this type of tourism to thrive.

Mount Zlatibor, with its unique bioclimatic characteristics, represents an exceptional resource for the development of health tourism. Its ability to provide improvements in the physical and mental health of visitors makes it not only an attractive tourist destination but also a key factor in enhancing the overall health of society.

Further research should enable even more effective utilization of Zlatibor's potential in preserving and improving the health of visitors in the future.

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UTICAJ BIOKLIMATSKIH USLOVA PLANINE ZLATIBOR NA ZDRAVSTVENI TURIZAM

APSTRAKT: Uvod: Bioklimatski uslovi imaju veliki značaj za sve oblike turizma, a prevashodno za zdravstveni turizam, jer treba da sadrže terapeutske i profilaktičke karakteristike. U poslednje tri decenije turizam na Zlatiboru je u stalnom usponu po broju turista i po razvoju turističke infrastrukture. Rad prikazuje bioklimatske i klimatske uslove na planini Zlatibor sa aspekta uticaja na turizam. Odgovori kako klimatski uslovi utiču na turistička kretanja na ovoj planini i u kojoj su meri značajni

za razvoj zdravstvenog turizama predstavljaju glavne teme ovoga rada. **Materijal i metode:** Podaci za istraživanje su dobijeni analizom temperature, vazdušnog pritiska, vlažnosti vazduha, insolacije i količine padavina. Na osnovu tih podataka izračunate su vrednosti fiziološki ekvivalentne temperature (PET) kao i univerzalnog termalnog indeksa (UTCI). **Rezultati:** Dobijeni rezultati bioklimatskih indeksa (PET i UTCI) ukazuju na mogućnost stresa na ekstremnu hladnoću u jutarnjim i večernjim satima od kraja oktobra pa sve do druge dekade u martu. Tokom letnjih meseci prijatne toplotne uslove imaju jutarnji i večernji sati. U zdravstvenom smislu klima Zlatibora je pogodna za održavanje zdravlja, kao i za lečenje različitih plućnih bolesti, anemije, poremećaja srca i krvnih sudova, a naročito poremećaja štitaste žlezde. Na osnovu podataka o klimi i rezultata dobijenih izračunavanjem fiziološki ekvivalentne temperature (PET) i univerzalnog termalnog indeksa (UTCI) bioklimatski uslovi su dovedeni u najbližu vezu sa turističkim kretanjima na Zlatiboru. **Zaključak:** Poređenjem broja turista u petogodišnjem periodu došlo se do zaključka da upravo bioklimatski uslovi u najvećoj meri utiču da letnja sezona bude najposećenija, a samim tim i najprijatnija za sve kategorije turista sa posebnim naglaskom na one turiste koji Zlatibor posećuju iz zdravstvenih i rekreativnih razloga. Ovaj period tokom godine odlikuju najbolji bioklimatski uslovi pa je i broj posetilaca ove planine tada najveći.

Ključne reči: *Zlatibor*, *bioklimatski uslovi, zdravlje, turizam.*

References

1. Bojović, G. & Plavša, J. (2011). Swot Analysis of Tourism on Kopaonik and the Spas of its Piedmont. *Turizam*, *15*(3), pp. 109–118, DOI: 10.5937/Turizam1103109B
2. Blazejczyk, K., & Blazejczyk, A. (2014). Assessment of bioclimatic variability on regional and local scales in central europe using ucti. *Analele stiintifice ale Universitatii" Alexandru Ioan Cuza" din Iasi-seria Geografie*, *60*(1), pp. 67–82
3. Błażejczyk, K. (2006b), MENEX_2005 — the Revised Version of Man-Environment Heat Exchange Mode. Downloaded 2023, March 10 from https://www.igipz.pan.pl/tl_files/igipz/ZGiK/opracowania/indywidualne/blazejczyk/MENEX_2005.pdf
4. Błażejczyk, A., Pecelj, M., Skrynyk, O., Krzysztof, B., & Skrynyk O. (2021). Weather suitability for outdoor tourism in three European

regions in first decades of the twentyfirst century. *International Journal of Biometeorology, 65*, pp. 1339–1356. Downloaded 2023, March 15 from https://www.researchgate.net/publication/343727132_Weather_suitability_for_outdoor_tourism_in_three_European_regions_in_first_decades_of_the_twenty-first_century

5. Höppe P. (1999). The physiological equivalent temperature – a universal index for the biometeorological assessment of the thermal environment. *International Journal Biometeorology*, *43,* pp. 71–5. Downloaded 2023, March 18 from https://doi.org/10.1007/s004840050118
6. Lešović, S., Smiljanić, J., & Ševkušić, J. (2018). Deset godina uspešnog rada multidisciplinarnog Centra za prevenciju i lečenje gojaznosti kod dece i adolescenata [Ten years of successful work of the multidisciplinary Center for the prevention and treatment of obesity in children and adolescents]. *Medicinski glasnik Specijalne bolnice za bolesti štitaste žlezde i bolesti metabolizma „Zlatibor" 23*(69), 7–29, https://doi.org/10.5937/MedGla1869007L
7. Matzarakis, A., & Mayer, H. (1996). Another Kind of Environmental Stress: Thermal Stress. WHO Collaborating Centre for Air Quality Management and Air Pollution Control. *Newsletters*, *18*, pp. 7–10. Downloaded 2023, March 25 from https://www.researchgate.net/publication/233759000_Another_kind_of_environmental_stress_Thermal_stress
8. Matzarakis, A., Rutz, F., & Mayer, H. (2007). Modelling Radiation fluxes in simple and complex environments-application of the RayMan model. *International Journal of Biometeorology*, *51*, pp. 323–324. Downloaded 2023, April 15 from https://link.springer.com/article/10.1007/s00484-006-0061-8
9. Novaković-Kostić, R. (2015). *Nacionalna turistička geografija* [*National tourist geography*]. Užice: Visoka poslovno-tehnička škola strukovnih studija, Downloaded 2023, April 28 from http://mhtsps.vpts.edu.rs/documents/090515/2.5/BTC%20Uzice%20-%20National%20tourism%20geography.pdf
10. Pecelj, M., Đorđević, A., Pecelj, R. M., Pecelj Purković, J., Filipović, D., & Šećerov, V. (2017). Biothermal conditions on Mt. Zlatibor based on thermophysiological indices. *Archives of Biological Sciences, 69*(3), pp. 455–461. Downloaded 2023, May 10 from https://www.researchgate.net/publication/309816669_Biothermal_conditions_on_Mt_Zlatibor_based_on_thermophysiological_indices
11. Popović, B. M. (2007). *Priče o vremenu i klimi*. [*Stories about weather and climate*]. Beograd: Hidrometeorološki zavod Srbije

12. Stojićević, G. (2016). *Bioklimatska slika Zapadne Srbije u funkciji turizma – doktorska disertacija* [*Bioclimatic picture of the Western Serbia in the function of Tourism – doctoral thesis*]. Novi Sad: Prirodno-matematički fakultet u Novom Sadu. Downloaded 2023, May 20 from https://nardus.mpn.gov.rs/handle/123456789/7190
13. Vuletić J, (2022). Analysis of equivalent temperatures in the area of Zlatibor in the function of outdoor tourism. *Serbian Journal of Geosciences. 8*, pp. 1–7, Downloaded 2023, May 26 from https://www.pmf.ni.ac.rs/download/casopisi/srbjgeosci/2022/srbjgeosci.2022.8.1.1.pdf
14. Agencija za zaštitu životne sredine. [Environmental Protection Agency]. *Godišnji izveštaj o stanju kvaliteta vazduha u Republici Srbiji za 2021. godinu* [*Annual report on the state of air quality in the Republic of Serbia for 2021*]. Downloaded 2023, Jun 8 from http://www.sepa.gov.rs/index.php?menu=5000&id=1304&akcija=showDocuments
15. Republički hidrometeorološki zavod Srbije [Republic Hydrometeorological Institute of Serbia]. Downloaded 2023, Jun 15 from https://www.hidmet.gov.rs/ciril/meteorologija/klimatologija_godisnjaci.php

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PROHIBITION OF MARKET ABUSE – EUROPEAN LAW AND THE LAW OF THE REPUBLIC OF SERBIA

ABSTRACT: Market abuse encompasses trading based on insider information and market manipulation. Such unfair market activities can endanger the entire market and, in their most intense and most pronounced form, seriously disrupt market dynamics, conferring undue advantages to certain participants, thus undermining principles of fair competition. Therefore, when defining legal regulations in the field of market abuse prohibition in a country, understanding the morphology of the market is crucial. It is important to consider both positive and negative consequences for the country's market economy, if the goal is to form a transparent, integrated and efficient market, which would be attractive to investors based on such characteristics and thereby contribute to the economic growth and development of the country. The Republic of Serbia still lacks sufficiently developed mechanisms and appropriate legal solutions necessary for the functioning of a market economy, but its advantage lies in the model, experience, and judicial practice of developed markets within the member states of the European Union.

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***Keywords*:** *Market abuse, insider information, market manipulation, market structures, legal regulations, European Union.*

1. Introduction

For the efficient functioning of any market economy, it is first necessary to carry out an expert analysis of the dominant market structures, establish how the market is organized and divided within the economy of a country, and then to evaluate its advantages and disadvantages. For the effective operation of market mechanisms within the framework of a free and unified market, it is necessary to have healthy and fair competition and clear legal regulations in case of violation of market morphology and its abuse. The threat of free competition is present in both developed and underdeveloped markets, and this topic is particularly sensitive in countries that are on the path of transition. The main forms of market abuse that prevent the realization of market transparency, as a prerequisite for successful trading, are trade in insider (privileged) information and market manipulation (Raičević & Kovačević, 2013).

Viewed from the economic side, information is considered a scarce resource whose use should be taken care of (Mušikić, 2005). Also, the economists are of the opinion that the characteristic of all information is its asymmetry and imperfection, as well as that for certain users (investors), certain information can be of importance, while for others they do not represent any improvement of knowledge and benefit (usefulness). It is also important to point out that every piece of information has its own shelf life. Based on everything presented, it is very difficult to define which situations are when some information is considered privileged or insider information and which are not. The given information, which has not been disclosed to the public, and can (could) have an impact on the price of a security, is called by different names: privileged, insider privileged or inside information, but regardless of the term used, its essence is reflected in an unfair advantage their owners, the use of which is strictly prohibited (Jocović, 2013).

Although speculation (manipulation) on the financial markets implies acting with illegal means in order to obtain benefits (profits) as easily and quickly as possible, it does not mean that all given actions are illegal, but such actions need to be defined on the basis of laws and/or standards. Then again, any legal action that is directed against other (groups of) persons, and even the state, is harmful if it damages other people's interests. As stated by Raičević & Kovačević (2013), there are situations when speculative businesses cause

indirect damages, in the sense that the social benefits from them are far greater than the damages (eg introduction of new technologies or trading at dumping prices).

Market mechanisms alone are not sufficient to establish the efficiency and fairness of a particular market. Therefore, the role of the state consists in formulating clear and unambiguous legal regulations in order to build a transparent market environment and protect all market participants, thereby creating a favorable market environment that is attractive to potential investors.

Laws represent determinant frameworks for shaping business and investment cooperation, as well as for encouraging and developing a congruent market structure, a functional market and, in general, the development of a country's competitiveness. In the legislative practice of the Republic of Serbia, from the aspect of promoting competition and protection (abuse) of the market, the Law on Protection of Competition (2009), the Law on Consumer Protection (2014), Law on the Protection of Users of Financial Services (2011), Law on the Capital Market (2011) and other Laws that define business conditions and the prohibition of abuse of market positions, and for the sake of a successful process of harmonizing legislation with European Union regulations in the process of joining the Republic of Serbia to this community.

The subject of the research in the paper is the presentation and analysis of the legal regulations in the area of the European Union, as well as its compliance with the legal regulations in the territory of the Republic of Serbia regarding the prohibition of the market abuse, specifically insider trading and market manipulation, all for the sake of assessing the competitiveness of the market environment in order to take the necessary steps and procedures for creating an efficient, integrated and transparent market.

The goal of the research is to, after a detailed analysis of the legal regulations regarding market abuse in the area of the European Union and the Republic of Serbia, gain insight and draw conclusions about the way to regulate and suppress market abuse, as well as to prevent the variety of its manifestations and for the sake of increasing the protection of market participants and thereby building a functional and competitive market structure, and thus the economy of a certain country or the entire geopolitical area.

2. Market structures, their disturbances and legal regulation of market anomalies

Market morphology (market position or condition) implies the circumstances and conditions under which the sale or purchase of a certain product or service on the market by market subjects takes place. Such processes are influenced by various factors, both on the supply side and on the demand side, and often on both market processes. Perfect competition and monopoly represent extreme cases of market competition, while other forms of competition that lie between these two extreme forms are called incomplete (imperfect) competition. Table 1 shows the morphology of the market, that is, the names of different market structures against the number of buyers and sellers as participants in a certain market.

Table 1: Presentation of the market morphology

Number of sellers and buyers		Number of buyers		
		Many	Little	One
Number of sellers	Many	Total competition	Oligopsony	Monopsony
	Little	Oligopoly	Bilaterally oligopoly	Quasi monopsony
	One	Monopoly	Quasi – monopoly	Bilaterally monopoly

Source: Đorđević, D. (2006)., p. 177.

Perfect competition, although it seems to be only a theoretical category, ensures maximum social welfare through dynamic competition of market participants. The attractiveness of a market depends on the possibility of doing business there, that is, easy and quick entry (and exit) from the given market. Globalization represents a challenge both for individual market actors and for entire national economies. Productivity, efficiency, rationality, innovation must be companions of all economic activities, so that local businessmen, as well as entire countries, can cope with the coming competition and (p) remain attractive for the investors. The threat to a company or country can be analyzed based on Porter's five market forces: "Intensity of rivalry, entry barriers, threat of substitutes, bargaining power of buyers and bargaining power of suppliers, which can be of high, medium or low intensity, while the threat to the observed company or the economy grows as the level of intensity of a certain force increases" (Porter, 2007, p. 24).

Disruption of the market structure leads to a mismatch between supply and demand, that is, an uneven relationship between buyers and sellers. Such

discrepancies can have significant implications for the functioning of the entire market mechanism. If this disruption occurs on the supply side, there is a reduction in the number of bidders (manufacturers or distributors), resulting in oligopoly, duopoly or, ultimately, monopoly structures that lead to a decrease in the level of supply and an increase in prices. In this way, there is a general decrease in the level of efficiency and the consumer is threatened, considering that he is forced to pay a higher price. In the event that there is a disturbance on the demand side, oligopson, duopson or monopson structures arise due to a smaller number of buyers. By reducing the level of demand, i.e. by reducing the volume of turnover, there is a drop in prices and the creation of fewer opportunities for the placement of certain products and services on the given market. Ultimately, production "suffers", that is, producers, who feel losses.

The main goal of all market participants, regardless of the type of market structure we are talking about, is to make (the largest possible amount of) profit. In the aforementioned race for the best possible financial position, many market actors resort to non-competitive behavior in order to create a better position on the market and fight for a higher ranking. From a theoretical point of view, market competition can be threatened in three ways Erić (2008): (1) monopoly agreements (cartels), (2) abuse of a dominant (ruling) position on the market, (3) market structures and competition protection. such tendencies of market participants, which implies non-compliance with the rules of competitive behavior, the competitive discipline of market subjects must be established as an obligation through compliance with legal regulations and by laws.

The branch of law that deals with issues of market structures and relations within them is called competition law. Its scope of interest is suppression of the creation of monopolies and abuse of a dominant (ruling) position on the market.

In countries with a developed market economy, the protection of competition is clearly regulated by special rules created by the practice of official bodies for the protection of competition, usually called Agencies or Commissions.[1]

The competences of these institutions are reflected in the procedures for applying the general rules of competition law. The courts control the decisions of the aforementioned authorities in cases against market players who threaten competition. The aforementioned rules refer in particular to the way of determining the relevant market in order to measure the market power of certain participants, as well as to the methodology of measuring that power.

[1] In the Republic of Serbia, there is also a Commission for the Protection of Competition, established by the Law on Protection of Competition (2005).

Competition protection policy was regulated in the Republic of Serbia for the first time by a special regulation in the form of the Law on Competition Protection (2005), passed in 2005. Although the law itself was characterized by a lot of shortcomings in its implementation, its most significant contribution can be seen through the establishment of the Commission for the Protection of Competition in April 2006. In fact, the establishment of such an independent body was also a form of international obligation that Serbia undertook within the process of joining the European Union through the Stabilization and Association Agreement (SAA) (2008, Article 73, paragraph 3 and 4). Namely, on the basis of the signed international agreement, what is not in accordance with the Continuation of harmonization of the competition protection policy in the Republic of Serbia with practice and EU law is carried out with the adoption of the new Law on the Protection of Competition in 2009 (2009), which is still in force, with amendments from 2013 (2013). As a special chapter in the negotiations on Serbia's accession to the European Union, the competition protection policy is foreseen, and the SAA prescribes the obligation of our country to apply the standards and criteria resulting from the application and interpretation of the rules of the EU and its institutions when determining the violation of competition. Apart from the mentioned law, the area of competition protection is regulated by the regulations issued by the Government of the Republic of Serbia, as stated on the website of the Commission for the Protection of Competition.

The Commission for the Protection of Competition, as an independent organization established on the basis of the Law on the Protection of Competition, has the status of a legal entity and is responsible for its work to the National Assembly by submitting an annual report on its work. It is a financially independent institution, and it finances its work with its own income, while the surplus is paid into the budget of the Republic of Serbia. Independence is also based on the election period for the leadership of the Commission (which is five years, unlike the election cycle), as well as the fact that the President of the Commission and a certain number of Council members cannot be party figures.

3. Prohibition of the market abuse – Legal regulation of the european union

The countries of the European Community for the first time legally regulated the abuse of insider information, so-called. Insider dealing as early as 1989 with the adoption of Directive 89/592/EEC better known as the Insider

Dealing Directive (IDD). It became the basis for the fight against abuse on the European securities market, but given the accelerated processes of financial market development, it could no longer respond to new requirements, and in 2003 a new directive was adopted that regulated the area of insider trading, information and market manipulation.

In the territory of the European Union, the mechanisms for preventing and sanctioning market abuses are currently based on the provisions of Directive 2014/57/EU of the European Parliament and of the Council of the European Union , starting from April 16, 2014, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive). All issues related to market abuse, including insider information and market manipulation, are regulated by this directive. Thus, Article 1, paragraph 1 of this Directive reads: "This Directive establishes minimum rules for criminal sanctions for trading on the basis of insider information, for illegal publication of insider information and for market manipulation in order to ensure the integrity of the financial markets in the Union and increase the protection of investors and confidence in those markets." The European Parliament and the Council of the European Union adopt this directive, taking into account the Treaty on the Functioning of the European Union, and in particular its Article 83. Paragraph 2, as well as the proposal of the European Commission, after forwarding the draft legislative act to the national parliaments, but also with the consultation and adopted opinions of the European Central Bank, as well as the European Economic and Social Committee, and respecting the regular legal procedure.

Previous EU directive – Directive on insider trading and market manipulation (market abuse) – Directive 2003/6/EC, which regulated the area of market abuse, specifically insider trading and market manipulation dealing and market manipulation), with the aim of increasing the integrity of the capital market and ensuring equal treatment of participants (Radomirović & Prokopović, 2012), ceased to be valid, and was replaced by the innovative Directive 2014/57/EU.

From all of the above, we conclude that many countries, both member and candidate countries, tried to achieve complete harmonization with EU law related to this area, but it seems that not all of them succeeded in this completely, and it was necessary to make certain corrections and in the directive itself insist on full harmonization in order to build an integrated and efficient financial market on the territory of the EU.

4. Prohibition of market abuse in the economy of the Republic of Serbia – legal regulation

Regarding market abuses, the most important thing is to establish a legal and institutional framework, i.e. mechanisms for sanctioning them within each separate legal system. It is precisely for this reason that most legal systems include regulations prohibiting the trading of privileged information and the implementation of market manipulations. For this purpose, criminal law and administrative sanctions are mostly used in order to prevent various forms of trade of privileged information and market information in which they can appear in everyday market practice among market actors.

The development of the financial market is of particular importance for attracting new competitors and achieving a developed market economy, especially for a country in the process of transition, such as the Republic of Serbia. The regulation of the prohibition of market abuse in the Republic of Serbia was established for the first time in 2003 by the Law on the Market of Securities and Other Financial Instruments (2003), in the section on privileged information, when the first attempt was made to harmonize with the European Law. Improvement of harmonization of this area with the legal practice of Europe was done by passing the Law on the market of securities and other financial instruments in the middle of 2006.

With the entry into force of the Law on the Capital Market (May 17, 2011, although its implementation was delayed for six months, until November 11, 2011 to be precise), the previous Law on the Securities Market and Other Financial Instruments was replaced, which protects investors in a better way, ensures the efficiency and transparency of the capital market, which simultaneously reduces the risk of participants in the given market, and defines the area of prohibition of market abuse based on European standards.

The Capital Market Law (2011), based on Article 1, paragraph 5, regulates: "prohibition of fraudulent, manipulative and other illegal actions and acts in connection with the purchase or sale of financial instruments, as well as the exercise of voting rights in connection with securities issued by public companies". On the basis of Chapter VI of the same law (Art. 73 – 94), abuses on the market, presented in Table 2, are regulated.

Table 2. Articles of Chapter VI of the Capital Market Law relating to Market Abuse

Articles of the Capital Market Law relating to Market Abuse	
Article 73	Use
Article 74	Subject to bans
Article 75	Inside information
Article 76	Prohibition of misuse of insider information
Article 77	Exchange of insider information
Article 78 and Article 78a	Other persons to whom the provisions prohibiting the misuse of insider information apply
Article 79, 80, 81 and 82	Disclosure of insider information directly related to the issuer
Article 83 and Article 84	List of persons possessing insider information
Article 84a	Trading ban period for a person performing the duties of a manager
Article 84b	Market research
Article 85	Manipulations on the market
Article 86	Prohibition of market manipulation
Article 87	Recommendation
Article 88	Identity of the person making the recommendation
Article 89	General rules for the content of the recommendation
Article 90	General rules for disclosure of interests and conflicts of interest
Article 91	Exceptions
Article 92	Distribution of a referral made by a third party
Article 93 and Article 94	Supervisory measures

Source: Authors, adapted based on the Capital Market Law (2011).

Within the framework of this Capital Market Law, two criminal offenses (Articles 281 and 282) are defined by penal provisions, which refer to the "Prohibition of manipulation on the market", i.e. "Using, revealing and recommending insider information". Since the entire issue related to the capital market and specifically the part related to abuses on the market is defined in one act, this way of defining the legal regulation is considered better and more practical from a legal and technical point of view (Milošević & Stanimirović, 2013).

The Law on the Capital Market also provides that the Commission for Securities prescribes in more detail the procedures that constitute market abuse (which are not clearly specified by law), as well as the obligations of the Commission and market participants in order to prevent and detect them.

5. Conclusion

Legal certainty is a decisive factor for the development of the competitiveness of a certain country as well as the attraction of new investors. If there are institutional barriers to entering the market, as well as legal obstacles within the legal system, in the sense that the regulatory framework has not defined the functioning of the market economy in the most efficient way, this can represent a problem for potential market participants, and generally harms the development of the entire economy of a country .

Abuse of the market in its worst form (intense, continuous and unpunished) as a rule leads to the acquisition of a privileged position of certain actors on the market, who thereby achieve a competitive advantage. Any abuse of the market leads to the disruption of market structures in terms of its deviation from the optimal model in the form of perfect competition. Ultimately, a monopoly position has extremely negative consequences for the economy and competitiveness of a country. Therefore, when defining the legal regulations governing the area of market abuse prevention, it is of key importance to know all potential forms of market structure and their overall positive and negative effects on the state of the economy in a country, and in order for the given legal solutions to contribute to enabling optimal conditions for realization economic growth and development.

Within the framework of the European Union, the prevention and sanctioning of market abuses in the form of regulation of trade based on insider information as well as market manipulations is carried out on the basis of Directive 2014/57/EU – Directive on criminal sanctions for market abuse (Market Abuse Directive) starting from the April 2014. The aforementioned directive established minimum rules for criminal sanctions for basic forms of market abuse in order to increase the functionality of financial markets and reduce risks for investors, and the task of the member states, as well as the accession countries of the EU, is to implement the aforementioned rules in a harmonious and unified manner, and to regulate and sanction this type of non-market behavior even more harshly through court practice.

For effective enforcement of the law on the capital market and criminal proceedings, it is not enough just to regulate and define the term (inside information and market manipulation) and punitive measures in case of market abuse. It is important to create a jurisprudence that will make this area more comprehensive, more precise and wider than it is able to be covered by legal norms, with its decisive and efficient implementation of given laws as well as specific interpretations. In this way, the situation will be avoided where

legal regulations are actually the best protection for potential perpetrators of market abuse crimes (manipulators and insiders). This especially applies to transitional countries, such as the Republic of Serbia, where the mechanisms for the functioning of the market economy are still insufficiently developed. On the other hand, the main advantage of smaller and underdeveloped markets (capital) lies precisely in the fact that they can base mechanisms and systems for the protection and establishment of a functional market on the experiences of large and developed ones, which are certainly the member states of the European Union.

In this context, the main task of market organizers and their controllers is to ensure, respect and implement clear legal regulations regarding the prohibition of market abuse, in order to ensure the integrity, functionality and liquidity of the market and, on that basis, to protect investors and other market participants.

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ZABRANA ZLOUPOTREBE TRŽIŠTA – EVROPSKO PRAVO I PRAVO REPUBLIKE SRBIJE

APSTRAKT: Zloupotreba tržišta podrazumeva trgovinu na osnovu insajderskih informacija kao i manipulacije na tržištu. Ovakve nefer aktivnosti u okviru tržišnih aktera mogu da ugroze i u svom najintezivnijem, izraženijem obliku dovedu do poremećaja optimalnih tržišnih struktura i sticanje povlašćenog položaja određenih učesnika na

tržištu, kroz dostizanje konkurentske prednost nedozvoljenim sredstvima. Zbog toga je prilikom definisanja zakonskih propisa u oblasti zabrane zloupotrebe tržišta u jednoj zemlji od ključnog značaja poznavanje morfologije tržišta, kao i svih njenih pozitivnih i negativnih posledica po tržišnu privredu jedne zemlje, zarad formiranja transparetnog, integrisanog i efikasnog tržišta, koje bi na osnovu takvih karakteristika bilo privlačno za investitore a time doprinosilo privrednom rastu i razvoju date zemlje. Republika Srbija još uvek nema dovoljno razvijene mehanizme i odgovarajuća zakonska rešenja neophodna za funkcionisanje tržišne privrede, ali se njena prednost ogleda u uzoru, iskustvu i sudskoj praksi razvijenih tržišta u okviru zemalja članica Evropske unije.

Ključne reči: *zloupotreba tržišta, insajderske informacije, tržišna manipulacija, tržišne strukture, pravna regulativa, Evropska unija***.**

References

1. Directive 89/592/ EEC, Downloaded 2023, October 22 from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0592:EN:HTML
2. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). Downloaded 2023, October 23 from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0057
3. Directive on insider trading and market manipulation (market abuse), Directive 2003/6/EZ Downloaded 2023, October 20 from http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0006
4. Raičević, V., & Kovačević, M. (2013). Pravni aspekti zloupotrebe berzanskog tržišta [Legal aspects of stock market abuse]. *Ekonomija – teorija i praksa*, *6*(3), pp. 51–62
5. Jocović, M. (2013). Pojam povlašćene informacije u pravnoj teoriji i praksi [The concept of privileged information in legal theory and practice]. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, *34*(2), pp. 941–962
6. Milošević, M. & Stanimirović, M. (2013). Suzbijanje privrednog kriminala i korupcije na tržištu kapitala Republike Srbije [Suppression of economic crime and corruption in the capital market of the Republic of Serbia]. In: Trifković, M., Matijević, M., Hodžić, K. (ured.), *Zbornik radova Fakulteta pravnih nauka*. [*Proceedings of the Faculty of Law*]. (pp. 180–191). Travnik: Univerzitet Vitez

7. Mušikić, J. (2005). *Insajder trgovanje – zločin bez žrtve* [*Insider trading – a victimless crime*]. Podgorica: Institut za strateške studije i prognoze
8. Zakon o izmenama i dopunama zakona o zaštiti konkurencije [Law on Amendments to the Law on Competition Protection]. Downloaded 2023, October 20 from http://www.kzk.org.rs/kzk/wp-content/uploads/2014/01/ZK.pdf
9. Zakon o tržištu kapitala [Capital Market Law]. *Službeni glasnik RS*, br. 31/11, 112/15 i 108/16, Downloaded 2023, October 20 from http://www.paragraf.rs/propisi/zakon_o_trzistu_kapitala.html
10. Zakon o zaštiti konkurencije [Law on Protection of Competition]. *Službeni glasnik RS*, br. 51/09 i 95/13, Downloaded 2023, October 20 from http://www.paragraf.rs/propisi/zakon_o_zastiti_konkurencije.html
11. Zakon o zaštiti korisnika finansijskih usluga [Law on the Protection of Users of Financial Services]. *Službeni glasnik RS* br. 36/11 i 139/14), Downloaded 2023, October 25 from http://paragraf.rs/propisi/zakon_o_zastiti_korisnika_finansijskih_usluga.html
12. Zakon o zaštiti potrošača [Law on Consumer Protection]. *Službeni glasnik RS*, br. 62/14 i 6/16 – dr. Zakon, Downloaded 2023, October 25 from http://paragraf.rs/propisi/zakon_o_zastiti_potrosaca.html
13. Đorđević, D. (2006). *Mikroekonomija – savremeni pristup* [*Microeconomics – a modern approach*]. Novi Sad: Privredna akademija
14. Porter, M.E. (2007). *Konkurentska prednost – ostvarivanje i očuvanje vrhunskih poslovnih rezultata* [*Competitive advantage – achieving and maintaining superior business results*]. Novi Sad: ASEE
15. Erić, D. (2008). *Značaj istraživanja tržišnih struktura i zaštite konkurencije u privredi Srbije* [*Importance of market structure research and competition protection in the Serbian economy*]. Downloaded 2023, October 25 from http://ebooks.ien.bg.ac.rs/195/1/de_2008_02.pdf
16. Zakon o potvrđivanju sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane [Law on Confirmation of the Stabilization and Association Agreement between the European Communities and their member states, on the one hand, and the Republic of Serbia, on the other hand]. *Službeni glasnik RS – Međunarodni ugovori*, 83/08, Downloaded 2023, October 25 from http://www.paragraf.rs/propisi/zakon_o_potvrdjivanju_sporazuma_o_stabilizaciji_i_pridruzivanju_izmedju_evropskih_zajednica_i_njihovih_drzava_clanica.html

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RELATIONSHIP BETWEEN ECONOMIC AND ORGANIZED CRIME IN MODERN SOCIETY

ABSTRACT: Organized crime and related economic crime are the focus of interest for all modern, well-organized states. Theoreticians generally agree that organized crime has closely followed the development of modern states, while economic crime has evolved with the development of the economy and business, both at national and supranational levels, alongside the expansion of information and communication technologies. Despite being viewed as two distinct types of crime, economic and organized crime are highly interdependent and interconnected. While a small number of economic crime offenses lack the characteristics of organized crime, a significant number of criminal activities exhibit organized elements within the realm of the economy and economic activities. Thus, the relationship between these two types of crime is directly proportional, wherein the development of organized crime follows the development of economic crime, and vice versa. In addition to the introduction and conclusion, the paper consists of three interconnected and interrelated parts. The first part elucidates the philosophy of organized crime. It highlights the problems of defining, the lack of a unique definition, and its multidisciplinary nature. Additionally, it presents the most significant characteristics and manifestations of organized crime in theory and practice. The second part deals with the issues of economic crime. Similarly to the first part, it discusses the process of determining and defining the concept of economic

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crime, presenting its basic characteristics and contemporary types. Finally, the third part of the paper examines the relationship between these two categories of crime.

***Keywords**: economic crime, organized crime, criminal offenses, modern society, criminal groups, criminal activities.*

1. Introduction

In conditions of general interconnectedness, free movement of people, goods, and capital, there has been evolution not only in general social development but also in the execution of numerous illegal activities such as those falling under organized and economic crime, terrorism, etc. The process of globalization and the associated rapid growth and development of information and communication technologies have enabled the exchange of ideas and knowledge worldwide at an incredible pace.

Organized crime and the related economic crime are the focus of interest for all modern well-organized states. In addition to the states themselves, international (regional and global) organizations and institutions also deal with the issues of these two types of crime. Economic crime, as the name suggests, has evolved with the development of the economy and business, both at the national and supranational levels, alongside the expansive development of information and communication technologies. It can be said that the relationship between these two types of crime is directly proportional, meaning the development of organized crime follows the development of economic crime, and vice versa.

In addition to the introduction and conclusion, the paper consists of three interconnected and interdependent parts. The first part presents the philosophy of organized crime. It highlights the problems of defining, the lack of a unique definition, and the multidisciplinarity of the concept of organized crime. Additionally, it presents the most significant characteristics and manifestations of organized crime in theory and practice. The second part covers the issues of economic crime. Similar to the first part, the second part addresses the process of determining and defining the concept of economic crime, presenting its basic characteristics and types in contemporary conditions. The third part of the work presents the relationship between these two types of crime. Additionally, in the final part of the work, it also addresses the consequences that economic and organized crime have on the state and society.

2. Criminological overview of the concept, characteristics, and divisions of organized crime

Legal, as well as related criminalistic and criminological, and other related scientific disciplines, do not have a unified opinion on the concept and definition of organized crime. However, theoreticians from these scientific disciplines generally agree that organized crime began to evolve with the development of modern states. At the current level of societal development, organized crime is the subject of consideration for an increasingly broad range of scientific disciplines. In addition to legal, criminalistic, and criminological science and practice, organized crime is increasingly gaining importance in economics, sociology, political sciences, and security sciences.

One of the most influential and cited foreign theoreticians dealing with organized crime is Howard Abadinsky. Abadinsky (2010) views organized crime as "a non-ideological association, existing among a certain number of closely connected individuals who are hierarchically organized" (p. 2).

Mijalkovski (2010) defines organized crime as "groups that execute systematic and persistent criminal attacks in various spheres of socio-economic life, through which certain organized groups of criminal delinquents, as well as members of criminal organizations, closely linked at a hierarchical level with divided roles that are unconditionally respected, achieve high criminal profits through ruthless and highly professional delinquent tactics and techniques" (p. 118).

Bjelajac (2015) regards organized crime as "the activity of criminal groups or organizations whose goal is the illegal conduct of business or the commission of criminal offenses for profit or dominance in specific areas of social life" (p. 70).

Based on the statements, general characteristics of organized crime can be highlighted: "universality and international character, multitude of diverse forms, connections with power and other influential societal institutions, a combination of corrupt and violent methods in operations, specificities in forms of criminal organization, criminal profit as the ultimate goal" (Mijalkovski & Tomić, 2014, pp. 149–156). Bošković and Skakavac (2009) delineate the following characteristics of organized crime: "criminal organization – criminal syndicate, hierarchy – responsibility and subordination, network structure, flexibility in operations, infiltration into state and economic structures, ties with authorities and other (public and private) institutions, violence as a method, profit as a goal, professionalism as a characteristic, etc." (p. 205). A highly significant characteristic of organized crime is its transnational nature. Namely, "the discrepancy in criminal law solutions in the field of detecting, preventing, and controlling crime, the liberalization of the global economic market, exceptional mobility and transfer of money and capital,

the state's inability to reconcile supply and demand in times of economic crisis" (Matijašević, 2008, p. 88) are some of the reasons for the wide maneuvering space for certain forms of organized crime.

Among theorists, there is no unanimous opinion on the classification and types of organized crime. In this context, Ignjatović (1998) lists the following manifestations: "extortion, gambling, drug trafficking, usury, disposal of hazardous materials, other illegal activities such as cigarette smuggling, pirated reproduction of copyrighted works, theft, robbery, prostitution, pornography, as well as corruption, money laundering, false bankruptcies, and insurance fraud" (pp. 69–87). Furthermore, Božić and colleagues (2017) adopt Bošković's classification, according to which, acts of organized crime include terrorism, corruption, money laundering, the trafficking of drugs, and other dangerous goods, illegal trafficking of children, people, and human organs (p. 278). At this point, it is worth noting another classification. Jašarević (2013) divides all forms of organized crime into basic and other forms. He lists as basic forms: "drug trafficking, terrorism, corruption, money laundering, human trafficking, extortion or modified form of blackmail, cybercrime, arms and nuclear material trafficking," while he classifies as other forms: "vehicle smuggling, cigarette and tobacco product smuggling, oil and petroleum derivatives smuggling, trade in cultural goods, war loot trading, trade in rare plants and animals, environmental crime, maritime piracy, organized illegal gambling, prostitution, etc." (pp. 190–224).

3. The criminology view of the concept, characteristics, and significance of economic crime

Similar to organized crime, economic crime is "a serious security risk, present in all countries" (Matijašević & Lakićević, 2022, p. 18).

Similar to the theoretical determination of organized crime, there isn't a single opinion or stance on the definition of economic crime. Depending on the perspective from which it is observed and analyzed, various authors from different scientific disciplines have provided their views on the concept of economic crime. The phenomenon of economic crime, in many ways, is similar to other types of crime, especially organized crime and some forms of modern crime such as cybercrime, which further complicates its issues.

Edwin Sutherland is one of the most cited authors in the context of economic crime. This American criminologist used the term "white-collar crime" in studying economic crime. Through this term, Sutherland defined crime that occurs in the field of business as follows – "manifested forms are most often

manipulations related to the buying and selling of various stocks, false advertising of goods, false representation of the financial status and operations of certain corporations, bribing business partners, direct or indirect bribery of officials to secure favorable business arrangements, embezzlement, misappropriation of funds, tax evasion, and similar acts" (Radojičić, 2013, p. 332). While dealing with the issue of economic crime, Sutherland was among the first to refute the established belief that only the poor social strata engage in crime.

The lack of a unified definition of economic crime is also contributed to by "the differences in political and economic systems worldwide, as well as the fact that economic crime encompasses various types of criminal offenses, both those against the economy and those against official duties, and partly offenses against property" (Banović, 2002, p. 13). Bošković (2006) views economic crime as criminal offenses directed against the economy, that is, "criminal offenses relating to abuses and other forms of unlawfulness within the economic system and financial operations. From a criminological perspective, economic crime, in addition to criminal offenses, includes economic misdemeanors and violations, as well as acts directed towards material goods, i.e., all other forms of property offenses" (pp. 337–338).

One particularly important point is that different terms and definitions are used for the same or similar unauthorized activities. Thus, alongside the concept of economic crime, terms such as commercial crime, business crime, market crime, corporate crime, etc., appear in theory and practice.

Taking into account the aforementioned definitions and practice in the legal-criminalistic context, the basic features of economic crime can be identified. The main characteristics of economic crime "include the following: concealment, dynamism (variability of manifestations), specialization and professionalization of perpetrators, specificity of evidence and means of proof, and specialization in combating economic crime" (Đukić, 2017, p. 144).

In addition to these, there are other characteristics of economic crime. In this context, they should be supplemented: by a diversity of manifestations, prevalence and international character, motive of greed, unethical behavior, etc. Economic crime is manifested through its various forms that depend on the area in which criminal activities are carried out.

Just as there is diversity in defining the concept of economic crime, there are also different classifications of its manifestations in legal theory.

Mićo Bošković has classified all forms of economic crime into 12 groups, noting that they are characteristic not only of the situation in the sphere of economic crime specific to the Republic of Serbia, but also for all countries worldwide. These are the types of economic crime presented in the following table:

Table 1. Manifestations of Economic Crime

No.	Basic Forms of Economic Crime	Types of Basic Forms of Economic Crime
1	Forms of economic crime in production	Criminal offenses of abuse of official position
		Criminal offenses of embezzlement
		Criminal offenses of negligent work in business operations
		Criminal offenses of unauthorized production
2	Forms of economic crime in trade	Forms of economic crime in the purchase of goods
		Forms of economic crime in the sale of goods
3	Forms of economic crime in foreign trade operations	Forms of economic crime in the export of goods
		Forms of economic crime in the import of goods
4	Forms of economic crime in property transformation	/
5	Forms of economic crime in the field of taxes	/
6	Forms of economic crime in foreign exchange transactions	/
7	Forms of economic crime in banking operations	/
8	Forms of economic crime in warehousing operations	/
9	Forms of economic crime in cashier operations	/
10	Forms of organized economic crime	Counterfeiting money and putting counterfeit money into circulation
		Money laundering
		Corruption
		Smuggling and illegal trade of various valuable goods
11	"White-collar" crime and corporate crime	/
12	Other manifestations of economic crime related to the following activities	Credit operations conducted in economic relations with foreign countries
		Transfer of technology and equipment
		Execution of investment works abroad
		Bankruptcy proceedings
		State public procurement and sales
		Construction industry
		Toll booths on highways and main roads

Source: Bošković, (2009). pp. 38–125.

Addressing the issue of economic crime, Carić and Matijašević Obradović identified the following dominant manifestations of this type of crime: "forms of economic crime in the industry and production sector, forms of economic crime in construction and urban planning, forms of economic crime in internal trade (buying and selling), forms of economic crime in foreign trade (import and export), forms of economic crime in the transfer of technology and equipment, forms of economic crime in foreign exchange transactions, tax evasion, forms of economic crime in banking operations, forms of economic crime in property transformation, forms of economic crime in insurance, forms of economic crime in bankruptcy proceedings, money laundering, corruption, counterfeiting money and putting counterfeit money into circulation, misuse of payment cards, smuggling, and illegal trade" (Carić & Matijašević Obradović, 2017, p. 112).

4. Relationship between Economic Crime and Organized Crime in Modern Society

Taking into account the previously presented definitions, characteristics, as well as forms of organized and economic crime, it is possible to recognize and indicate the interconnectedness of these types of criminality. Considering the mode of organization (as a group, gang, organization, association, etc.), internal structure (in terms of hierarchy, discipline, code of silence, etc.), goals that often have a profit-driven but also political character, methods of operation, and the level and quality of established connections (between members of organized criminal groups and authorities at various levels, political parties, economic and financial institutions, and organizations), certain manifestations of criminal activity can be classified as both economic and organized crime.

From a criminological perspective, clear connections between organized and economic crime are evident. A large number of authors agree that economic crime is actually a distinct form of organized crime. Thus, Šikman (2010) views economic crime "as a narrower concept of organized crime, and certain forms of economic crime can be subsumed under the activities of organized crime if these forms of criminality contain all the elements that characterize organized crime" (p. 80).

Economic crime can be viewed in two ways. It can be manifested as a form of criminal activity within organized crime. However, it can also be executed in a manner that does not possess elements of organized crime.

Areas where organized criminal activity is most present within the sphere of economic and financial operations include banking, stock trading, insurance, wholesale trade, etc. According to Carić and Matijašević Obradović (2017), "perpetrators of economic crime in the mentioned and similar areas of economic and financial operations are businessmen, which makes it invisible and diminishes its significance and danger, as they endeavor to organize criminal activities through careful planning of illegalities, involving other individuals, exerting necessary influence, all with the intention to increase profit or unlawfully gain financial benefits" (p. 57).

The functioning and conduct of activities by organized criminal groups in the economic sphere can have drastic consequences not only in the field of the economy or its sectors but also in the overall functioning of the entire state. Disrupted economic conditions within a state pose a significant threat to its national security.

Organized criminal groups "through the commission of criminal offenses, not only in the economic and financial field but in all economic and other criminal offenses of this category, seek to achieve the highest possible financial gain or profit and legalize it. Numerous criminal offenses fall under the category of organized economic crime, but the most common include: counterfeiting money, counterfeiting and misuse of payment cards, smuggling of goods and people, money laundering, tax evasion, and similar. The commission of these and other criminal offenses in the field of economic crime by organized criminal groups, when manifested on a larger scale, leads to disturbances in the state's monetary system, the creation of budget deficits, social tensions and dissatisfaction, political instability, etc., thereby endangering the economic security of the state, which generally has direct consequences on the national security of a country" (Nicević & Ivanović, 2012, pp. 95–96).

Especially concerning the context of compromising national security due to the mutual relationship between economic and organized crime and the functioning of criminal groups, one should not disregard activities that diminish the sense of security among citizens in society, as well as the operations of business entities in the contemporary business environment.

5. Conclusion

By analyzing the facts and perspectives presented in the study, one can form a general stance on organized and economic crime in contemporary living and working conditions. With the overall development of society, the

diversification of national economies, the process of regional and broader international integration–i.e., globalization–destructive social phenomena have also evolved. Organized crime achieved its rapid "development" in rapidly growing industrialized countries over the past two centuries. States undergoing property and social transformation have only contributed to the further development of organized criminal activities.

Regarding organized crime, significant attention has been devoted to this issue over the last 50 years. Due to the substantial interest and the impact organized crime has on society as a whole, numerous theorists have provided their definitions of this concept. Apart from legal and criminological theories, there exist a considerable number of definitions and recommendations for defining this concept due to significant societal losses on a normative level.

Similar to the issue of organized crime, the problem of economic crime faces the absence of a unified definition and approach.

The recommendation that arises concerning both organized and economic crime is that there must be a dual perspective on both types of criminality, considering them in both narrow and broader contexts. Both types of crime deal with highly complex phenomena subject to daily influences from various social spheres.

It's challenging to differentiate and classify various criminal offenses into a single type of criminal activity (completely separate from another type of criminal activity) because many criminal offenses simultaneously belong to both economic and organized forms of criminal activity. Generally speaking, delineating boundaries between specific types of crime is highly difficult; hence, some theorists use the term "contemporary crime." This type of crime exhibits characteristics of both economic and organized crime.

Considering them as two distinct types of crime, economic and organized crime are to a large extent interdependent and interconnected. A small number of criminal offenses in the realm of economic crime do not possess elements of organization, while conversely, a large number of criminal activities with organized elements occur within the domain of economy and economic activities.

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ODNOS PRIVREDNOG I ORGANIZOVANOG KRIMINALA U SAVREMENOM DRUŠTVU

APSTRAKT: Organizovani kriminalitet i sa njim povezan privredni kriminalitet u fokusu su interesovanja svih moderno uređenih država. Teoretičari se u načelu slažu da je organizovani kriminalitet u stopu pratio razvoj savremenih država, dok je privredni kriminalitet evoluirao sa razvojem ekonomije i privrede, na nacionalnom i nadnacionalnom nivou, kao i sa ekspanzivnim razvojem informaciono-komunikacionih tehnologija. Posmatrajući ih kao dve posebne vrste kriminaliteta, privredni i organizovani kriminalitet su velikoj meri uslovljeni i međusobno povezani. Mali broj krivičnih dela iz oblasti privrednog kriminaliteta nema i karakter organizovanog, dok s druge strane, veliki broj kriminalnih aktivnosti sa elementima organizovanog vrši se u okviru privrede i privredne delatnosti. Može se reći da je odnos ove dve vrste kriminaliteta direktno proporcionalan, odnosno da razvoj organizovanog kriminaliteta prati razvoj privrednog i obrnuto. Pored uvoda i zaključka, rad se sastoji iz tri međusobno povezane i uslovljene celine. U prvom delu predstavljena je filozofija organizovanog kriminala. Ukazano je na problematiku definisanja, nepostojanja jedinistvene definicije i multidisciplinarnosti samog pojma organizovanog kriminaliteta. Pored ovoga predstavljene su najznačajnije karakteristike, kao i oblici ispoljavanja organizovanog kriminaliteta u teoriji i praksi. Drugi deo obuhvata problematiku privrednog kriminala. Slično prvom delu, i u drugom delu ukazano je na postupak određivanja i definisanja pojma privredni kriminal, predstavljene su njegove osnovne karakteristike i ukazano je na vrste ovog oblika kriminaliteta u savremenim uslovima. U trećem delu rada predstavljen je odnos ova dva oblika kriminaliteta.

Ključne reči*: privredni kriminalitet, organizovani kriminalitet, krivična dela, savremeno društvo, kriminalne grupe, kriminalne aktivnosti.*

References

1. Abadinsky, H. (2010). *Organized Crime, 9th edition*. Wadsworth, Belmont CA – USA: Cengage Learning
2. Banović, B. (2002). *Obezbeđenje dokaza u kriminalističkoj obradi krivičnih dela privrednog kriminaliteta* [*Provision of evidence in the criminal processing of criminal acts of economic crime*]. Beograd: Viša škola unutrašnjih poslova
3. Bjelajac, Ž. (2015). *Politika suzbijanja kriminaliteta* [*Crime suppression policy*]. Novi Sad: Pravni fakultet za privredu i pravosuđe
4. Bošković, M. & Skakavac, Z. (2009). *Organizovani kriminalitet – karakteristike i pojavni oblici* [*Organized crime – characteristics and manifestations*]. Novi Sad: Fakultet za pravne i poslovne studije dr Lazar Vrkatić
5. Bošković, M. (2009). *Privredni kriminalitet* [*Economic crime*]. Banja Luka: Fakultet za bezbjednost i zaštitu
6. Bošković, M. (2006). *Kriminologija* [*Criminology*]. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu
7. Božić, V., Nikač, Ž., & Simić, B. (2017). Borba protiv organizovanog kriminaliteta s osvrtom na permanentnu edukaciju policijskih službenika [The fight against organized crime with reference to the permanent education of police officers]. In: *Policija i pravosudni organi kao garanti slobode i bezbednosti u pravnoj državi – tom 2* [*Police and judicial authorities as guarantors of freedom and security in the rule of law – volume 2*]. Beograd: Kriminalističko-policijska akademija; Fondacija Hans Zajdel; Kragujevac: Pravni fakultet
8. Carić, M., & Matijašević Obradović, J. (2017). *Privredni kriminalitet* [*Economic crime*]. Novi Sad: Univerzitet Privredna akademija
9. Đukić, S. (2017). Otkrivanje i obezbeđenje dokaza u kriminalističkoj obradi krivičnih dela privrednog kriminaliteta [Discovery and provision of evidence in the criminal processing of criminal acts of economic crime]. *Vojno delo*, *69*(6), pp. 139–165
10. Ignjatović, Đ. (1998). *Organizovani kriminal* [*Organized crime*]. Beograd: Policijska akademija
11. Jašarević, O. (2013). *Kriminologija – etiologija i fenomenologija kriminaliteta* [*Criminology – etiology and phenomenology of criminality*]. Kiseljak: Pravni fakultet Univerziteta u Travniku

12. Matijašević, J. & Lakićević, S. (2022). The causes of Economic crime and the review of its effects in the business field. *Pravo – teorija i praksa*, *39*(4), pp. 18–29
13. Matijašević, J. (2008). Organizovani kriminalitet – pojam, karakteristike, uzroci i metodi suprotstavljanja [Organized crime – concept, characteristics, causes and methods of opposition]. *Pravo – teorija i praksa*, *25*(1–2), pp. 80–89
14. Mijalkovski, M. & Tomić, D. (2014). *Osnovi bezbednosti* [*Basis of security*]. Beograd: Fakultet za inženjerski menadžment
15. Mijalkovski, M. (2010). *Terorizam i organizovani kriminal* [*Terrorism and Organized crime*]. Beograd: Univerzitet u Beogradu, Fakultet bezbednosti
16. Nicević, M., & Ivanović, A. (2012). Organizovani privredni kriminalitet kao faktor ugrožavanja ekonomske bezbednosti [Organized economic crime as a factor threatening economic security]. *Ekonomski izazovi*, *1*(1), pp. 87–99
17. Radojičić, S. (2013). *Izbegavanje plaćanja poreza, privredni kriminal i korupcija, neobjavljena – doktorska disertacija* [*Tax evasion, economic crime and corruption – doctoral dissertation*]. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu
18. Šikman, M. (2010). *Organizovani kriminalitet – krivični, procesni, kriminalistički aspekt* [*Organized crime – criminal, procedural, criminal aspect*]. Banja Luka: Defendologija centar za bezbjednosna, sociološka i kriminološka istraživanja

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MINIMUM WAGE – THE RULE INSTEAD OF THE EXCEPTION IN THE LABOR MARKET

ABSTRACT: The issue of the minimum wage has been attracting attention for many years, not only from experts, but also from the general public. Determining the minimum wage in every country, including Serbia, aims to establish minimum standards for personal income and combat poverty. The basic feature of the minimum wage is that it is a temporary measure, lasting up to 6 months, as a response to an employer's poor financial performance, and as such it represents an extraordinary measure, which should be abolished upon returning to the normal economic conditions. Upon resuming normal business operations, the employer is required to compensate employees for the shortfall, ensuring they receive their contracted salary in full. However, instead of the minimum wage being an exception, used only in extraordinary circumstances, it has now become commonplace in the labor market, challenging the original concept of the minimum wage and raising questions about its effectiveness. This paper aims to examine the concept of wage and minimum wage in Serbia, along with its practical implications in the domestic labor market.

Keywords: *earnings, minimum wage, minimum price of work, employment relationship.*

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1. Introduction

One of the main instruments of the state's economic policy on the labor market is the minimum wage. The reasons for its introduction are different, such as the growth of personal income, the fight against poverty and the eradication of illegal work. In general, the minimum wage can be defined as the wage required to satisfy the minimum and basic life needs of the employee, as well as his family members. Therefore, the objective of the minimum wage is primarily social, and it is understood as an element of the social policy of a state within its labor market. The minimum wage protects the minimum standard of living of the employee, but also the members of his family, which he needs to support from such earnings. The poverty line is commonly used to represent this minimum standard of living (Anker, 2005, p. 4). The poverty line is the level of income that is necessary for a family of four to be able to afford the low cost of food and non-food items, at levels that are considered acceptable for a particular country (Anker, 2005, p. 6). One of the formulas for calculating the minimum wage required for living is the amount obtained when the poverty line is multiplied by the number of household members and the resulting amount is divided by the number of employees in the household (Kosanović & Paunović, 2020, p. 125). Throughout its history, the concept of minimum wage has changed. In some countries, it is first defined as an existential wage, that provides workers with the minimum means for living and reproduction (Aleksić, 2020, p. 15). In other countries, the minimum wage was manifested through the determination of a fair wage, which aimed to prevent the excessive exploitation of labor (Aleksić, 2020, p. 15). Certainly, the minimum wage can be explained as a salary sufficient for the basic and minimum needs, necessary for life. Although it has been said that the minimum wage is linked to the fight against poverty, the main justification for its introduction is not the reduction of poverty, but the establishment of minimum labor standards below which no employment relationship can be considered economically and socially acceptable. On the other hand, there seems to be at least a potential link between minimum wages and poverty, at least in the case of in-work poverty, so that raising the minimum poverty threshold should have a distributional effect on the lowest earners and benefit those who do not have enough resources to make ends meet (Aumayr-Pintar, Cabrita, Fernández-Macías & Vacas-Soriano, 2014, p. 141). For these reasons, this issue is given great importance, both by employers and by employees and their professional associations. Therefore, in this paper, the primary attention will be devoted to defining the general concept of earnings, but the central

topic will be related to the definition of the minimum wage in the legal regime in the Republic of Serbia, as well as the analysis of its practical domains in the labor market. The initial hypothesis is based on the fact that the procedure for determining the minimum wage is precise and clear, but that it is meaningless due to the short deadlines for its determination, as well as that the purpose of its existence is called into question, so that instead of an extraordinary state measure, it has become a permanent guarantee of minimum income of employees.

2. General concept of earnings

Initially, in order to define and analyze the concept of minimum wage, it is necessary to first define the general concept of earnings. Namely, the minimum wage derives its existence and its meaning from the general concept of wages/earnings, and therefore these two concepts are closely related. In this regard, we can say that the right to earnings is a fundamental right, which stems from the very nature of the employer-employee contract (Stajić, 2008, p. 1361). Salary is compensation for the fact that the employee puts his working abilities at the employer's disposal, while in the case of being prevented from working, the right to wage compensation is realized, because the employee is then unable to put his working abilities at the disposal of the employer (Kovačević, 2021, p. 43). Therefore, the employee personally perform work according to the instructions and orders of the employer, who in turn provide him with the necessary conditions for work and earnings for the work performed, while at the same time respecting the norms provided by the law and general acts of the employer (Bilić, 2011, p. 755). In domestic positive law, wages are understood as all payments to employees on which the corresponding taxes and contributions are paid. In everyday speech, wage or salary is mistakenly equated with the amount that the employer pays the employee for the work performed. Salary, seen as the amount paid to an employee, is only a partially correct definition, because net salary is only one segment of salary in its legal sense. In this sense, it can be said that salary can be defined as gross salary, which means the net salary, paid by the employer to the employee for the work performed, increased by tax and related contributions, which are paid at the expense of the employee. When, on the other hand, we are talking about the legal provisions of importance for earnings, the first is the Labor Law, which confirms that the employee has the right to an appropriate salary, which is determined in accordance with the law, the general act of the employer and the employment contract (Labor Law, 2005).

But with that, the legislator in a "stingy" way only confirms the constitutional right of the workers, without going into the clarification of what "appropriate salary" is (Perić, 2011, p. 74). It seems that the precise determination of the concept of appropriate earnings was deliberately omitted, possibly due to real problems in defining it, but also due to political and economic circumstances in society. Certainly, the concept of salary includes basic salary, salary based on performance, increased salary, salary from profit, but also a category of compensation equal to salary (so-called salary for inactivity) (Lubarda, 2013, p. 432). Salary can also be determined as periodic and monetary payments of an alimony character, to which the employee is entitled regardless of whether his work has led to positive business results or not (Kovačević, 2021, p. 45). The employee has the right to earnings, as a constitutional and legal right, and as such it must not and cannot be conditioned by business results, because that would lead to a direct violation of the said right and would depend on the current economic circumstances in society. By tying the payment of salary and its amount to the degree of success in business, it would mean renouncing the concept of fairness and dignity of the person. Therefore, the absence of a connection between the employer's profit, on the one hand, and the payment of wages, on the other hand, is one of the basic features of work within the employment relationship (Kovačević, 2021, p. 45). This further means that the position of the employer, in addition to his management, normative and disciplinary authority, essentially determines that he exclusively bears the burden of business risks (Kovačević, 2021, p. 45). However, employers can give employees a salary increase due to achievements in work, when there is a possibility for it. In this field, it is natural that relations between employees and employers, that is, between their professional organizations, are built in the spirit of loyalty, i.e. on the basis of mutual respect, honesty, correctness and fairness (Mirjanić, 2014, p. 138). The essence of their relations should be expressed by a balance of interests (Mirjanić, 2014, p. 139). But in practice, we have witnessed that such a relationship often does not exist, leaving the workers to fight independently for their wages, i.e. higher-quality and better-paid jobs. A quality job includes many different elements – such as salary, safe working conditions and social protection, which are just some of the segments (Kovačević Perić, 2016, p. 121). But, of all the conditions, the appropriate salary for the work performed, which is adequate to satisfy life's needs and enables a harmonious, decent and peaceful life, stands out as by far the most important factor when establishing an employment relationship. Certainly, in addition to the salary, the employee also has the right to compensation in the amount of the average salary in the previous 12 months, in accordance

with the general act of the employer and the employment contract, during absence from work on a holiday that is a non-working day, annual vacation, paid leave, military exercises and responding to the call of a state authority. As discussed above, it is sometimes referred to as inactivity compensation (Lubarda, 2013, p. 438). The right to remuneration (or the right to salary compensation) is recognized, as a rule, by law and regularly belongs to the rank of basic social rights, as part of the social public order (Lubarda, 2013, p. 438). Also, regarding the employer's obligations, the Labor Law points out that he is obliged to provide the employee with a calculation for each payment of salary and salary compensation. It was stated that the employer is obliged to provide the employee with the calculation for the month for which he did not pay wages, i.e. wage/salary compensation. In such a situation, the employer is obliged to provide the employee with a notice that the salary payment, that is, the salary compensation, has not been made and the reasons for which the payment has not been made (Labor Law, 2005). Therefore, in the mentioned situations, the law precisely, temporally and situationally binds the employer to the payment of wages to the employee in certain life circumstances, thereby protecting the employees' standard of living and their economic integrity. However, compliance with these provisions by employers is questionable, especially with regard to providing an explanation when salary or salary compensation has not been paid.

3. International standards on minimum wage

Convention of the International Labor Organization (ILO) No. 26 on the regulation of the mechanism for calculating the minimum wage, as well as the basic principles of the regulation of the minimum wage, from 1928, defines that every country that ratifies this convention is obliged to create or maintain a mechanism for determining the minimum wage. More precisely, it is stated that minimum wage rates can be established for workers employed in certain trades (and especially in jobs for work at home), in which there are no mechanisms for effective regulation of wages by collective agreement and where wages are extremely low. This provision, which refers to minimum wages, is the basis for a more precise definition of the minimum wage in the future. In the same convention, it is clearly stated that the established minimum wage rates are binding for employers and workers, so they cannot be subject to change by an employment contract or a collective agreement, except with the general or special authorization of the competent authority. The convention confirmed the obligation of all contracting states to take

the necessary measures, through a system of supervision and sanctions, to ensure that employers and workers are informed about the minimum wage rates in force and that wages are not paid at a lower rate than the established ones. Furthermore, the right of workers to whom minimum rates are applied and to whom wages are paid lower than these rates, to recover their rights within a certain period, through court or other legal proceedings, was also confirmed. In this way, for the first time, the possibility of protecting the rights of employees, based on salary and minimum wage, is foreseen.

The ILO Convention No. 95 on the protection of wages from 1949 is also significant, which defines wages as compensation for work that is determined or calculated, which can be expressed in money and regulated by agreement or national laws or other regulations, which the employer pays on the basis of a written or informal contract, for work performed or for services provided or to be provided in the future. Earnings are paid directly to employees, unless it may be determined differently by national laws or other regulations, a collective agreement or an arbitration decision, or if the employee has agreed to a different regime. Wages may be paid only in the manner and within the limits prescribed by national laws or other regulations, to the extent that they are considered necessary for the survival of the worker and his family. From this it can be seen that the method of salary payment is related to the possibility of meeting the basic life needs of employees and their family members, bearing in mind that the word "survival" was chosen.

Furthermore, the right to a minimum wage was regulated by the ILO in Convention No. 131. on determining minimum wages with special reference to developing countries from 1970, which was ratified by Serbia. The Convention in question concerns primarily the regulation of the issue of minimum wage, whereby the following elements should be taken into account when determining the level of the minimum wage, as far as possible and appropriate in the light of national circumstances: (A) the needs of workers and their families, taking into account the general level earnings in the country, cost of living, social security and relative living standards of other social groups; (B) economic factors, including the requirements for economic development, the level of productivity and the desirability of achieving and maintaining a high level of employment (ILO Convention No. 131). Therefore, the Convention expanded the field of action and confirmed that the right to earnings refers not only to the individual employee, but also to the needs of his family members, which must be met, but it foresees a limitation of regulating the level (height) of the minimum wage, related to social and economic components.

In the last few years, the issue of wages has become more relevant than ever in the European Union, especially considering the economic crisis since 2008, as well as the epidemic of *COVID-19* and the consequences that have been left behind. Namely, earnings in Europe have been affected by the then recession since 2008, which actually started for most countries even before the impact of the financial crisis. Maintaining workers' incomes is essential to economic recovery (O'Farrell, 2010, p. 23). Some European countries, such as Germany, have dangerously unbalanced economies that depend on exports. Higher worker incomes can help sustain and increase domestic consumption, thereby improving the economy (O'Farrell, 2010, p. 23). In other countries, many workers are heavily in debt. Maintaining the income of these workers will help them pay off their debts, which is an important factor in the health of the financial system (O'Farrell, 2010, p. 23). More recently, the activity in the European Parliament, which in 2022 passed the Minimum Wage Directive, No. 2022/2041, stands out. This act should ensure a minimum level of wage protection in all EU member states, in order to guarantee a decent and adequate standard of living for workers and their families. In the aforementioned Directive, No. 2022/2041, it is prescribed that minimum wages are considered appropriate, if they are fair in relation to the distribution of wages in the relevant member state and if they ensure a decent standard of living for employees, based on a full-time employment relationship. The adequacy of legal minimum wages is determined and assessed by each member state with regard to its national socio-economic circumstances, including employment growth, competitiveness and regional and sectoral trends (EU Directive 2022/2041). For the purpose of that determination, member states should take into account purchasing power, long-term national levels of productivity trends, as well as the level of earnings, their distribution and their growth (EU Directive 2022/2041). All EU member states have minimum wage policies, with the majority (21 states) having a legally regulated minimum wage, while in six states the minimum wage is the result of collective bargaining (Bradaš, 2021, p. 3).

As stated above, the directive on minimum wages makes progress on the level of harmonization of legal standards in that field of labor law. But the diversity of systems (related to minimum wages) among countries makes a coordinated approach difficult (Aumayr-Pintar, Cabrita, Fernández-Macías, & Vacas-Soriano, 2014, p. 3). In principle, coordination would be easier among countries with a static minimum wage determination system, compared to those where the minimum wage is agreed through collective bargaining (Aumayr-Pintar et al., 2014, p. 2). Ensuring that workers in the Union earn

adequate minimum wages is essential for guaranteeing adequate working and living conditions, as well as for building fair and resilient economies and societies, as stated in Principle 6 of the European Pillar of Social Rights: "Workers have the right to fair wages, which ensure a decent standard of living." It was also stated that adequate minimum wages will be provided in a way that ensures the satisfaction of the needs of the worker and his family in the light of national economic and social conditions, while providing access to employment and incentives for job searching. In-work poverty will be prevented (The European Pillar of Social Rights, 2017). All wages will be determined in a transparent and predictable manner, in accordance with national practices and with respect for the autonomy of social partners (The European Pillar of Social Rights, 2017). The principles of transparency and predictability of wages will later, based on this provision, be an integral part of the right to a minimum wage. The above-mentioned acts of the European Union are significant in the field of reducing the differences in earnings that occur between the countries of Western and Eastern Europe, which still exist today, despite all the efforts made in this field. Namely, a large number of studies indicate that there is a persistent wage gap between Western Europe and the new EU member states from Eastern and Central Europe. Although great progress has been made, the difference is still significant even after 27 years of transition from the socialist system and after 14 years of membership in the EU (Myant, 2018, p. 5). We can say that progress in the field of labor law is of great social interest and importance, even for Serbia, which in the future will have to harmonize its normative framework with the above-mentioned EU acts. Certainly, it is important to say that adequate minimum wages contribute to the existence of fair competition, strengthening productivity and promoting general economic and social progress.

4. Minimum wage in the Republic of Serbia

The minimum wage, in terms of the Labor Law, is introduced in case of bad business performance of the employer (when the employer does not have the means to pay the contracted salary) and such a payment regime is of limited duration, up to six months. However, after the expiration of six months from the adoption of the decision on the introduction of the minimum wage, the employer is obliged to inform the representative trade union of the reasons for continuing the payment of the minimum wage (Labor Law, 2005). But this obligation loses its significance in the private sector where trade unions do not exist at the employer level or play no role at all. Namely, if such

a trade union does not exist, there is no problem for the employer to inform non-representative trade unions about the reasons for continuing the payment of the minimum wage, or to just highlight the notice on the notice board, about the reasons for the continuation of the payment of the minimum wage. Certainly, the payment of the minimum wage should be the exception, not the rule. However, there are also opposing opinions, which go in the direction that the minimum wage should still be the rule, even in normative standards. Namely, employers, regardless of whether or not they have difficulties in business, pay the minimum wage, and even the state as the largest employer pays the minimum wage (about 20,000 employees who receive wages from the budget of the Republic of Serbia, receive the minimum wage) (Kosanović & Paunović, 2020, p. 135). However, in the case of the minimum wage, there is a very easy possibility of abusing the aforementioned legal institute, so that employers can add even a single dinar to the amount of the minimum wage, thereby circumventing the regulations, but such behavior is not considered prohibited, that is, it is not a violation. The minimum wage is determined based on the minimum price of work, per working hour, for a period of at least 6 months. For the period January-December 2023, the minimum wage in Serbia is 230,00 dinars net per working hour. According to the decision of the Government of Serbia on the level of the minimum wage for the period January-December 2024, the minimum wage without taxes and contributions (net) will be increased to 271 dinars per working hour in 2024, which is an increase of as much as 17,8 percent. However, the main characteristic of the minimum wage should not be its height, which is constantly pointed out when talking about its increase, but it should be its temporary nature. Namely, after the return to normal operations, the employer is obliged to pay the employees the difference up to the contracted salary. But compliance with such an obligation is highly questionable. We can say that this type of income from the original idea of the lawmaker in practice, very quickly transferred to the field of employees in terms of some kind of security and minimum guaranteed value that the employee can count on at the end of the month, with a large number of employers in Serbia. Its legal nature is derived from the need to ensure the existential social needs of the employee and his family members. An additional problem with the minimum wage is the definition of the term "disruption in business" as a condition for its introduction. The employer is obliged to determine the reasons for the introduction of the minimum wage by its general act, i.e. an employment contract. If the reasons are not prescribed by the collective agreement (labor regulations), i.e. the labor contract, the employer cannot introduce a minimum wage. But that is only the first condition

for the introduction of the minimum wage, while the second condition is reflected in the actual occurrence of the prescribed circumstances, which result in a disruption in business. It is important to mention that in order for the employer to make a decision on the introduction and payment of the minimum wage in accordance with its general act, it must contain clear reasons for the decision to pay the minimum wage to all employees (Gajić, 2020). Therefore, in its general act, the employer must foresee specific situations in which he can make a decision on the introduction of the minimum wage. The position of judicial practice is unique that these situations must be determined – not determinable, e.g. the general reason "disruption in business" is not adequate, if it is not defined what concretely reflects the disruption of business and what is the precise reason for the occurrence of such a disruption (Gajić, 2020). It is very important for the employer to determine those reasons, and if he has not determined the reasons for making the decision on the introduction of the minimum wage, he is obliged to pay the employees the appropriate salary, even in the case of real disruptions in business. Also, if the employer paid the minimum wage to the employees, and failed to establish, in accordance with the law, the reasons for making a decision on the introduction of the minimum wage, he is acting illegally and with such actions he is causing damage to the employees in the amount of the difference between the corresponding and the paid minimum wage, which is why is obliged to pay the employees the difference (Judgment of the Court of Appeal in Belgrade, No. Gž 1 574/2017 of March 3, 2017).

As can be seen, the courts in their rulings largely went in favor of the employees, regarding the protection of the right to a minimum wage. However, in addition to the protection of rights from the employment relationship through the courts, recently there are more and more methods of out-of-court settlement of labor disputes, including those disputes concerning non-payment of the minimum wage. Namely, it is about conciliation, mediation and arbitration. This matter is legally regulated in Serbia with the adoption of the Labor Law and the Law on Peaceful Resolution of Labor Disputes. Thus, an individual dispute can be resolved before an arbitrator if the subject of the dispute is either the termination of the employment contract or the payment of the minimum wage (Počuča & Mirković, 2009, p. 112). Therefore, if the employee believes that the right to pay the minimum wage has been violated, he can turn to the Agency for Peaceful Resolution of Labor Disputes, which was established by the above-mentioned Law on Peaceful Resolution of Labor Disputes. Such a procedure is considered faster and more efficient than the "classic" judicial settlement of a labor disputes. However, this is

not the degradation of our courts in terms of their expertise and honesty, but the simple fact that they are relatively overwhelmed with various cases and that efficiency is not their strong point (Počuča & Mirković, 2009, p. 111). Such out-of-court settlement of labor disputes, including those concerning the minimum wage, raised the level of legal protection and legal security of employees. It is certainly the goal of every state to have as well-organized legislation and a well-rounded legal system as possible, and it is certain that in the future most labor disputes will be resolved this way (Počuča & Mirković, 2009, p. 115).

It is important to note that in addition to determining the reasons for the introduction of the minimum wage by a general act, the employer is obliged to offer the employees an annex to the employment contract, in the event of the introduction of the minimum wage. In addition to the offer to change the contract, the employer is obliged to submit in writing the reasons for offering to change the contract and the deadline in which the employee should declare the offer. Certainly, the employee has the right to a minimum wage for standard performance and time spent at work. The Labor Law further foresees the existence of the Social and Economic Council, which is responsible for determining the minimum wage in Serbia. The Socio-Economic Council (SEC) was originally established by the Socio-Economic Council Act of 2004. By that law, SEC is defined as an independent body, financed from the budget of the state, which has 18 members, six each from the government, representative trade unions and employers' associations. In countries like Serbia and Hungary, the SEC determines the level of the minimum wage, while in France it gives an opinion on the level of the minimum wage (Lubarda, 2013, p. 156). If the SEC does not make a decision within 15 days from the start of negotiations, the Government of the Republic of Serbia will make a decision on the level of the minimum labor price within the next 15 days (Labor Law, 2005). From a strictly legal point of view, we can say that the procedure for defining the minimum wage is clear. However, the effectiveness of the tripartite social dialogue, which refers to the participation of representatives of the Government, representative trade unions and employers' associations in defining the minimum wage, through the Social-economic tripartite dialogue, is limited in Serbia. Namely, it is often the case that the tripartite dialogue does not result in an agreement on the minimum price of work, i.e. minimum wage between the social partners, which is due to the short deadlines for the duration of the negotiations, and due to diametrical attitudes about the amount of the minimum price of work. As a result of such a situation, the government unilaterally determines the level of the minimum price of work, which means

that the purpose of the tripartite social dialogue and the negotiation process between the social partners is almost meaningless. The government often does not consult the social partners on social and economic reforms. Tripartism is, in fact, one of the methods of functioning of social dialogue, which still implies the participation of the state (Jovanović, 2014, p. 11). The so-called tripartite social dialogue is our practice and a transitional necessity and the result of the power imbalance of those who participate in that dialogue (Jovanović, 2014, p. 11). In such circumstances, it is clear that the position of employees in that relationship with the state and employers is unfavorable, so the struggle to achieve fair wages is made even more difficult, perhaps intentionally. However, the most responsible for building trust and understanding are those who are the strongest – the state and employers (Jovanović, 2014, p. 11). The situation in which there is no agreement between social actors, as well as the procedure of determining the minimum wage, have an unfavorable impact on employees in Serbia, on their social and economic position. In terms of social dialogue and tripartism, it is important that government institutions respect the principles of representativeness, voluntariness, autonomy and non-interference in the internal affairs of trade unions and employers' organizations (Mirjanić, 2014, p. 140). It is certain that even in the next few years, minimum wages will not reach the level of the minimum consumer basket and will remain at a level that does not allow employees to meet the basic needs of their families (Bradaš, 2021, p. 12).

Certainly, when determining the minimum wage, two criteria are taken: 1) the needs of the employees (and family members) and 2) the employer's ability to pay (the national economy) (Lubarda, 2013, p. 427). The elements, i.e. the criteria for determining the minimum price of work are: the existential and social needs of the employee and his family expressed through the value of the minimum consumer basket, the employment rate on the labor market, the growth rate of the gross domestic product, consumer prices, productivity and the level of average wages in Republic of Serbia (Jovanović, 2015, p. 282). Therefore, when it comes to the needs of employees, theoretically it most often refers to life needs, which the employee must satisfy. When we talk about life needs, we originally meant biological ones, while nowadays it also refers to broader social needs, without the satisfaction of which a decent and human-worthy life is not possible (Lubarda, 2013, p. 427). The minimum wage is adjusted by 1) indexation (automatically) or 2) a more flexible ratio (Lubarda, 2013, p. 431). The first method is related to the increase in the cost of living, if there is a price increase of more than two percent in two consecutive months and is applied in France and Belgium. The second method is used in

Argentina, as well as in countries that leave the regulation of the minimum wage to the competent institution, which performs its correction, but leave it the autonomy to determine the percentage of adjustment, taking into account the economic situation in the country, unemployment, etc. (Lubarda, 2013, p. 431). The most common adjustment of the minimum wage is based on growth rates: inflation, GDP, average wage, median wage, productivity, employment, etc. (Kosanović & Paunović, 2020, p. 126). In practice, a negative attitude is also taken regarding the employee's renunciation of the right to minimum wage. In the sense of the above, any statement by the employee about waiving the right to minimum wage would be null and void and without legal effect (Higher Commercial Court, judgment Pž 1285/2008 of June 5, 2008). In order for an employee to realize the right to minimum wage, it is necessary to have full-time work and standard work performance. It is about two cumulatively set conditions. Jurisprudence also gives us examples of requests for the payment of the minimum wage in situations of absence from work, i.e. non-arrival at work. Thus, the Commercial Court of Appeal in decision Pž 14578/2010 of October 26, 2011, concludes: "The employee has the right to the minimum wage, but for standard performance and full-time work, and not for the period in which he did not come to work and during which he did not work. Earnings/salary is a successive claim, which is paid in installments and only on the basis of work. The existence of the employment relationship itself, without work and coming to work, is not enough to realize the right to the payment of wages, and this also applies to the payment of the minimum wage". It is often the case in practice that the minimum wage is actually used as the basic price of work in collective agreements (with the employer and special, i.e. sectoral) contracts. This has the effect that any increase in the state-mandated minimum wage ultimately causes an increase in overall labor costs. In a period of economic instability, there are difficulties in doing business (insufficient demand on the market, low product prices, low product collectability, illiquidity, high production costs), so employers often cannot meet the minimum wage increase, i.e. to pay (minimum) wages. The result is that there is a reduction in the number of employees, irregular payment of wages, irregular payment of contributions for mandatory social insurance. For the above reasons, employers do not respect the provisions of collective agreements, and often the employees themselves agree to work for wages less than the minimum, in order to ensure their minimum existence and keep their existing jobs. Thus, instead of being a barrier to the violation of rights from the employment relationship, the collective agreement actually becomes an instrument for the same, which employers use without regard for the position

of employees and their families. Theoretically speaking, the collective agreement should strengthen the awareness of employees and citizens about the rule of law, about the development of mechanisms for correcting the operation of the market (Stajić, 2008, p. 1362). One of the ways of employees' fight in the field of wages can be stronger union organization of employees. Namely, trade unions played a key role in ensuring fair and safe working conditions for employees, from the very beginning of labor relations, until today (Jašarević, 2014, p. 30). Trade unions fought for the recognition of employment status (which implies certain legal and factual protection of workers), quality labor legislation and the participation of employees in regulating working conditions through collective bargaining (Jašarević, 2014, p. 30). There was a massive disillusionment of employees in trade unions and a decline in confidence in the possibility of a trade union contributing to the well-being of employees (Jašarević, 2014, p. 40). In order to improve this area of law, the fight against the violation of labor rights and the shadow economy, the Republic of Serbia has drawn up a special program related to the promotion of dignified work, which is harmonized with the ILO. Poverty rates and adequate living wages are at the center of public attention and political debate at the domestic and international level. Despite everything, the set social standards are often not respected, which is reflected in unemployment and underemployment of workers, low wages, non-payment of wages, minimal social protection of the global population, high rate of occupational diseases and accidents at work (Bilić, 2011, p. 785). Maintaining the aforementioned conditions on the labor market is possible due to the simple fact that the ILO has limited power in strengthening its normative acts in the member states (Bilić, 2011, p. 785). The application of ILO acts depends on the strength of assurance and technical support of member states in the implementation and enforcement of international labor standards (Bilić, 2011, p. 785). Also, the insufficient capacities of the labor inspection contribute to the existence of such a situation on the labor market. Labor inspection is a much-needed mechanism for promoting dignified work and ensuring working standards in the workplace. It can be said that the labor inspection is a vitally important instrument of state supervision over the application of labor regulations (Radovanović, 2023, p. 323). The operation of the labor inspection improves working conditions and ensures the protection of rights from the employment relationship (Radovanović, 2023, p. 323). In Serbia, the rapid transition to a market economy resulted in the deterioration of the working environment and working conditions. The Labor Inspectorate in Serbia faces the challenge of adapting the system to new conditions in the market economy. In connection

with the work of the inspection, there are frequent negative comments. This especially applies to its capacities, which cannot meet the needs of the market. Namely, according to certain information, Serbia has only 225 labor inspectors, who supervise about 400,000 economic entities (Bradaš, 2021, p. 16). According to the relevant parameters, each employer could be inspected only once every eight years (Kovačević, 2022, p. 220). The proper and timely operation of the labor inspection can significantly contribute to the establishment of relations in which the rights, obligations and responsibilities of employees and employers, as social partners, can be fully realized (Stojšić, 2008, p. 88). The field of activity of the labor inspection is very close to the citizens, because it is about the field of work, which is characteristic of every individual in one of its manifestations: through the exercise of rights from the employment relationship, employment outside the employment relationship, exercise of the right to safe and healthy work, the right on suspension of work and the like (Stojšić, 2008, p. 83). In this regard, the most common abuses of the minimum wage concept are regarding the length of the payment, the reasons for its introduction, the use of the minimum wage as a reference value for the payment of other wages (Bradaš, 2021, p. 16). Also, compliance with social security laws remains a problem, which also contributes to the underfunding of the social security system. Reporting lower earnings than what is actually paid is a widespread phenomenon in Serbia.

5. Conclusion

Considering the above, it is easy to see that a large number of workers face problems in the field of earnings and meeting their basic life needs, as well as the needs of their family members. Therefore, the question of wages and the level of the minimum wage will remain a neurotic point of the labor market in Serbia, which will be discussed for many years to come. Speaking of the legislative framework, it can be said that the current Labor Law has made great progress in the field of legal standards, especially in the part that concerns the definition of the minimum wage rate and the procedure on how it is determined, and as such remains significant. However, there is still room for improving positive legal standards. For example, it turned out to be unjustified to determine the minimum price of work through a special mathematical formula, but instead it should be the result of a social dialogue between social partners (the state, employers and trade unions), based on realistic statistical parameters. Also, we should consider the possibility that in addition to the minimum price of work at the national level, it can be introduced at the local

level as well. Also, due to the short deadline for reaching an agreement on the rate of the minimum price of work between the social partners, the possibility of extending the negotiation deadline should be considered, because it turned out that the current deadline of 15 days for finding a compromise is insufficient. Certainly, the minimum wage must not only be the wage sufficient for survival, but the one that can provide the employee and his family members with a life worthy of a human being, but in practice this is still not the case.

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MINIMALNA ZARADA – PRAVILO UMESTO IZUZETKA NA TRŽIŠTU RADA

APSTRAKT: Pitanje minimalne zarade dugo godina privlači pažnju, ne samo stručne, nego i šire javnosti. Utvrđivanje minimalne zarade u svakoj zemlji, pa i u Srbiji, vezuje se za uspostavljanje minimalnih standarda na polju ličnih primanja, te je kao takva vezana i za borbu protiv siromaštva. Osnovna odlika minimalne zarade je ta da ona ima privremeno trajanje, do šest meseci, usled lošeg poslovanja poslodavca, te kao takva ona predstavlja samo jednu privremenu i vanrednu meru, koja se ukida vraćanjem u normalno ekonomsko stanje. Nakon povratka u normalno poslovanje, poslodavac je dužan da zaposlenima isplati razliku do ugovorene zarade. Međutim, umesto da institut minimalne zarade bude izuzetak koji se koristi samo u vanrednim okolnostima, isti je postao pravilo na tržištu rada, čime se dovodi u pitanje čitav koncept minimalne zarade, do te mere da možemo reći da je svrha njenog uvođenja u potpunosti obesmišljena. Stoga ćemo u ovom radu razmatrati pojam zarade i minimalne zarade u Srbiji, kao i njene praktične domene na domaćem tržištu rada.

Ključne reči: *zarada, minimalna zarada, minimalna cena rada, radni odnos.*

References

1. Aleksić, D. (2020). *Tržište rada niskih zarada – Efekti promene minimalne zarade i nejednakost zarada u Srbiji – doktorska disertacija* [*Low-wage labor market – Effects of minimum wage change and wage inequality in Serbia – doctoral dissertation*]. Beograd: Univerzitet u Beogradu, Ekonomski fakultet
2. Anker, R. (2005). *A new methodology for estimating internationally comparable poverty lines and living wage rates, Working Paper No. 72*. Geneva: International Labour Office, Statistical Development and Analysis Group, Policy Integration Department
3. Aumayr-Pintar, C., Cabrita, J., Fernández-Macías, E. & Vacas-Soriano, C. (2014). *Pay in Europe in the 21st century*. Luxembourg: Publications Office of the European Union
4. Bilić, A. (2011). Transformacija radnopravnog odnosa [Transformation of the labor law relationship]. *Zbornik Pravnog fakulteta sveučilišta u Rijeci*, *32*(2), pp. 755–794
5. Bradaš, S. (2021). *Minimalna zarada u Srbiji* [*Minimum wage in Serbia*], Beograd: Fondacija centar za demokratiju
6. European Commission. (n.d.). Adequate minimum wages in the EU. Downloaded 2023, October 13 from https://ec.europa.eu/social/main.jsp?catId1539&langIden
7. European Commission. (2017). The European Pillar of Social Rights in 20 principles. Downloaded 2023, October 13 from https://op.europa.eu/en/publication-detail/-/publication/ce37482a-d0ca-11e7-a7df-01aa75ed71a1/language-en/format-PDF/source-62666461
8. European Commission. (2020). Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels. Downloaded 2023, October 13 from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uriCELEX:52020PC0682
9. European Parliament. (2021). New rules for fair minimum wages in the EU. Downloaded 2023, October 13 from https://www.europarl.europa.eu/news/en/press-room/20211107IPR16808/new-rules-for-fair-minimum-wages-in-the-eu
10. EUR-Lex. (2022). Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union. Downloaded 2023, October 12 from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2041

11. Gajić, B. (2020). Korona i radni odnosi [Corona and labor relations]. *Advokatska Kancelarija*, (70), pp. 3–15
12. International Labour Organzation (n.d.), Minimum Wage-Fixing Machinery Convention, No. 26, from 1928. Downloaded 2023, October 13 from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C026
13. International Labour Organization (n.d.), Minimum Wage Fixing Convention, No. 131, from 1970. Downloaded 2023, October 13 from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131_
14. Jašarević, S. (2014). Uloga sidikata u ostvarivanju zdravih i pravičnih uslova rada [The role of trade unions in achieving healthy and fair working conditions]. *Radno i socijalno pravo*, *18*(1), pp. 29–45
15. Jovanović, P. (2014). Nasleđeno i sadašnje stanje kolektivnih prava zaposlenih u svetlu aktuelnih promena u radnom zakonodavstvu [Inherited and current state of collective rights of employees in light of current changes in labor legislation]. *Radno i socijalno pravo*, *18*(1), pp. 1–28
16. Jovanović, P. (2015). Minimalna zarada prema Zakonu o izmenama i dopunama Zakona o radu [Minimum wage according to the Law on Amendments to the Labor Law]. *Bilten Vrhovnog kasacionog suda*, (3), pp. 277–283
17. Kovačević, Lj. (2021). *Zasnivanje radnog odnosa* [*Establishing an employment relationship*]. Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo
18. Kovačević, Lj, (2022). Jedan vek inspekcije rada u Srbiji: razvoj i aktuelni izazovi [A century of labour inspection in Serbia: Development and contemporary challenges]. In: Ignjatović, Đ., (ed.), *Kaznena reakcija u Srbiji, 12 deo* [*Criminal reaction in Serbia, part 12*] (pp. 179–225). Beograd: Srpsko udruženje za krivičnopravnu teoriju i praksu, Pravni fakultet Univerziteta u Beogradu
19. Kovačević Perić, S. (2016). Nezaposlenost mladih [Youth unemployment]. *Radno i socijalno pravo*, *20*(1), pp. 111–136
20. Kosanović, R. & Paunović, S. (2020). Minimalna zarada u Srbiji – predlozi za izmene [Minimum wage in Serbia – proposals for changes]. *Radno i socijalno pravo*, *24*(2), pp. 119–140
21. Krstić, J. (2021). Minimalna zarada kao garantovana vrednost [Minimum earnings as a guaranteed value]. *Pravni portal*, in press. Downloaded 2023, October 13 from https://www.pravniportal.com/minimalna-zarada-kao-garantovana-vrednost/

22. Lubarda, B. (2013). *Radno pravo. Rasprava o dostojanstvu na radu i socijalnom dijalogu* [*Labor law. Discussion on dignity at work and social dialogue*]. Beograd: Pravni fakultet Univerzitet u Beogradu, Centar za izdavaštvo
23. Međunarodna organizacija rada, Tim za tehničku podršku dostojanstvenom radu i Kancelarija za Srednju i Istočnu Evropu. (2019). *Program dostojanstvenog rada za Republiku Srbiju od 2019. do 2022* [*Decent Work Program for the Republic of Serbia 2019 to 2022*]. Downloaded 2023, October 12 from https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/genericdocument/wcms_676207.pdf
24. Ministarstvo za rad, zapošljavanje, boračka i socijalna pitanja. (2023). *Povećanje minimalne cene rada za 17,8 odsto za 2024. godinu* [*Increase of the minimum labor price by 17.8 percent for 2024*]. Downloaded 2023, October 10 from https://www.minrzs.gov.rs/sr/aktuelnosti/vesti/povecanje-minimalne-cene-rada-za-178-odsto-za-2024-godinu
25. Ministarsto za rad, zapošljavanje, boračka i socijalna pitanja. (n.d). *Dokument programa dostojanstvenog rada za Republiku Srbiju 2013–2017* [*Document of the decent work program for the Republic of Serbia 2013–2017*]. Downloaded 2023, October 13 from https://www.minrzs.gov.rs/arhiva-internet-prezentacije-2019/program-dostojanstvenog-rada-za-rs-2013-2017.html
26. Mirjanić, Ž. (2014). Uporedna analiza zakona o radu [Comparative analysis of labor law]. *Radno i socijalno pravo*, *18*(1), pp. 129–142
27. Myant, M. (2018). *Why are wages still lower in eastern and central Europe?,* European trade union institute*, Working Paper 2018.01.* Brussels: ETUI aisbl
28. O'Farrell, R. (2010). *Wages in the crisis*, *Working Paper, No. 2010.03*. Brussels: European trade union institute
29. Perić, S. (2011). *Pristojan rad – doktorska disertacija* [*Decent work – doctoral dissertation*]. Niš: Pravni fakultet Univerziteta u Nišu
30. Počuča, M. & Mirković, P. (2009). Mirno rešavanje radnih sporova [Peaceful settlement labor disputes]. *Pravo – teorija i praksa*, *26*(7–8), pp. 109–116
31. Radovanović, V. (2023). International standards and authorizations of labor inspection in agriculture in case of termination of employment relationship. *Economics of Agriculture*, *70*(1), pp. 323–334. Downloaded 2023, October 13 from https://www.ea.bg.ac.rs/index.php/EA/article/view/2187/1629

32. Savez samostalnih sindikata Srbije. (2022). *O minimalnoj zaradi* [*About the minimum wage*]. Downloaded 2023, October 13 from https://sindikat.rs/2022/05/10/o-minimalnoj-zaradi/
33. Stajić, D. (2008). Socijalno pravična zarada kao temeljni uslov integracije sveta rada u Evropsku uniju [Socially fair wages as a fundamental condition for the integration of the world of work into the European union]. *Politička revija*, *18*(4), pp. 1359–1369
34. Stojšić, Lj. (2008). Organizacija i nadležnost inspekcije rada u Republici Srbiji [Organization and jurisdiction of labor inspection in the Republic of Serbia]. *Pravo – teorija i praksa*, *25*(7–8), pp. 83–89
35. Vlada Republike Srbije. (2023). *Usvojena odluka o visini minimalne cene rada za 2024*. *godinu* [*The decision on the amount of the minimum labor price for 2024 was adopted*]. Downloaded 2023, October 13 from https://www.srbija.gov.rs/vest/731082/usvojena-odluka-o-visini-minimalne-cene-rada-za-2024-godinu.php
36. Zakon o o radu [Labor law]. *Službeni glasnik RS*, br. 24/05, 61/05, 54/09, 32/13, 75/14,13/17 – odluka US, 113/17 i 95/18 autentično tumačenje
37. Zakon o mirnom rešavanju radnih sporova [Law on Peaceful Settlement of Labor Disputes]. *Službeni glasnik RS*, br. 125/04, 104/09 i 50/18
38. Zakon o Socijalno-ekonomskom savetu [Law on the Social-economic Council]. *Službeni glasnik RS*, br. 125/04

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RESTRICTIVE AGREEMENTS AS A FORM OF COMPETITION VIOLATION IN SERBIA – THEORY AND PRACTICE

ABSTRACT: Restrictive agreements are agreements among market participants that significantly restrict, distort or prevent competition. This paper aims to elucidate the concept of restrictive agreements as a form of competition infringement within the scientific, professional and business-legal communities. The paper systematizes the definitions of this concept and examines the relevant laws and regulations governing it. Additionally, the paper will analyze and evaluate the efficacy of the Commission for the Protection of Competition, highlighting both its strengths and weaknesses in making decisions on the prevention of monopolies. Through an analysis of the commission's decisions concerning companies operating within the territory of the Republic of Serbia, this paper identifies challenges and proposes solutions to enhance the Commission's effectiveness.

Keywords: *Restrictive agreements, Commission for the protection of competition, violation of competition.*

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1. Introduction

Competition represents one of the most beneficial phenomena in the economic life. Its advantages are multiple, and simply cannot imagine the normal functioning of economic transactions, the operation of the market and the economy in general, the development of a society, and the quality satisfaction of the needs of social life without the existence of competition. It is an economic phenomenon, the subject of study in the economic sciences, but considering that the law defines the framework within which economic activities take place and economic phenomena manifest, it is also a subject of legal regulation. Legal solutions ensure that competition thrives, survives, and produces its positive effects. Legal theory provides very few definitions of competition (Porter, 2008).

The violation of effective competition through the actions of associations as market participants has two main manifest forms: a severe form, in the sense of an absolutely prohibited restrictive agreement, and a milder form – an activity that is potentially in conflict with competition protection rules (Commission for the protection of competition, 2021).

The main types of acts and actions that constitute competition violations are: a) restrictive agreements and arrangements; b) abuse of dominant market position; c) concentration of market power that leads to or can objectively lead to one of the previous forms of competition violations; and d) state aid (Ezrachi, 2010).

2. The concept of restrictive agreements

Restrictive agreements or arrangements are agreements between market participants, which are in relation to competitors or potential competitors, regardless of whether they are formal or informal, written or unwritten agreements, and that (United Nations Conference, 2010):

- Agreements that determine prices and other sales conditions, including international trade.
- Coordinated bidding or offering in public procurement procedures, also known as bid-rigging or collusive tendering.
- Market or customer allocation.
- Restraints on production or sale, including by quota.
- Group boycotts and concerted refusals to purchase/ supply.
- Collective denial of access to an arrangement, or association, which is crucial to competition.

All the listed forms of restrictive agreements and arrangements are prohibited. There is the possibility of individual or group exemption from the prohibition, with individual exemptions granted by the competent authority upon the request of a party to the agreement, provided that the conditions prescribed by law are met.

2.1. Institutional mechanisms and measures for the protection of competition

There are significant differences in the institutional approach to the application of competition law in different countries, as well as cultures. In many countries, including the European Union, an administrative concept of enforcement is applied, while in other countries, there is a system of so-called parallel or divided competences involving two or more administrative authorities, with one of them potentially acting as an entity with quasi-judicial powers in making decisions on competition violations and imposing protective measures and sanctions. Some countries provide for the jurisdiction of regular courts in the enforcement process (with or without special divisions for competition violations), while others have specialized competition courts (tribunals).

In order to establish a body for the protection of competition, it is necessary to make a decision on the relationship with the elected political officials of the executive and legislative powers in the Government. Ideally, the competition protection body can be both independent from political pressure in implementing its policy to investigate and prosecute competition violations, but also responsible for exercising its powers and spending public funds (Kovacic & Human 2012). In Serbia, the authority responsible is the Commission for the Protection of Competition, which is an independent and autonomous organization exercising public powers and having the status of a legal entity.

Protection measures and sanctions are predominantly of an administrative nature, such as behavioral measures and structural measures. The first type of administrative measures compels market participants to refrain from competition violations in the future or to undertake specific acts and actions aimed at eliminating harmful market effects and preventing the occurrence of future damage. Structural measures are those measures taken by the competent competition authorities to restore the disrupted balance of market shares among participants in the relevant market. They typically involve an order for the divestiture of a specific portion of a company's assets. Monetary

fines represent a significant tool for enforcing competition law against entities found to have committed acts or actions that violate on competition.

Regardless of financial resources, some countries recognize the right of market participants and consumer organizations to file a lawsuit for compensation in the competent court. This is a private legal instrument that leads to the restitution of property to subjects who, due to competition violations, have suffered actual damages in the form of reduced assets or prevented expected growth. In some countries, a lawsuit for compensation represents an independent legal protection instrument, considering that there is no requirement for prior completion of an administrative procedure for examining and determining competition violations.

In a certain number of countries, criminal liability for individuals is provided for in cases of more severe competition violations (cartels). Prison sentences for individuals, as responsible individuals within the management of economic entities, have a significant preventive character. In addition to imprisonment or as an alternative to it, some countries provide for the possibility of imposing a measure prohibiting the management of economic entities for a certain period.

2.2. The legal regulations that regulates competition violations with a focus on restrictive agreements

Since not every concept that exists in nature and affects society is legally regulated, more precisely, there are no statutes concerning it, we can conclude that the legal regulation of a specific concept must follow its significance. This means that only those concepts that become significant to society at a particular historical moment are legally regulated. It follows that legal concepts are regulated only at the point in the historical development of society when society has developed sufficiently to recognize the importance of their legal regulation. Regarding this, we come to the point when, under the pressure of European legislation, the Republic of Serbia realized the need to protect the competition of its market and regulate the concept of a restrictive agreement.

The Law on Protection of Competition (2009) in addition to regulating the protection of competition and establishing the position, organization, and authority of the Commission for Protection of Competition, also regulates the concept of restrictive agreements, their prohibition, and the conditions under which they are exempted from the prohibition. A characteristic feature of an individual exemption from the prohibition is that the request

is submitted by the parties involved in the restrictive agreement, and the Commission for Protection of Competition makes the decision regarding the exemption.

3. Initiation of the procedure for the protection of competition

Taking solutions from other state systems uncritically, we find ourselves in a situation where five individuals, who do not have directly superior experts to oversee them, make decisions about competition protection in the Republic of Serbia. Instead, we should utilize the existing judicial system, which already has expert judges in the field of commercial law and expert witnesses in the field of economics. This system also has an appellate court and extraordinary legal remedies and has so far proven to be more efficient and under less public pressure than any government administrative authority.

Since there hasn't been an announcement of a change in the competition protector, we must familiarize ourselves with the issues related to the competition protection process before the Commission for Protection of Competition.

A party in a proceeding before the Commission for Protection of Competition can be a market participant who has submitted a notification of concentration or a request for individual exemption, or a market participant against whom an investigation procedure has been initiated. We must emphasize that the legal status of a party, as per the Law on Protection of Competition, is not limited to those who initiate the investigation of competition violations, information and data providers, experts, and organizations whose analyses are used in the proceedings. It also includes other government authorities and organizations that collaborate with the Commission during the process. The Commission is only obligated to inform each initiator of an investigation into a competition violation about the outcome of the initiative within 15 days from the date of receiving the initiative.

The Commission initiates an investigation procedure into a concentration violation as a result when, based on the submitted initiatives, information, and other available data, it reasonably assumes the existence of a competition violation (Vukadinović, 2006).

The commission within its jurisdiction: Decides on the rules and obligations of market participants in accordance with the Law on Protection of Competition; Participates in the development of regulations related to the field of competition protection; Proposes to the Government the adoption of regulations for the implementation of this law; Monitors and analyzes

competition conditions on individual markets and in individual sectors; Gives an opinion to competent authorities on proposed regulations, as well as on valid regulations that violate competition; – gives an opinion regarding the application of regulations in the field of competition protection; Achieves international cooperation in the field of competition protection, in order to fulfill international obligations in this area and collect information on competition protection in other countries; Cooperates with state bodies, bodies of territorial autonomy and local self-government, in order to ensure the conditions for the consistent application of this law and other regulations regulating matters of importance for the protection of competition; Undertakes activities to develop awareness of the need to protect competition; Keeps records on reported agreements, on participants who have a dominant position on the market, as well as on concentrations, in accordance with this law; Organizes, undertakes and controls the implementation of measures to ensure competition protection (Radenković-Jocić, 2006).

3.1. Measures for competition protection and procedural penalties

In order to protect competition, specific sanctions must be established. These sanctions are specified in the Competition Protection Act as measures for competition protection or as procedural penalties.

To better understand the scope of penalties for competition violation, we must understand how they are determined. Namely, from the previous discussion, we concluded that the amount of the penalty should not exceed 10% of the total annual revenue generated within the territory of the Republic of Serbia. First, we need to determine the amount of the competition protection measure, and its level depends on the starting point, which is then multiplied by the factor of the severity of the violation, and subsequently by the factor of the duration of the violation.

In Serbia, there have been modest results in detecting and penalizing market participants in the previous period. The total amount of fines imposed on participants in restrictive agreements from the inception of the Commission for Protection of Competition until the end of 2020 is 20.111.243.690 Serbian dinars, as indicated in table 1.

Table 1: Measures for competition protection

Year	Subject	Amount of fine (DIN)
2011	Veterinary Chamber of Serbia	1.243.690
2011	Niš ekspres i Jeremić transport	21.650.850
2011	Lasta i Evropa-Bus	118.985.835
2011	Takovo , Uniqa i AS insurance	25.879.773
2012	Pharmaceutical companies	1.289.274.214
2012	Idea i Grand Prom	112.439.961
2015	D&D Travel ,DJD transport i Jeremić transport	915.696
2015	Amm Immovables, beteco, sagoja i Advane line	33.832.595
2016	Umbrela corporation LTD	1.631.513
2016	Bora Kovačević i Large transport	10.484915
2017	Vital i Victoriaoil	3.751.637
2018	Auto Čačak D.O.O I drugo	10.909.400
2018	B2M doo – Beograd, Grafo Trade doo – Beograd, Trgodunav doo – Beograd i Master Clean Express doo Palic	3.731.025
2019	Mikops – Birolinija – Biro Print Sistemi – Dikti Line – Birodeveloping – Birotehnika – Konica Minolta Poslovna	59.837.072
2020	Keprom DOO I Senta prompt – "Folly farm"–„oaza zdravlja"Apoteka „Užice",	4.475.256
2020	Yuglon DOO – Keprom DOO – Aksa DOO – „K-PHARMA" – Sopharma Trading– Medicom DOO Šabac– NS Pharm DOO Novi Sad – Apoteka Kraljevo – Vega DOO	8.889.067
2020	Mikrolift servis remont i montaža liftova i električnih uređaja – SCLIFT2018 D.O.O.	49.468

Source: View of the author according to decisions of the Commission for the Protection of Competition of the Republic of Serbia

The severity of the violation factor can be influenced by several reasons, which are categorized as follows: very serious competition violations (for which a factor of 2 to 3 is prescribed), serious competition violations (for which a factor of 1 to 2 is prescribed), and minor competition violations (for which a factor of 1 is prescribed). (Regulation on crieria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, the method and terms of their payment and the conditions for determining those measures, 2010).

3.2. Judicial Review of the Commission's Decisions

After the completion of the proceedings before the Commission, a party to the proceedings has the right to seek judicial protection, which involves filing an administrative lawsuit with the Administrative Court within 30 days from the date of receiving the final decision of the Commission. In this proceeding, the legality and appropriateness of the Commission's decision can be examined. Legality is considered to be whether the decision was made in accordance with the procedure defined for decision-making, while appropriateness assesses whether the Commission made the decision in line with the objective entrusted to it. We can say that legality pertains to legal matters, regulating the procedure and authorities, while appropriateness grants a certain scope of decision-making even in the realm of political matters on the basis of which the Commission's decision is made.

After receiving the lawsuit, the Administrative Court sends the lawsuit to the Commission within 15 days for a response. From the moment the lawsuit is received, the Commission has a period of 30 days to provide a response to the Administrative Court regarding the same. After receiving the response, the Administrative Court will make a decision within a maximum of three months. In such cases, the Administrative Court typically proceeds by reviewing the written evidence submitted by both parties, and court hearings are very rarely scheduled (only in situations where the case is more complex, and the court believes that an oral debate would facilitate a better understanding of the matter). Due to this procedure before the Administrative Court, trials usually last significantly shorter compared to other courts.

To illustrate the judicial review, an example of an Administrative Court decision can be given, which consists of examining the legality of the decision but does not pay attention to the appropriateness of the decision, and does not provide any explanation as to whether such a decision is in line with the purpose of the Law on Protection of Competition or contradicts it.

By the decision of the Commission for Protection of Competition Number: 6/0-02-764/2018-19 dated December 31, 2018, the concentration of the participants Telekom and Radius Vector was approved in a simplified procedure.

The Administrative Court issued Decision 3U.2054/2019 on May 9, 2019, in which it noted that the plaintiff (who filed an administrative lawsuit against the decision of the Commission made in a simplified procedure) was not a party to the proceedings that preceded the issuance of the contested decision. More precisely, neither Telekom nor Radius Vector were involved, and therefore, the plaintiff lacked the legal standing to file the lawsuit.

Consequently, in this specific case, the procedural and legal prerequisites, under Article 33, paragraph 1 of the Law on Protection of Competition on Protection of Competition Act, were not met.[1]

This leads to the conclusion that the Commission was allowed to make a decision in a simplified procedure without a hearing, without public participation, and most importantly, without the involvement of consumers to whom this concentration would apply. In this manner, the Commission approved the concentration in the market solely by reviewing a list of cases without any public insight. However, if someone who is not a party in the sense of Article 33 of the Law on Protection of Competition attempts to challenge the legality of such a decision, they will be rejected with the explanation that they do not have the right to review one of the publicly significant decisions made by a five-member body without any factual scrutiny or subordination.

The question arises: why would anyone have an interest in re-examining a decision that allows them to enjoy any right? The most common party to initiate proceedings is the one who has suffered harmful consequences due to the actions of other participants in the market. However, neither the Law on Protection of Competition nor the judicial practice allows them to discuss this issue in court.

I believes that with such a division of power, consumers are at the greatest disadvantage and in the most difficult legal position. Consequently, the court did not consider whether such a decision aligns with the objectives proclaimed in Article 1 of the Law on Protection of Competition.

4. Example of control of a restrictive agreement between companies Telekom and Telenor

The companies Telekom Serbia A.D. and Telenor Serbia have approached the Commission for Protection of Competition with a request for individual exemptions (as explained in the previous text). In proceedings related to such requests, the Commission first determines its jurisdiction, and then decides on whether the conditions for granting an exemption under the submitted agreement are met, in accordance with the law-prescribed conditions (Article 11, 12, 13, and 14 of the Law on Protection of Competition Act), which it will do in the case of this received request. To prevent further misinformation of the public, we emphasize that this is not about the concentration (merger) of two

[1] Presuda Upravnog suda broj 3U.2054/2019 od 9. maja 2019 godine [Judgment of the Administrative Court No.3U.2054/2019 of May 9, 2019.]

or more market participants but about an exemption from the prohibition of contracts with limited and defined business cooperation in a specific segment of business (Commission for Protection of Competition, 2021).

On April 21, 2021, the Commission for Protection of Competition issued decisions through which it granted exemptions from the prohibition of restrictive agreements for the Contract for the Provision of Ethernet Bit stream Services dated December 30, 2020, and the Contract for the Right to Use Optical Fibers dated December 30, 2020.

Since both parties in the proceeding, namely Telenor and Telekom, were satisfied with this decision, it was not expected that either of them would oppose such a resolution. The competitor in the market is the only one who filed an administrative lawsuit to determine that this decision has caused harm to them. However, the Administrative Procedure Act and the Competition Protection Act do not provide the possibility for third parties, such as competitors or consumers, to challenge such a decision, which represents a significant problem in the legal system. This lack of transparency in the arguments for and against exemptions from certain agreements is particularly problematic.

The problem with the legal control of such a decision is that its annulment can only be sought through administrative litigation. Administrative litigation can be initiated by a person who believes that their right or legally-based interest has been violated, and an interested party can initiate administrative litigation only if the annulment of the administrative act by the Administrative Court would be detrimental to them. None of the situations mentioned relate to the possibility of initiating administrative litigation against an individual act that would be detrimental to consumers.

After submitting a request for the review of the annulled decision, filed due to a violation of the law, another regulation, or a general act, and a violation of procedural rules that could impact the decision, the Supreme Court of Cassation issued – Uzp 217/2022 a judgment on July 8, 2022, rejecting that request.

From the explanation provided by the Supreme Court of Cassation, it is evident that the court considers such a request to be allowable but not justified. The argument of the Supreme Court of Cassation is based on the fact that the competitor in the market did not prove that the actions of market participants directly harmed their competitive position in the market by significantly restricting, disrupting, or preventing competition.[2]

[2] Presuda Vrhovnog kasaciong suda broj Uzp 217/2022 od 8. jula 2022 godine.[Judgment of the Supreme Court of Cassation No.Uzp 217/2022 of July 8, 2022.]

The problem with the existence of such a competition protection procedure lies in the fact that the law does not provide an effective means of protecting market participants who are not signatories to agreements and consumers. This protection depended on the opinion of the Supreme Court of Cassation, against which any substantive legal review and control were not allowed. Instead, only constitutional and international legal controls, which are limited to major procedural errors and the conduct of proceedings, were applicable. In this case, such major errors did not occur.

In this manner, competition in the Serbian market is protected only if the participants who have entered into specific agreements are dissatisfied with the Commission's decision. However, in cases where other market participants or consumers may potentially be harmed, they do not have a legal avenue to protect their interests. The available path may not likely give the desired results.

The purpose of competition protection is to safeguard the market from the consequences of restricting competition, which can be irreplaceable. It also serves as an indirect protection for end-users – consumers, who are left to navigate the market through the means of refusal to participate, as they lack other legal avenues for protection.

The procedure before the Commission is envisioned more as a criminal procedure where participants in a potential restrictive agreement defend themselves against the establishment of a prohibition. There is no way for anyone to turn to the Republic of Serbia in any manner for protection from the consequences of a violation of competition in the market.

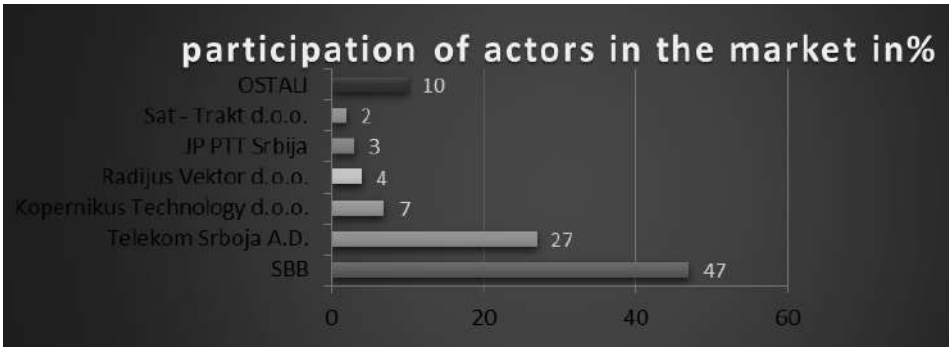
4.1. The Issue of Agreements

Article 1 of the Law on Protection of Competition (2009) clearly defines that competition protection in the market of the Republic of Serbia is carried out "in the interest of economic progress and the welfare of society, especially for the benefit of consumers." Based on the analysis conducted so far, it is evident that consumers, in every aspect, do not benefit from the intended actions of Telekom Serbia; quite the opposite.

Article 10 of the same legislative act states the prohibition of restrictive agreements, which are defined as "agreements between market participants that have the purpose or effect of significantly restricting, disrupting, or preventing competition in the territory of the Republic of Serbia." According to this law, it is sufficient for the purpose of a specific agreement to be aimed at significantly restricting, disrupting, or preventing competition.

According to market share data for media content distribution, the largest operator in the Republic of Serbia in 2019, and still is the business entity Serbia Broadband – Serbian cable network D.O.O. (SBB), with a market share of 47% in terms of the number of subscribers. Telekom Serbia A.D. held approximately 27% of the market share in 2019. In addition to SBB D.O.O. and Telekom Serbia A.D., other notable companies include the business entities J.P. PTT Serbia, Copernicus Technology D.O.O., Radius Vector D.O.O., and Sat – Tract D.O.O. These operators, measured by the number of subscribers, together account for 90% of the market for media content distribution, as shown in Graph 1 (Regulatory Agency for Electronic Communication and Postal Services, 2023).

Graph No. 1: Company Market Share in the Distribution of Media Content in Serbia in 2019.



Source: View of the author according to Regulatory body for electronic communications and postal services

On November 1, 2018, Telekom Serbia became the sole member of the business entity My Supernova D.O.O. Belgrade by "concluding an agreement for the purchase and transfer of shares in the total share capital, with a 100% ownership structure" (Telekom Serbia, 2023). My Supernova D.O.O. holds a 14.8% share in the media content distribution market. Therefore, Telekom Serbia, along with its subsidiary My Supernova D.O.O., is the second-largest operator in the Republic of Serbia, with a market share of 44%.

With only a 3% higher market share, the SBB Group is another significant player in the market. Therefore, if the state-owned company Telekom Serbia, through its collaboration with Telenor, enabled the "suppression of SBB" in the Serbian market and thus "complete domination of content in relation to United Media," it would signify an intention to monopolize the market. The

dismantling of the SBB Group in the Republic of Serbia in favor of Telekom Serbia places Telekom Serbia in a position to control 90% of the content in the market. In simpler terms, the state would control the entire media content market through its company.

The contract signed by Telekom and Telenor, which media outlets operating under the United Group, owned by SBB, report as a "devilish plan," is actually quite common. It's a restrictive agreement similar to what SBB and Telenor had or Telenor and VIP had, which is possible only if their exemption is approved by the competition protection commission.

A similar contract was also held between Telekom and SBB, and this was before the competition protection commission, established by law in 2005, even had the authority to approve the leasing of state company infrastructure to a private firm. Moreover, it was not within the commission's scope to assess how SBB's free use of Telekom's infrastructure until 2003 affected competing firms, many of which SBB later acquired.

Telekom and Telenor must prove to the competition protection commission, which is responsible for granting them an exemption, that their agreement "does not exclude competition in the relevant market or its essential part" (Article 11 of the Law on Protection of Competition) and that it "provides consumers with a fair share of the benefits."

It is not easy to assess the effect on consumers of the Competition Protection Commission's decision to exempt the agreement between Telekom and Telenor from prohibition. However, certain conclusions can be drawn, and they suggest that all agreements aimed at destroying competition can be beneficial to consumers in the short term. However, due to price wars among competitors, there may be price dumping in the market.

5. Conclusion

The need to protect competition is indisputable and the normal development of competition on the market is of great importance for every country. In this paper, we tried to present more closely the theoretical and practical work of the commission for the protection of the currency, as well as the decisions and results that the commission made in restrictive agreements. That's why we start from the conclusion that the protection of competition must be regulated towards a specific goal that should be achieved, and not just by establishing one body that is responsible for all infringements of competition in the Republic of Serbia, as if such a big issue can be solved by one body and that on the territory of the whole States.

Competition protection in Serbia must be widespread and easily accessible to all market participants, especially consumers, and should take place both at the national and local levels. Apart from the far-reaching consequences that infringement of competition can have in the long term, the existence of such a regulation gives the possibility that when a violation of competition is discovered, the worst sanction that follows the perpetrator is to return a certain part of the profit.

The problem of supervision over the protection of competition in Serbia is not sufficiently regulated, and during the many years of practice of the Commission for the Protection of Competition, it has been seen that the sanctions that have been imposed are not always adequate in terms of the damage caused by the violation of competition.

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RESTRIKTIVNI SPORAZUMI KAO OBLIK POVREDE KONKURENCIJE U SRBIJI – TEORIJA I PRAKSA

APSTRAKT: Restriktivni sporazumi su sporazumi između učesnika na tržištu koji za cilj ili posledicu imaju značajno ograničenje, narušavanje ili sprečavanje konkurencije. Cilj ovog rada je da se naučno-stručnoj i poslovno-pravnoj zajednici približi koncept restriktivnih sporazuma kao jednog od oblika povrede konkurencije. U radu su sistematizovane definicije ovog pojma kao i zakoni i uredbe kojima se ovaj pojam bliže reguliše. Zatim će u radu biti prikazan rad Komisije za zaštitu konkurencije, sa prikazom njenih prednosti i mana pri donošenju odluka o sprečavanju monopola. Problemi se uočavaju u odluci Komisije za zaštitu konkurencije na primeru preduzeća na teritoriji Republike Srbije i na osnovu njih se pronalaze rešenje za unapređenje rada same komisije.

Ključne reči: *restriktivni sporazumi, komisija za zaštitu konkurencije, povreda konkurencije.*

References

1. Ezrachi, A. (2010). *EU Competition Law*. Oxford; Portland, Hart Pub
2. Kovacic, W. E., & Hyman, D. A. (2012). Competition Agency Design: What's on the Menu? *European Competition Journal*, *8*(3), pp. 527–538
3. Komisija za zaštitu konkurencuje broj: 6/0-02-764/2018-19 [Commission for the protection of competition number: 6/0-02-764/2018-19]. Downloaded 2023, October 11 from http://www.kzk.gov.rs/odluke/tipovi/sporazumi1
4. Porter, M. (2008). *O konkurenciji* [*Competitive strategies*]. Beograd: Fakultet za ekonomiju, finansije i administraciju
5. Radenković-Jocić, D. (2006). *Privredno pravo – privredno pravo sa osnovama prava* [*Commercial law – commercial law with the basics of law*]. Niš: SKC
6. Regultorno telo za elektronske komunikacije i poštanske usluge [Regulatory Agency for Electronic Communication and Postal Services]. Downloaded 2023, October 15 from https://www.ratel.rs/sr/
7. Telekom Srbija [Telekom Serbia]. Downloaded 2023, October 13 from https://telekomsrbija.com/
8. United Nations (2010). United Nations Conference on Trade and Development "Model Law on Competition" : TD/RBP/CONF, New York; Geneva
9. Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima njihovog plaćanja i uslovima za određivanje tih mera [Regulation on crieria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, the method and terms of their payment and the conditions for determining those measures]. *Službeni glasnik RS*, br. 50/10
10. Zakon o zaštiti konkurencije [Law on Protection of Competition]. *Službeni glasnik RS*, br. 51/09 i br. 95/13
11. Vukadinović, R. D. (2006). *Zakon o zaštiti konkurencije* [*Law on Protection of Competition*]. Beograd: Službeni glasnik

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THE ETIOLOGY OF JUVENILE DELINQUENCY

ABSTRACT: In contemporary societies characterized by advanced information technology and widespread accessibility to various resources, social and psychological factors leading to adverse personal and societal consequences significantly influence minors, providing fertile ground for the emergence of juvenile delinquency. Juvenile delinquency is a serious problem for all contemporary societies, encompassing different forms of deviant behaviors among minors, including criminal acts that trigger legal proceedings and sanctions. Since there are a lot of theories and studies which focus on the distinctions between delinquency and criminality, this paper does not deal with that in greater detail. Instead, it focuses on elucidating juvenile delinquency as a foundational concept for understanding diverse forms of deviant behavior from criminal, psychological, and sociological perspectives. The paper identifies causes of juvenile behavior and early indicators for identifying young offenders. The primary research objective is to explore delinquency prevention strategies tailored to offenders. The examples illustrate the most frequent criminal acts perpetrated by reported, accused, and convicted minors, categorized by gender, age, and type of criminal sanction.

Keywords*: juvenile delinquency, causes of criminal behavior, early indicators for identifying young offenders, delinquency prevention.*

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1. Introduction

Delinquency is certain criminal behaviour which is reflected in the violation of legal norms, and for the violation of which there is the sanction determined by law. Juvenile delinquency is a form of the criminal behaviour which represents a characteristic of the juvenile population. According to the legislation of the Republic of Serbia, more precisely, according to the LJOCA (the Law on the Juvenile Offenders of the Criminal Acts and on the Criminal-Law Protection of the Minors, 2005), as well as according to the Criminal Code (the Criminal Code of the Republic of Serbia, 2005), all individuals up to the age of 18 are considered minors. With the fact that there is a classification in relation to this statement that:

- individuals who have reached the age of 14 and are not 16 years of age are considered minors,
- and individuals who have reached 16 years of age and are not 18 years of age are considered older minors.
- Individuals under the age of 14 are considered children and are not subject to criminal-law liability.

The criminality of young people is treated separately from the criminality of adults, because there is the attitude that the criminal responsibility of the minors is reduced due to their immaturity. We are going to determine the negative indicators in the society that contribute to the increasing prevalence of juvenile delinquency. We are going to describe how it is shown from the side of the determining of the psychological concept of delinquency, because every criminal act first starts in the head, by creating an idea, a possibility for the execution of a criminal act, and then by developing the further stages that precede the completion of the criminal act, which means, the creation of the consequence of the criminal act. In the paper, a statistical and comparative method is applied and the available literature is analyzed in order for us to determine how important the family is as a factor in the development and the encouragement or the restraint of the criminal activity, and to also dtermine to what extent the education, the Internet and the media influence young people, and certainly how to influence young people in order for them not to commit criminal acts and how to direct them to positive things, sports, education and self-improvement, and certainly to consciously choose the people that would contribute to the elevation of the personality of the minors, but in a positive direction.

2. The conceptual determination of the juvenile delinquency

2.1. The criminal-law definition of the term

"The appearance of socially maladjusted behaviour of the special population structure of the inhabitants who are no longer considered children, but in their development they have not reached the stage of full age is a type of an offence which is called the juvenile delinquency" (Bošković & Marković, 2015, p. 315).

As we said in the introduction, there is a special classification of juvenile offenders according to the legislative practice. That division is based on the anatomical and psychological development, which means, on the mental maturity of the certain structure of the juvenile population, that is, the real foundations of the possible alignment of their attitudes towards the acquisition and respect of legal, moral and social norms. Minors generally belong to the most dangerous groups which have tendencies towards delinquent behaviour.

One of the most common delinquent behaviours is certainly the violence. According to the Republic Institute of Statistics of the Republic of Serbia (2023), in 2022, only 132 disciplinary measures were applied to juvenile offenders, of which 78 were the warning and guidance measures, 53 were the measures of enhanced supervision and 1 was the institutional measure. All these measures were imposed for the criminal offence of violent behaviour which is in the scope of the criminal acts against public order and peace.

All the forms of the delinquent behaviour of young people can be classified into four categories:

- The actions destructively directed against the integrity of other individuals,
- The actions destructively directed against the property and material goods of others,
- The withdrawal actions and
- The actions of self-destruction.

Some of the expressions that are in use, and more closely clarify the concept of the juvenile delinquency, are:

- neglectful upbringing,
- uninvolved upbringing,
- endangered upbringing,
- young people with antisocial behaviour,
- moral deviation,
- moral defect,

- behavioural disorder,
- a disorder of habits,
- social maladjustment,
- asocial, antisocial, sociopathological behaviour of young people,
- juvenile delinquency,
- juvenile crime,
- bullying and
- hooliganism (Jašović, 1978, p. 21).

The opinion that the juvenile delinquency represents the violation of legal and moral norms that are valid in the society at a certain time is also accepted. This understanding leads to the perception of the juvenile delinquency through individual and collective morality at a certain age, which represents the significant violation of any social norm (Kostić, 2012, p. 223). We come to the conclusion that, from the criminal-law point of view, the juvenile delinquency comprises the heavier forms of asocial behaviour which reflect in the violation of the legally set limits, by committing criminal acts, the most common of which are violent, and they are: theft, robbery, the intentional provoking of the damage, fire, hooliganism, armed robbery, and we even have murders.

Nowadays, it is increasingly reported from the media that a minor has tried to stab his friend with a knife after a difficult argument, as it is stated by Nova RS (2023), "a minor from Preševo, arrested for the attempted murder, stabbed another minor three times. Five minors took part in the fight, and after the fight, he stabbed the minor with a knife, one stab was in the chest area, and two stabs were in the area of the back. Although less serious physical injuries were found, this act is qualified as the attempted murder for the reason that injuries were inflicted near vital organs."

2.2. The psychological determination of the term

In terms of psychology, "risk factors are the variables which are connected to the large probability of occurrence, severity and longer duration of the juvenile delinquency." Risk factors can be divided into 5 groups:

1. Individual,
2. Family,
3. Factors related to the peer group,
4. School and
5. The wider community.

Still, experts think that in the early life, the most important are individual factors (for example, complications during childbirth, hyperactivity, difficulties related to temperament), and family risk factors (for instance, parents' criminal or antisocial behaviour, substance abuse), (Marković, Mitrović, Ivanović-Kovačević, Šobot & Srdanović, 2008). A family is a universal human community consisting of adults, reproductively capable partners and their offspring.

In addition to that basic reproductive, economic and social role, the family also has a significant psychological, parenting and socializing role. It is an important primary group and one of the most significant agents of socialization (Vidanović, 2006, p. 300). Therefore, when there is the disturbance within the family and the failure to fulfill all the roles which are important for the preservation and socialization of family members, there is the appearance of deviant behaviour, and the inclination towards criminal activities.

Thus, we have the examples from practice where children grew up in broken families, where parents were often under the influence of opiates, drugs or alcohol, where the relationships between parents were broken, and which were accompanied by frequent arguments and fights, which could lead to inadequate socialization of children, and therefore, to their delinquent behaviour. The frequency of psychiatric disorders among delinquents is higher than among non-delinquent and non-clinical youth population.

For example, among delinquents who have been sentenced to institutional sanctions, the rate of mental disorders ranges from 50 to 100%. Among the disorders, behavioural disorders, disorders in the form of opposition and defiance, developmental disorders and hyperkinetic disorder are the most common disorders (Šobot, Ivanović-Kovačević, Marković, Srdanović-Maraš, Mišić-Pavkov, 2010, p. 54).

2.2 The sociological definition of the term

As we saw from the summaries regarding the defining of the term "juvenile delinquency" from a criminal-law and psychological point of view, we have another important defining of the term "juvenile delinquency", and it has to do with the sociological view of this term, and while defining it, we stated that there are three groups of authors in sociology who defined the term "juvenile delinquency".

1. "The first group, that is, the sociologist Davis gave the example where a six-year-old girl was found in the Indian jungle, who, until the day she was found could neither speak nor walk, nor did she

show any signs of intelligence or expression of feelings. The causes of this condition are certainly not hereditary factors, but the conditions in which the girl grew up and was completely separated from the human society and the environment in which her peers lived" (Pešić-Golubović, 1966, p. 320).

2. "The second group of authors, as opposed to emphasizing hereditary factors, started with social factors, that is, the factors of the environment in which an individual forms himself, matures and lives. Namely, the main or the only influence on personality development is the influence of the immediate environment. This theoretical orientation is better known as empirical, it unilaterally defines the factors which determine the deviant and generally delinquent and criminal behaviour of an individual" (Nikolić & Joksić, 2011, p. 15).
3. By observing these two theories, we come to the conclusion that there is the third theory, that is, the so-called mixed theory or convergence theory. The point of this theory is in its premise that the personality development is influenced by both internal (hereditary) and external (social) factors (Nikolić & Joksić, 2011, p. 15).

By observing these three aspects, criminal-law, psychological and sociological aspects, we come to the conclusion that the most common reason for the appearance of delinquency and deviant behaviour among the minors belongs to individual, family factors, and to the unsuccessful socialization of young people, as well as to the influence of external factors and to the influence of the environment in which the minor lives. Certainly, we cannot help but look back at the economic factor that is of great importance nowadays, especially for young people, where there are certain divisions between young people from economically stronger and more stable families, and young people from economically weaker (poorer), destructive families. Between these two divisions there is a big gap and also a burden on young people that because of the desire to fit into the society and get closer to young people from economically "stronger" families, they are ready to commit various misdemeanour and criminal acts, just to be a part of the society. Also, the minors who were ostracized and ridiculed by the environment in some period of their lives will start with even worse negative behaviour in order for them to attract the attention of their friends, but often this negative behaviour does not lead to the attracting of the attention of friends in the direction the minor actually wanted, and then he turns to other people, usually older ones, who, in some period of their life lived the same thing that he is going through.

3. The causes of the juvenile criminal behaviour

In this part, we are going to single out some of the internal factors that are essential for the functioning and socialization of every minor, and we are going to see, according to statistical data which criminal acts most often result from dysfunctional internal factors.

Certainly, internal factors include:

1. the influence of the family,
2. the influence of the environment,
3. intelligence,
4. the Internet and social networks,
5. alcoholism,
6. drug,
7. leisure,
8. hooliganism – supporters' groups,
9. education and
10. material status.

3.1. The influence of the family

One of the most important factors in the socialization of the minors is the influence of the family that is a universal human community that, in addition to the reproductive role, has an important psychological, parental and social role. "The family is an informal agent of a person's socialization, which means that it is only a transmitter of social values that do not depend on it, because the society is the source of the content of the socialization process (Nikolić & Joksić, 2011, p. 46). Certainly, the structural anomalies in the family, especially the disruption of family relationships and the disruption of the family structure influence the causes of delinquency.

"Family criminogenic factors of causation include: the structural disruption of the relationships which manifest themselves in the absence of the family discipline, disturbed relationships between parents and children, and marital relationships, and in the absence of, or in improperly directed family function of upbringing" (Bošković & Marković, 2015, p. 134). The way of raising children is an important condition for children's behaviour in all developmental stages. "Deviance can bring a repressive and abstinent way of upbringing with itself. In the case of the repressive upbringing, or the strict upbringing and punishment, it creates a psychologically disabled, insecure and depressed personality, and in another or the abstinent way of upbringing,

it creates an aggressive personality, without feeling for the limits of what is socially acceptable and normal.

Children from these families move in a vicious circle, where crimes, criminal offences, aggressiveness, feelings of guilt and anxiety come to the fore" (Berger, 1965). However, "the children from the families where there are mutual trust, love and friendly relationships both between parents and between parents and children are more likely to be the adults with positive characteristics (with a sense of independence, self-confidence, balanced, with good social contacts), rather than the children from the families where there are frequent conflicts and disagreements and where there is not enough love as well as care for the child" (Radoman, 2013).

3.2. Education

Education is certainly related to the school as an educational, social institution which has a positive influence on the education and upbringing of people. In most cases, the school is a positive factor, but it can also be seen as a criminogenic factor. Namely, the school carries out certain activities, with the aim of educating young people, through passing and attending certain syllabus. In the implementation of the syllabus, it is possible to encounter various problems that, in conjunction with criminogenic factors, may result in the commission of a criminal act.

"As the cause of the problems in the process of the education, there are: too extensive syllabus, insufficient expertise of the teaching staff, the existence of the group of privileged students due to the status of their parents, conflicts with the teaching staff and other students, inconsistency of the reform process of the school system, as well as the uninteresting school material (Dimovski. 2012, pp. 259–260). In his research, Moyers came to the data that out of 25 juvenile murderers, 76% of them had certain learning problems, and that 86% failed at least one grade (Heckel & Shumaker, 2001, p. 36). However, we also have a specific example from our practice which happened on May 3rd, 2023, where a boy who was a student of the seventh grade and at the age of 13, killed ten people, nine of whom were students, and one man who was a worker at school, a school security guard.

Namely, according to the information transmitted through the media, this boy is an excellent student, has above average intelligence, but he had a problem with being accepted by his surroundings, and with the absence of empathy and emotion. From this most terrible example, we realize that, not only the children who, according to some parameters, are the worst at

school and at performing school activities, are the candidates for embedded criminogenic factors and potential perpetrators of criminal acts. In this example, other internal factors failed. If they had been implemented, this serious accident would very likely have been prevented.

3.3. The Internet and social networks

One more internal factor which increases the volume of juvenile delinquency is the Internet and social networks, in other words, mass communication means. These are: newspapers, television, radio, the Internet, social networks, video games. Namely, scientists believe that there are two mechanisms of learning children's aggressive behaviour. One of them is watching violent television programmes, where young children often imitate what they see on television. So, if they watch the scenes of violence, they will probably behave like that in the future. Older children subconsciously acquire aggressive behaviour, as a way of solving some conflict situations. Thus, the latest research by "Children of Europe on the Internet", conducted in 19 European countries, found that Serbia leads in terms of the number of children under 13 who use social networks. According to the interview of children from Serbia and the writing of the BBC for Serbia (2022), the interests of this population were expressed, in which video games with violent content and social networks such as: Tik Tok, Instagram, Facebook, Twitter or X Network lead. Namely, when the terrible tragedy happened on May 3rd, we had the opportunity to see how children who use their Internet and social opportunities beyond any control, react to the placement of the negative information from the media, so there was the case that children supported violence, glorified the boy who committed this serious murder, and threatened that they would do the same or something similar.

Nowadays, every information which is provided to the citizens about the situation in the state and the society has crossed the normal limits, so we have the reporting on the trial of an organized criminal group that committed serious crimes, in which their testimonies and interrogations, and the testimonies of cooperating witnesses, are transmitted word for word. We also have the examples where certain shows are repeated from period to period, which are a reminder of the time, of the behaviour and customs that prevailed in the 90s, of how "the guys from the streets of that time" behaved, how they spoke, and what jobs they were engaged in. All these factors lead to the fact that children, adolescents take on these personality traits, identify with them in the desire and hope that they will also be accepted by the environment, that they will be

the most popular in the environment, and that other children will envy them for their strength, popularity, "Danger", and that if they have a problem, they will solve it in a much easier (according to them) way, and that is, most often, the solution that includes violence, abuse, threat. According to the Republic Institute of Statistics of the Republic of Serbia (2022). against the minors in 2022, according to the criminal offence that is from the group of Crimes against Life and Body, 3 criminal charges were filed for murder, 70 criminal charges were filed for inflicting grievous bodily harm, 248 criminal charges were filed for causing minor bodily harm, for the participation in the fight there were 33 criminal charges, and 6 criminal charges for the endangerment with a dangerous weapon during a fight and argument. There were 360 criminal charges filed in total.

We are also the witnesses of quite dangerous Internet challenges, where minors filmed themselves performing the challenge. On the website of the Government of Serbia called "Smartly and Safely", some of the most famous Internet challenges are listed, some of them are dangerous and even deadly. In that way we had the opportunity to hear the news that the Interpol warned the Ministry of Internal Affairs of the Republic of Srpska that for March 3rd, 2021, the mass suicide of young people on the Tik Tok social network (N1info, 2021) was announced.

4. The early signs for the recognizing of the young delinquents

According to all the data that we have written about in this paper, which we have obtained through the research of the theoretical part, by the defining of the concept of the juvenile delinquency itself, and of the causes that we have explained as well, we could state that the early signs for the recognizing of the young delinquents cannot be linked only to the criminal-law sphere, but the broader picture must be observed, which means that all the aspects of the criminal behaviour are included. It is important to observe the family circumstances in which the minor lives, what his previous life is like, under whose influence he was, what kind of parents he has, whether they are caring and understanding parents or the parents who stick firmly to the rules and who respect the order. We should define what kind of the environment is the one in which the minor lives, starting with the school, because it is the environment in which the minor spends the most of his time, also by observing the environment in which the minor spends his time besides school, we should find out if he is engaged in any sports activities, if there is the time called leisure. Does he use social networks? What are his interests, favourite

books, favourite TV shows, what genre are they? And of course, what kind of economic-social status does his family have? There are a lot of factors which have to fit into the larger picture.

From the previous research, we have seen that the children from the destructive families, with a weaker economic status, with the intelligence and education that do not correspond to their age, who have difficulties fitting into the society, who have difficulties accepting and understanding feelings and needs of others, and have no empathy, have the highest chances of leaning towards the juvenile delinquency. If he is a child who has a prominent change of behaviour, who tends towards the violence, who responds violently, by fighting and threatening, to any constructive criticism, who is reluctant to talk to adults, who withdraws into a shell, who has a predisposition to depression, who hides, who has friends from dubious circles, where there is the reduced parental control, where parents do not actively participate in the education and upbringing of the child, where children are neglected, abused at some point in their lives, or they experienced some bigger trauma such as the loss of a parent, these children should be treated with special care, because everything which was listed represents, surely, the early warning signs for the recognition of the young offenders.

5. Becoming familiar with the delinquency prevention – directed to offenders

Preventive treatment and preventive action enable us to act timely and remove the causes and conditions that would prevent potential delinquents from committing illegal acts. Certain authors claim that "the crime prevention is the system of measures and activities aimed at eliminating immediate objective and subjective conditions and circumstances which influence the commission of crime" (Aleksić & Milovanović, 1995, p. 234).

"There are general and specific forms of the prevention. General forms include the measures in which all social and state bodies participate, starting with the family, school, social welfare bodies, legislative bodies, etc. Special forms of the prevention include the taking of actions and measures by state authorities which perform the function of suppressing the crime, and they are the police, the public prosecutor's office and the courts" (Nikolić & Joksić, 2011, p. 110). The fight against negative phenomena is very important for the progress of the society. By introducing the minors to positive processes in our society, the moral and social upbringing of young people is achieved, and in this way the awareness of personal responsibility for one's own progress and the progress of the society is developed.

The centers for social work, the prosecutor's office, the courts, and the police play a major role in the process of the prevention and in the development and the progress of the society. When choosing a prevention model, it is necessary to take into account the special characteristics of the social environment in which the minor lives, the family circumstances, the minor's personality, as well as the environment in which the minor spends his time. However, if we observe all these special characteristics related to the minor, to his personality and his environment, it is also necessary to take into account what type of offence it is, which conditions influenced its execution, whether the execution of the act was repeated, and certainly, if there is a possibility that, by applying preventive measures, we can ensure that the minor does not commit the same or similar criminal acts again. As this prevention refers to the perpetrator of the crime himself, the cooperation is possible, even desirable, with the center for social work, which has certain activities that it undertakes in order for it to influence the proper development of the minor and the strengthening of his personal responsibility. In this case, the center for social work appears as a guardianship body when a minor is in conflict with a parent, a guardian, or with the community, when he endangers himself and the environment with his behaviour and when parents do not perform their parental duties. Thus, according to the Center for Social Work of Novi Sad, for the minor perpetrators of criminal offences (that is, for the younger minors between the ages of 14 and 16 and for the older minors between the ages of 16 and 18), a representative of the guardianship authority carries out an assessment of the condition, needs and risks for the child, develops the service plan with the participation of the child and the parents, implements the advisory work, mediates with other institutions, includes the child in certain treatments in order for him to find a solution which is the best for the child, and thus he cooperates with the public prosecutor, that is, the judge for the minors, because of the selection and application of the disciplinary orders and measures, he attends the hearing of the minors in court during the preparatory procedure as well as the sessions of the council for the minors, he takes care of the implementation of the disciplinary orders and measures, etc. (The Child and Youth Protection Service, the Center for Social Work of Novi Sad)

Certainly, the basic form of response to the minors, and in accordance with the LJOCA, is the application of 9 disciplinary measures that are divided into three groups, and they are: the milder disciplinary measures (warning and guidance), more severe disciplinary measures (the measures of increased supervision), and institutional measures.

6. Conclusion

The juvenile delinquency is a big problem both in the world and in our country. The minors are a sensitive group that we, adults, need to shape, so that tomorrow, when they reach adulthood, they will be adults, mature, capable, independent, responsible and working people who can deal with every situation, whether it is negative or positive, and who are ready to be the positive members of the society. As we saw in the paper, the family is the most important factor in the development and the understanding of the minor, for his driving force, the factor that is needed for the minor to start his life in the right and correct direction, to learn to be valuable, and to build his self-confidence, it has to be explained to him that he should not depend on the opinions of his peers and other people, that it is important how he feels, and that there is no shame in showing his feelings. Understanding and separating good from bad behaviour starts in the family, and that is why parents are the key starting points in a child's life. It is certainly important to have a daily conversation with the minors, both in the family and at school, in state institutions, by professionals, and it is necessary to pay special attention to establishing a valuable system for young people. The aim of dealing with juvenile delinquents should be to change them, their attitudes, and to show them that the problems should not be solved by using violence, and that it is not appropriate to use the violence to achieve one's own goals.

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ETIOLOGIJA MALOLETNIČKE DELINKVENCIJE

APSTRAKT: U vreme savremenih društava, gde je savremena informaciona tehnologija na visokom nivou razvijenosti, gde je sve dostupno i poznato, a društveni uzroci i psihološke karakteristike koje proizvode nepovoljne lične i društvene posledice široko rasprostranjene, koje utiču prevashodno na maloletna lica, predstavljaju pogodno tle za razvoj maloletničke

delinkvencije. Maloletnička denkvencija je ozbiljan problem sa kojim se susreću sva savremena društva, i predstavlja najširi pojam koji obuhvata različite pojave devijantnog ponašanja maloletnika. Reč je o maloletnim licima koja su izvršila neko od krivičnih dela, zbog kojih je pokrenut krivični postupak i izrečena neka od sankcija. Postoje mnoge teorije i istraživanja koja se osvrću na razliku između delinkvencije i kriminaliteta, te se u ovom radu tom razlikom nećemo posebno baviti. U ovom radu će biti prikazan sam pojam maloletničke delinkvencije kao polazne tačke za razumevanje svih oblika devijantnog ponašanja, i to sa aspekta krivičnopravnog, psihološkog i sociološkog stanovišta. Utvrđeno je koji su to uzroci kriminalnog ponašanja maloletnika, i koji su to rani znaci za prepoznavanje mladih prestupnika. Cilj istraživanja je svakako i upoznavanje sa prevencijom delinkvencije, koja je usmerena na prestupnike. Iz primera se vidi koja su to najčešća krivična dela koja prijavljeni, optuženi i osuđeni maloletnici izvršavaju, podele prema polu, starosti, i krivičnoj sankciji.

***Ključne reči**: maloletnička delinkvencija, uzroci kriminalnog ponašanja, rani znaci prepoznavanja prestupnika, prevencija delinkvencije.*

References

1. Aleksić Ž., & Milovanović Z., (1995). *Leksikon kriminalistike* [*The Lexicon of Criminology*]. Beograd: Glosarijum
2. Bošković M., & Marković M., (2015*). Kriminologija sa elementima viktimologije* [*The Criminology with the Elements of Victimology*]. Novi Sad: Pravni fakultet za privredu i pravosuđe
3. Berger R., (1965). La famille est-elle un foyr criminogene? *Revue internationale de criminolagie et de police technigue. Geneve*. *77*(2), pp. 510–521
4. Dimovski D. (2012). *Kriminološko određivanje ubistva – doktorska disertacija* [*The Criminological Determination of the Murder – doctoral dissertation*]. Niš: Pravni fakultet
5. Heckel R. Shumaker D. (2001). *Children who Murder: a Psychological Perspective*. Westport: Praeger Publishers
6. Jašović Ž. (1978). *Kriminologija maloletničke delinkvencije* [*The Criminology of Juvenile Delinquency*]. Beograd: naučna knjiga
7. Kostić M. (2012). *Politika suzbijanja kriminaliteta* [*The Crime Prevention Policy*]. Niš: Pravni fakultet, Centar za publikacije
8. Krivični zakonik [Criminal Code]. *Službeni glasnik RS*, br.85/05, 88/05-ispr., 107/05-ispr., 72/09, 111/09, 121/12, 104/013, 108/14, 94/16, i 35/19

9. Marković J., Mitrović D., Ivanović-Kovačević S., Šobot V., & Srdanović J., (2008). *Karakteristike porodične strukture i komunikacija u porodicama sa decom sa poremećajem ponašanja. Aktuelnosti iz neurologije, psihijatrije, i graničnih područja.* [*The Characteristics of the Family Structure and the Communication in the Families with Children with Behaviour Disorder. The News from Neurology, Psychiatry, and Border Areas*]. Novi Sad : Klinički centar Vojvodine, Klinika za psihijatriju
10. Nacionalni kontakt centar za bezbednost dece na internetu. „Pametno i bezbedno" [The National Contact Center for the Children's Safety on the Internet. "Smartly and Safely"]. Vlada Srbije. Downloaded 2023, November 28 from www.pametnoibezbedno.gov.rs
11. Nikolić Z., & Joksić I. (2011). *Maloletnička delinkvencija* [*Juvenile Delinquency*]. Beograd: Institut za kriminološka i sociološka istraživanja
12. Pešić-Golubović Z. (1966). *Problemi savremene teorije ličnosti* [*The Problems of the Contemporary Personality Theory*]. Beograd: Kultura
13. Republički zavod za statistiku Republike Srbije. (2023). *Maloletni učinioci krivičnih dela, 2022.* [*The Minors who Committed Criminal Acts, 2022*]. Downloaded 2023, November 28 from www.stat.gov.rs/sr-latn/oblasti/pravosudje/maloletni-ucinioci-krivicnih-dela
14. Radoman V. (2013). *Porodica pojam, istorijat, psihološki značaj* [*Family Concept, History, Psychological Significance*]. Downloaded 2023, November 20 from http://www.fasper.bg.ac.rs/nastavnici/Radoman_Vesna/predavanja/podrska_porodici/pojam%20porodice.pp
15. Šobot V., Ivanović-Kovačević S., Marković J., Srdanović-Maraš J., & Mišić-Pavkov G. (2010). *Maloletnička delinkvencija* [*Juvenile Delinquency*]. Novi Sad: Klinički centar Vojvodine, Institut za psihijatriju
16. Vidanović I. (2006). *Rečnik socijalnog rada* [*The Dictionary of Social Work*]. Beograd: Tiro-erd
17. Služba za zaštitu dece i omladine. Centar za socijalni rad grada Novog Sada [The Child and Youth Protection Service. The Center for Social Work of Novi Sad]. Downloaded 2023, December 01 from www.csrns.org.rs
18. Istraživanje „Deca Evrope na internetu". Korišćenje interneta i digitalne tehnologije kod dece i mladih u Srbiji [The Research "The Children of Europe on the Internet." The Use of the Internet and Digital Technology among the Children and Young People in Serbia]. (2019). Downloaded 2023, December 01 from www.unicef,org/serbia/medija/centar/vesti/deca-evrope-na-internetu
19. Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica [The Law on Juvenile Offenders and Criminal-Law Protection of the Minors]. *Službeni glasnik RS*. br. 85/05

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STRUCTURE AND RATIO LEGIS OF RETENTION RIGHT IN CONTEMPORARY CIVIL LAW

ABSTRACT: The subject of this work is critical analysis of key segments of the civil law institute of retention, i.e., the right to retain the debtor's property – primarily in positive Serbian law, but also in European regulations with the longest tradition of civil codes. Through the application of various scientific methods, particularly axiological and comparative law, the author analyzes and evaluates the following segments of *Ius retentionis*: definition, content and effect, forms, conditions for establishment, protection, and termination, with demarcation from related institutes. Commenting on various positive legislative solutions, the author also reflects on: the solutions of two previously drafted drafts that embody potential proposals for future Serbian civil law; as well as the model-rule DCFR, which constitutes part of the "soft" law of the EU, with which the domestic solution is useful to harmonize in the future, with the aim of determining the direction of further development of this institute. By providing explanation of some doctrinal and disputed retention issues (such as: permitted object, scope, legal nature), the author provides an authentic picture of this useful, but controversial institute. The author concludes that retention can be described as unfinished real right *sui generis,* an atypical legal real guarantee authentically exercised by self-protection technique, whose *ratio legis* is threefold: social, material and procedural justification. All of this finally outlines the direction of its further affirmation, i.e., the

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strengthening of retention in all segments of the institute, regarding: effect, content, expansion of the object, simplified conditions for establishment, as well as an increasing number of modalities.

Keywords: *security right for claims, right of retention of possession and settlement, structure and ratio legis of Ius retentionis, self-protection.*

1. Introduction

Retention, *(Ius retentionis),* as a legal phenomenon, dates back from the Roman law and represents the right of the plaintiff's creditor to refuse to return the object he retains, until his claim to the plaintiff has been settled (Lorenc, 1966, p. 10). The requirement of fairness (*aequitas*) was used by the praetor as a basis for recognizing general "bad faith objection" to the creditor (accused for returning the object), as some kind of a sanction to the negligent party, who is not returning the property he owes, while simultaneously trying to vindicate it from the creditor, contrary to the principle of good faith – *bona fides* (Pavićević, 2019b).

From the moment of its genesis, and its further evolution, until now, in contemporary civil law systems, the right to retain the debtor's property has been functioning as a developed *sui generis* legal means for protecting the interest of endangered creditor (due, but outstanding claim), which in both doctrine and practice causes numerous perplexities and questionable judicial and doctrinal interpretation. Therefore, the subject of this work is a comprehensive study of the physiognomy of this peculiar institute, viewed from its key elements such as: concept, content and effect, the way it differentiates from another related institutes, conditions for its establishment, modalities, protection and termination. This issue is the subject of the author's axiological analysis – not only in our positive, but also in comparative law, aimed at setting the trace for the institute's further development, by explaining *ratio legis* of this atypical right of real securing claims.

Namely, despite obvious usefulness of this security right (from the viewpoint of creditor's endangered property interests) disputable is that the privilege for one party – is at the same time – direct, seemingly inexplicable violation of another party's right within this obligation relation. From the debtor's perspective, retention is a burden, independently originating from the will of the person on whose property rights it has been constituted, conditioning unequal treatment of the parties, whose relation should have been coordinated. The autonomy of the debtor's will can be unilaterally eliminated by retention,

with legally imposed obligation to sustain the creditor's choice (non-issuing the debtor's property, with potential loss of ownership); while simultaneously, the creditor's autonomy stays intact – he can exercise retention, but does not have to. Secondly, it implies stepping out from the rule according to which protection of violated subjective right might be demanded only by the state authority (the court) and cannot be exercised in person (in a private way), via so called "primitive justice" institute.

This imposes the question: why does such a security right which is limiting, unwanted and coercive for the debtor, even exist, when it endangers some basic postulates of the civil law and dramatically violates the private interest, i.e. the debtor's absolute property right? (Pavićević, 2016, p. 492). We will try to respond to this and other significant, but controversial questions (outreach, legal nature and similar) in this research, by critically analysing retention's physiognomy – in different European-continental type positive law regulations, through legal practice, but also through so far conceived future solutions draft proposals.[1] Additionally, in this work we are reviewing the solution of the so-called "soft" EU law, which domestic regulation *de lege lata and de lege ferenda* is to be usefully harmonized with, with reference to ongoing harmonization with European law on supranational level (DCFR, 2008).[2]

2. Definition of the right of retaining possession

General rules of right of retaining possession in domestic law, contained in the Art. 286 Law on obligations from 1978 in the Chapter III, regulate creditor's rights and effects of the debtor's obligations, while special rules of particular retention modalities are contained in special laws. Original Latin term for this institute is *Ius retentionis,* while the term *retention* is used as a Serbanized foreign word, as well as right of retaining possession as translation

[1] 2011 Draft of Serbian Property Law and other real rights and Preliminary Draft of the Civil code of the Republic of Serbia with 2019 amendments are so far drafted legal proposals for the future Serbian civil law, created by two different commissions. Although they did not become statutory in the meantime, they are significant for the analysis because they are showing potential (but different) directions in which further Serbian civil law should go, which is why their solutions are important to be commented on.

[2] The Draft Common Frame of Reference (DCFR) from 2008 is a model-rule, i.e. a foundation for drafting the planned European civil code and a part of the so-called "soft" EU law, whose nature is not legally binding, but serves more as a recommendation, a guideline for domestic lawmakers.

from Latin, with the same meaning as retention.[3] Retention is a legal real security right authorizing the creditor (retainer) to retain debtor's property, that had not come into his possession against the debtor's will, until the debtor settled due, enforceable claim, and if the debtor failed to do so, to collect the claim at the value of the retained property prior to all unsecured and secured creditors whose lien arose subsequently (Pavićević, 2015a).

It is possible to derive following elements from the aforementioned definition: 1. higher gender concept of retention as – particular real right of possession for securing claim (of appurtenance nature with securing function); and 2. key quality retention differences with regards to the other security rights: 1) *content*: this right authorizes the creditor *to retain* debtor's property already in his possession, but to primarily settle at the value of the property (if the property is movable); 2) *timeline dimension*: it refers to timely unlimited authorization to hold someone else's property (until the final settlement of its secured claim); 3) *object* (broader concept of the object of retention – it can be movable or immovable property); 4) *subject*: creditor in the capacity of a *retainer*; and the debtor, at the same time the owner of the retained property in the capacity of *retention opponent;* 5) *particular technique to exercise the right*: protection of rights by private means – to retain the property the debtor wants to be handed over, as a kind of permitted self-help; and 6) *legal basis* for establishment – law in narrower sense (regardless the debtor's will).

Observed from comparative law point, European regulations know two different ways of standardizing retention: general and casuistic. The general term of this institute is described in the doctrine as the existence of general legal definition of retention, valid for each creditor, in a situation where the required legal conditions are collectively fulfilled. This group of regulations is consisted in: Austrian, German, Swiss, domestic and many others (§ 471 of Austrian Civil Code, 1811; § 273 of German Civil Code, 1896; Art. 895 of Swiss Civil Code, 1907). Contrary to previous, smaller number of European regulations acknowledge retention only in certain cases, within certain institutes, which is referred to as "casuistic" standardization, traditionally including Italian, and until more recently French regulation (Colin & Capitant, 1935; Simler & Delebecque, 1989; Basso, 2010).

[3] In comparative law retention is named as: *droit de retention* (French law); *dirritto di ritenzione* (Italian law); *Retentionsrecht* (Swiss and Austrian law), *Zurückbehaltungsrecht* (German law).

3. Contents of the right of retaining possession

Retention is the right, that, in a qualified form, can be exercised in two stages: 1. A stage when the debtor is under pressure; and 2. A Settlement stage, so the rights and obligations of the parties within their relation can be exercised. It can be divided in two groups (Stanković & Orlić, 1996, p. 265). The first group is consisted of mutual authorizations and obligations of the retainer and retention opponent during the retention stage (a debtor is pressurized to settle his debt), and the second group is consisted of authorizations and obligations in the settlement stage.

The contents of this right in domestic legal solution (via two aforementioned stages) consists two creditor's authorizations – retainer: to retain and settle (Koziol & Welser, 1988, pp. 89–90; Babić, 2005, p. 7; Hiber & Živković, 2015, p. 169). *A. Retaining of object*: The right of possession is legally recognized to the retainer, accompanied by mere factual ownership over the property. This authorization represents a kind of pressure on the debtor to repay the debt, the success of which depends on many circumstances (how much the debtor is in the need of it, what is its value, what are the costs of keeping and maintaining, and so on) and might last until it is repaid (Paunović, 2008, p. 68). The consequence of retainer's legal authorization to possession, is the right to reject debtor's request to return the property, by making an objection in the lawsuit triggered under petitory or possessory suit.

B. Settlement at the value of the retained property implies judicial or extrajudicial sale of the property (only for the claims in economic contract), and it can follow only after the debtor has been informed (art. 898 of Swiss Civil Code, 1907; Art. 289 and 980 of Law on Obligations, 1978). This is the greatest change of this institute's structure in relation to domestic pre-war law, where retention in the civil law was only the means to exert pressure on delinquent debtor, unlike in commercial retention, back then. The only difference that has remained between these two categories of retainers is the way of settlement: by court for non-merchants (court decision on public sale or at the current price); i.e. out-of-court for merchants (after 8 days period from the debtor's notification on intended sale expires). The authorization for settlement comes into force in the second stage of retention exercise and according to domestic and our neighbouring countries rights, the retainer is settled the same way as the pledgee, in order of precedence (Petrić, 2004, p. 39).

The right of *priority* settlement implies the retainer's right to primarily settle at the price acquired by selling previously retained property prior to:

1. all ordinary, unsecured creditors; and 2. all secured creditors over that property whose real rights have emerged later. The order of settlement of several diverse security rights on the same property with multiple pledges has been regulated according to the principle *prior tempore potior iure* (Art. 985 Law on Obligations, 1978). Retention rank is defined according to the moment of acquisition of this right, which is to say – the moment of fulfilling the last condition (cumulatively) determined by the law.

In the stage of exerting the pressure on the debtor, retainer is obliged to: 1. take a good care of the property as a good host, i.e. good businessman (otherwise he will be held accountable for crookback destruction, damage or loss of its value); 2. Refrain from using the property, as retention does not mean one has the right to use someone else's property (only in exceptional cases if the debtor agrees to that); 3. Return the property to the debtor after the debt is repaid (which is the consequence of appurtenance of retention in termination); and to 4. Return the property to the debtor only if he previously provided other suitable means for securing claim (which is authentic, alternative, but "attractive" way for the debtor to get his property back, without settling the claim).

In the second stage of exercising retention right, retainer is obliged to: 1. notify the debtor on the intended property sale in a timely manner (as a concession to the debtor who is opposing to retention, by giving him additional deadline to settle already due claim, aimed at protecting him from easy loss of ownership over property without prior warning); and 2. Refund money surplus that exceeds the value of the settled claim (otherwise retainer would be unjustly enriched).

4. Rights with similar function

In literature, retention is compared to particular Law on obligations institutes – with the objection of unfulfilled contract and compensation, but is justifiably more frequent paralleled with real rights, having the function of real security of claims (Colin & Capitant, 1935; Catala-Franjou, 1967; Pavićević, 2015b).

In most regulations, even in domestic one, retention as the right of real securing is most similar to the pledge – namely pledge of chattels,[4] and in that context it is possible to name both numerous similarities and differences

[4] In Swiss and Austrian regulation, retention is standardized directly like the pledge on movable property, as its most similar real right.

between these two institutes. Key similarities with the pledge of chattels are: – possession is essential for both rights; – same rules are applied when it comes to settlement; – principles of appurtenance, indivisibility, specialty, primacy (Planojević, 2012, p. 421). On the other side, there are important *differences such as*: – possession with retention must be immediate; – retention does not contain the right to follow, and terminates with the loss of possession; – retention is possible only for due claim (except when the debtor is insolvent); – retention is not voluntary securing; – retention cannot be transferred to another person; – retention is possible with immovable property, and so on.

Unlike other rights from the group of real guarantees, retention does not originate on the basis of the obligee's will, but is directly based on the law; and for the sake of that (because it occurs against the will of the person whose property is affected), it is not standardized as a fully formed real right (it lacks the right to follow), but as an *incomplete, truncated* real right. The way it is exercised is peculiar – as a self-protection, being the main trait by which it can be easily distinguished from contractual right of lien. On the other side, retention also resembles a legal pledge, which especially refers to commercial retention. Nevertheless, retention is a general rule, which can secure any claim with certain legal qualities, unlike classic legal pledge, protecting itemized determined claim, and exactly determined subjects, making retention the right with equally intense effect, but a wider spectrum.

5. Types of the right of retaining possession

Based on different division criteria, literature knows following types of retention: 1. legal and contractual, according to legal grounds on which retention originates – legal retention is a rule in comparative law, and contractual is most often unregulated case (Stipković, 1972, p. 287). 2. General and special, according to criterion whether in concrete regulation, that type represents a rule or an exception. Thus, a general rule in domestic law – Art. 286 of Law on Obligations, special types of retention are for example: retention of conscientious holder of someone else's object, a caterer and irregular deposit (Art. 38 par. 7 of the Law on the Basics of Property Relations, 1980; Art. 728 and 722 of Law on Obligations, 1978). 3. Civil and commercial retention, and a criterion for division is: turnover to which these modalities are applied, i.e. according to the occupation of creditor-retainer. 4. Regular and emergency retention, according to the criterion of due claim, as a condition for establishing retention – regular retention implies due claim, which is the rule, while by emergency retention, undue claim due

to debtor's insolvency can be exceptionally provided (Art. 286 par. 2 Law on Obligations, 1978). 5. Ordinary and qualified, according to the content of authorities granted to the retainer (only retention of the debtor's property, as in German civil law for example; or retention plus settlement as in domestic solution). Besides the abovementioned common ones, the doctrine divides them into: retention in the narrower or broader sense; classic retention and the so-called *pignus gordianum*; related to real right and obligation; judicial or extrajudicial; material and formal; and materialized and dematerialized (specific for French law).

6. Conditions for acquiring the right of retaining possession

Positive (objective) general conditions for retention emergence are: 1. a claim with proper characteristics; 2. a thing with appropriate properties, as an object; and 3. possession of object (Gucunja, 1979). Except for these positive conditions, one negative subjective condition is also necessary, namely that: retention in concrete case is not excluded by creditor's will (creditor may or may not be a retainer).

1. *Claim with certain qualities, as a condition.* Secured claim is the main right and the reason for constituting retention as appurtenance. In order to be suitable for securing by retention, the claim (of any kind), must cumulatively possess following qualities: – to exist; – to be valid; – to be sufficiently determined or at least determinable; – due (with the exception of emergency, if the debtor is insolvent); – enforceable[5] (therefore, not natural; but can be statute-barred, provided that the statute of limitations occurred only after retention over the object had been established); ultimately, the claim has to be – outstanding, for retention's constitution to be meaningful.
2. *An object with certain qualities, as a condition.* The object of retention right in comparative law can be a physical thing (as a rule), but in a broader sense as well – performance (as an exception).[6] When it comes to the kinds of things being the objects of retention in comparative law, *movable property* is originally the object of retention in all regulations, while different rules are applied to immovable property. Namely, all movable property could be divided in three

[5] This condition is logical, because what the creditor cannot get through court (by pending litigation), he cannot also get indirectly out-of-court (by retention).

[6] Performance as a permitted object of retention right can be found in German and Swiss civil law.

groups: 1. one that *cannot be the object of retention* (things within legal transaction, e.g. personal documents, human body parts, and so on; then, collection of things and future things; 2. one that *can be* the object of retention, *with some extra conditions* (generic things, such as money, on condition they are individualized); securities, on condition that they are materialized; expendable and replaceable things, on condition that they are not perishable); and 3. movable property that *can* always be the object of retention – in regulations of the so-called commercial concept of the object of retention, additional condition for retention is monetization of a movable object. Domestic solution of qualified retention (with the right of settlement), refers to a commercial object, i.e. negotiable movable thing and cash, while personal documents, correspondence and similar documents are not eligible for retention, as they cannot be monetized.

With regards to immovable property as a potential object of retention in comparative law, two basic models of regulations can be distinguished: 1. the one prohibiting retention over immovable property as a general rule (e.g. Swiss solution); and 2. the one permitting retention over immovable property (domestic solution).[7] It is possible to divide the second mentioned model into the following subtypes: a) regulations that standardize *content-unlimited* retention of immovable property (retention of somebody else's immovable property, with the possibility of settlement at its value), and b) the ones with *content-limited* retention of immovable property (retention only, without authorization for settlement from retained immovable property).

The formulation of the object of retention in domestic law, as well as in regulations in our neighbouring states which we share our legal tradition with, is unequally interpreted in the doctrine and in judicial practice, notwithstanding the clarity of language expression: "*any debtor's thing*", designating each thing as permitted object of retention – not only movable, but also immovable property (Verdict of Supreme court of Bosnia and Herzegovina, no. Rev. – 402/80. dated 10. 30. 1980; A Supreme court decision of the Republic of Croatia no. Rev-933/00 dated 01. 29. 2002; A verdict of District court in Valjevo,

[7] Majority of European regulations in its legal formulations does not limit the object of retention to a movable property (e.g. in domestic, in our neighbouring countries regulation, in German and French regulation, and so on).

no. 1619/2003 dated 12. 05. 2003).[8] Thus, there are interpretations according to which the retention of immovable property is prohibited in domestic law or is content-limited (reduced to the means of pressure, without the right to settle). However, a valid standard literally enables equal retention of both categories of things, namely qualified ones, since the immovable property is, in principle, fulfilling general condition – that it is a thing, even though the technique of primary settlement of retainer is considered problematic (Hiber & Živković, 2015, p. 169).

Finally, in the context of *ownership of things* as an object of retention in domestic right the retained thing must be owned by the debtor from the main obligation relation (retention opponent). In case it is debtor's property, it might be retained when it is co-owned, but not when it is jointly owned. On the other hand, in comparative law, the owner of the retained thing can exceptionally be: a third party (not being a debtor), which is not legally regulated in our country; and creditor-retainer (which is not in the spirit of domestic institute, whose primary goal is to settle at the value of the retained property).

3. *Possession.* The immediate possession of things is necessary for establishing retention in domestic law, which can be acquired prior or after due claim by debtor's voluntary handing over. Speaking about qualities of retainer's possession, conscientiousness is not a legal condition for establishing retention according to the general rule (except for retention of conscientious holder who has lost the claim dispute). In regards to the legality of possession, retention is excluded if certain contracts are a legal basis for handing over the thing to the creditor, meaning for the things given to: 1) safekeeping, i.e. depositing (exceptions are catering and irregular deposit) and 2) borrowing, only if the debtor requests those things to be returned – for the reason of protecting his trust and because those are contracts with charities (Art. 287 par. 1 of Law on Obligations, 1978).

Speaking about the way of obtaining possession, retention is excluded if possession is flawed, i.e. obtained by force, or misuse of trust (Art. 287 par. 2 of Law on Obligations, 1978). Regarding potential types of possession, under formulation: "creditor…in whose hands is some debtor's thing"… domestic

[8] The inconsistency of judicial practice on this issue is evident from the following court decisions: A verdict of Supreme court of Bosnia and Herzegovina, Rev. – 402/80. from 10. 30. 1980., *Bulletin of the Supreme court of BiH.,* 1/81, p. 5; Supreme court decision of the Republic of Croatia number Rev-933/00 from 29. January 2002.; Verdict of District Court in Valjevo no. 1619/2003 from 12. 05. 2003., *ParagrafLex.*

law implies immediate possession of the retained thing,[9] while in some foreign regulations, such as German, the mediate possession is also permitted (Westermann, 1960, p. 165).

7. Retention effect

Retention has three directions effect: 1. *depending on the property sphere of the creditor itself, retainer* – manifests as the right of temporary delay of owed performance; 2. *towards debtor-retention opponent* – as the way of exerting pressure on unduly debtor to settle the secured claim, with the possibility of primary settlement of the retainer at the value of the retained thing, the same way the pledgee is settled. Out of bankruptcy, it means settlement prior to all ordinary creditors, and all other real secured creditors over that thing, whose lien arose later, under the principle *prior tempore potior iure* (Art 200 of Law on Execution and Security, 2015). In bankruptcy, retention operates as *secured right*, enabling the holder to put out the retained thing from bankruptcy estate and guarantees the right to primary, separate settlement (Art. 49 par. 1 of Bankruptcy Law, 2008). 3. Eventually, retention *effects third parties* – with concrete right over the retained thing, but also effects all third parties in general.

Retention as a "power to block" the request to the debtor to hand over his property, implies the possibility of contested right of retention for third parties, making retainer the holder of a "factual privilege". In that way the private retainer's interest is ahead of all other conflicted private interests. Nevertheless, as being already stated, retainer has no right to follow, but only the right to reject to hand over the property to any person who demands it from the holder. This kind of effect on third parties surely overcomes the scopes of effect *inter partes,* and neither can be considered as effect *erga omnes* in a true sense of the word, as a significant limitation.

8. Protection and termination of the right of retaining possession

The right of retention is an "unfinished" real right, because it does not contain the right to follow for retainer, so its holder lacks real legal protection,

[9] The existing formulation in the Article 286 of Domestic Law on Obligations: "*creditor…in whose hands is some debtor's thing...*" in our estimate is not optimal and should be precised by future law.

unlike a lien (which is provided with a special petitionary action, *vindicatio pignoris*). Retention can only be protected by possession lawsuits, through the courts, and application of possession self-help, out-of-court, in legally provisioned deadlines (Art. 77 of Law on the Basics of Property Relations). Only with permanent and unwanted loss of possession of retained thing, the possibility for retention terminates, because it is the right strictly related to the possession of things (Oftinger, 1952; Tuor & Schnyder, 1979).

Reasons to terminate retention can be: 1. *immediate* (termination of retention along with the termination of a claim as the main right) and 2. *indirect* (regardless the existence of claim). As an appurtenance, retention terminates indirectly by the rule, with the termination of secured claim as the main right, namely: 1. *fulfilment* of claim, as the basic and the most common way; and 2. *all other ways,* whose effect is the same as the fulfilment of claim[10] (Kovačević-Kuštrimović & Lazić, 2009, p. 248).

Regardless the fate of its secured claim, retention terminates when: 1. other suitable securing (on debtor's request) is obtained; 2. property is destroyed; 3. involuntary (and permanent) loss of possession of things took place; 4. creditor unilaterally wavered retention right (voluntary returned the retained thing to the owner); 5. ownership over the retained (movable) thing is renounced by its owner (debtor); 6. consolidation happened, i.e. owner's personality and retainer are unified in one person.

9. Draft proposals de lege ferenda

1. *Two domestic draft proposals.* In Preliminary draft of the Serbian Civil Code (Art. 429–432), the retention right is identically regulated as in the current solution – is it systematically located within the Law of obligations institutes. However, by solution of previously prepared 2011 Draft of Property law and other real rights (Art. 522–527), retention right is for the first time systematically and formally integrated into real rights of secured claim, as real legal guarantee containing authorization for exerting pressure and primary settlement with *erga omnes* effect*,* as the right most similar to the pledge of movable property. This solution is more elaborate and more innovative than Preliminary draft solution, since it has changed the

[10] Those other ways to terminate the claim, are: giving instead of fulfilling, compensation, debt relief, novation, confusion, time lapse, debtor's death in case of obligations *intuitu personae*, impossibility of fulfilment, etc.

physiognomy of the institute, including resolution of some significant, doctrinally disputed issues. Concretely, this text specifies: retention's legal nature (real right, not the obligation, relative right); effect (*erga omnes,* not *inter partes*); permitted object for establishment (exclusively referring to movable property, as a significant specification), etc., which we consider as advantage.

2. *Solution of Draft Common Frame of Reference for European private law (DCFR). Right of retention of possession* is located in the Chapter IX – *Proprietary security rights in movable assets* namely as: an atypical real means of securing claim over movable property (DCFR, Subsection 4, IX. – 2:114). The effect of this right is determined as: "amplified to the classical *iura in re aliena"* (Von Bar et al., 2009, p. 5448; Faber, 2014, p. 27). It is of appurtenance and of possession right character; with the content of retaining debtor's property, and settling the retainer at its value; the grounds for its origin is a law or a contract; specifically effecting third parties – as a super privilege (Faber & Lurger, 2011). It provides primary settlement to the holder even before holders of other real guarantees over that thing, that had existed prior to retention, disrupting the order of settlement, confirmed by the rule *prior tempore potior iure* (Pavićević, 2019a).

10. Conclusion

During its evolution, retention in European regulations has passed through different developmental phases – from Roman obligation objection of dolus, whose fate depended on the praetor's estimate in each single case; from prohibition in former Austrian regulation (before novels), then in casuistically recognized exceptions,[11] until contemporary general institutionalized subjective civil law. In that regard, continuity of one general idea of fairness protection and equivalence of mutual giving between the parties is obvious, reflected by the most common *ratio* of retention starting from Roman, up to the modern concept.

The fact that retention has been continuously existing in various European-continental (but also in Anglo-American regulations, in a specific form of *lien* institute), indicates its irreplaceability with any other means of

[11] In pre-war law of the Kingdom of Serbia, retention was only casuistically recognized, on the level of exception: Art. 471 ABGB from 1811, § 220 Civil Code for the Kingdom of Serbia, from 1844; and § 101 General Property Code for Montenegro from 1888.

securing claim. Retention is the right of securing *sui generis*, which does not have its counterpart, due to which, logically, earns a special place in civil law domestic system. Answer to the initial question in this research – what justifies its existence lies in the fact that *general interests* are those which prevail over private debtor's interest, who is genuinely affected by exercising retention right, but are simultaneously overlapping with creditor's private interest – who gets "rewarded" by such legal outcome.

Despite negative and unwanted consequences caused by retention in property-right debtor's sphere, it also has a couple of various justifications, that legitimize and make its existence purpose-serving in contemporary conditions, namely: 1) *material law* (it is a security right that has been acquired independently of the debtor's will, in order to protect creditor's interest, endangered by unsettled claims by unruly debtor,; it ensures reestablishment of disrupted balance, protecting not only individual's personal interest in obligation relation, but also a general one, embodied by the principles of fairness, conscientiousness and honesty); 2) *procedural* (implemented as an objection in a litigation, contributing to the rationalisation of time and costs, resulting in conducting only one, instead of two litigations, in accordance to procedural economy principles); and 3) *general social* – embodied by protection of rights through permitted self-help, and not through autocracy (Pavićević, 2016, p. 493).

The issue of retention's legal nature is justifiably considered in the doctrine as the most disputed one. Contemporary retention is the institute that contains certain similarities with legal power, in which subjective civil law elements are more dominant (Bandrac & Crocq, 1995, p. 933; Laurent Aynes, 1995, p. 452; Paunović, 2008, p. 65).

This is the right with legal effect that prevails relation *inter partes*, on real right of (self)securing claim, not on the law of obligations,[12] that mostly resembles a lien (possessory and legal lien). It mainly contains real right elements, in its complex structure, in precise words – retention is incomplete (truncated) real right, as it is deprived of the right to follow, but systematically belongs to the real right within civil law system, concretely to the group of real guarantees (Stojanović, 1998, p. 7; Stanković & Vodinelić, 2007, p. 108; Planojević, 2012, p. 4). Due to all these characteristics, one should not be surprised by the fact that direction of development of this "super-privilege", justifiably named by the French doctrine: "the queen of real security" – is strengthening in all the segments of the institute being: legally recognized

[12] This is the solution of Swiss Civil Code (which is one of the most modern European civil codes).

contents, effect, expansion of permitted object, mitigated conditions for its establishment and increasing number of emerging modalities.

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STRUKTURA I RATIO LEGIS RETENCIJE U SAVREMENOM GRAĐANSKOM PRAVU

APSTRAKT: Predmet kritičke analize u ovom radu su ključni segmenti građanskopravnog instituta retencije, tj. prava zadržavanja dužnikove stvari – prevashodno u pozitivnoj domaćoj, kao i evropskim regulativama sa najdužom tradicijom građanskih zakonika. Autor u radu primenom različitih naučnih metoda, a prevashodno aksiološkog i uporednopravnog, analizira i ocenjuje sledeće segmente instituta *Ius retentionis*: definiciju, sadržinu i dejstvo, oblike, uslove za zasnivanje, zaštitu i prestanak, uz razgraničenje od srodnih instituta. Komentarišući različita zakonodavna rešenja *de lege lata*, autor čini osvrt i na: rešenja dva dosad izrađena nacrta koji oličavaju potencijalne predloge budućeg srpskog građanskog prava (Nacrt zakonika o svojini iz 2011. godine i Prednacrt Građanskog zakonika Srbije); kao i na – model-pravilo DCFR, koje čini deo „mekog" prava EU, sa kojim je domaće rešenje korisno u budućnosti harmonizovati – a sa ciljem utvrđivanja smera daljeg razvoja ovog instituta. Uz argumentovano objašnjenje pojedinih doktrinarno i praktično spornih pitanja o retenciji (poput: dozvoljenog objekta, domašaja, pravne prirode i sl.), autor daje autentično obrazloženje značaja ovog korisnog, ali i kontroverznog instituta. Autor zaključuje da je retencija nedovršeno („krnje") stvarno pravo *sui generis,* atipična zakonska realna garancija koja se autentično realizuje tehnikom samozaštite, a čiji je *ratio legis* trostruk: opštedruštveno, materijalno i procesno opravdanje. Sve ovo konačno trasira smer njene dalje afirmacije, tj. jačanje retencije u svim segmentima instituta i to u pogledu: dejstva, sadržine, proširenja objekta, olakšanih uslova za zasnivanje, kao i sve većeg broja modaliteta.

Ključne reči: *realno obezbeđenje potraživanja, pravo zadržavanja i namirenja, struktura i ratio legis retencije, samozaštita.*

References

1. Austrijski građanski zakonik, Allgemeines bürgerliches Gesetzbuch from 1811. [Austrian Civil Code]. Downloaded 2023, December 10 from https://www.trans-lex.org/602100/_/austrian-civil-code/
2. Babić, I. (2005). Založno pravo (Stvarnopravno obezbeđenje potraživanja) [Lien (Real security of claims)]. In: Radovanov, A. (ured.) *Primena novih zakona u oblasti privrede, pravosuđa i radnih odnosa* [*Application of new laws in the field of economy, justice and labor relations*] (pp. 4–45). Novi Sad: Privredna akademija: Pravo: Udruženje pravnika Vojvodine
3. Bandrac, M. & Crocq P. (1995). Droit de retention, Nature juridique, Qualification de sûreté ou de garantie [Right of retaining possession, Legal nature, Qualification of security right]. *Revue trimestrielle de droit civil* (4), pp. 931–934
4. Basso, P. (2010). *Il diritto di ritenzione.* Milano: Giuffré Editore
5. Catala-Franjou, N. (1967). De la nature juridique du droit de retention [The legal nature of the right of retention]. *Revue trimestrielle de droit civil* (65), Paris, pp. 9–44
6. Colin, A. & Capitant, H. (1935). *Cours élémentaire de droit civil français II* [*Basic course in French Civil law II*]. Paris: Dalloz
7. Faber, W. & Lurger, B. (2011). National reports on the Transfer of Movables in Europe, Downloaded 2023, December 5 from https://www.weltbild.at/media/txt/pdf/9783866539099-028901971-national-reports-on-the-transfer-of.pdf.
8. Faber, W. (2014). Proprietary Security Rights in Movables – European Developments: A Spotlight Approach to BOOK IX, DCFR, *Juridica International, Law Review*, (2), pp. 27–36
9. Gucunja, J. (1979). Uslovi za vršenje prava zadržavanja prema Zakonu o obligacionim odnosima [Conditions for exercising the right of retention according to the Law on Obligations]. *Glasnik Advokatske komore Vojvodine,* (9–10), pp. 17–31
10. Hiber, D. & Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja* [*Securing and consolidation of claims*]. Beograd: Pravni fakultet u Beogradu
11. Kovačević-Kuštrimović, R. & Lazić, M. (2009). *Stvarno pravo* [*Real law*]. Niš: Punta
12. Koziol, H. & Welser, R. (1988). *Gründriss des bürgerlichen Rechts* [*Outline of civil law*]. Wien: Manz

13. Laurent Aynes M. (1995). *Les sûretés – la publicité foncière* [*Securities – land advertising*]. Paris: Dalloz
14. Lorenc, R. (1966). *Pravo zadržanja (ius retentionis) – doktorska disertacija* [*Right of retaining possession – doctoral thesis*]. Beograd: Pravni fakultet Univerziteta u Beogradu.
15. Nacrt Zakonika o svojini i drugim stvarnim pravima Srbije iz 2011. Downloaded 2023, December 17 from https://ius.bg.ac.rs/wp-content/uploads/2020/10/NACRT-ZAKONIKA-O-SVOJINI.pdf.
16. Nemački građanski zakonik, *Bürgerliches Gesetzbuch* [German Civil Code] from 1896. Downloaded 2023, December 10 from https://www.gesetze-im-internet.de/englisch_bgb/.
17. Oftinger, K. (1952). *Kommentar zum Schweizerichen Zivilgesetzbuch* [*Commentary on the Swiss Civil Code*]. Zürich: Schulthess.
18. Opšti imovinski zakonik za Knjaževinu Crnu Goru iz 1888. [General Property Code for the Principality of Montenegro]. Downloaded 2024, January 5 from https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/crna-gora/Opsti_imovinski_zakonik_CG.pdf
19. Paunović, S. (2008). Pravo zadržavanja – retencije (Ius retentionis) [Right of retention (Ius retentionis)]. *Sudska praksa*, (27), pp. 64–69
20. Pavićević, A. (2015). Pojam retencije u domaćem i uporednom pravu [The concept of retention in domestic and comparative law]. *Pravni život*, *64*(10), pp. 505–521
21. Pavićević, A. (2015). Osvrt na sličnosti i razlike između zemljišnog duga i prava retencije [The review of similarities and differences between the land debt and right of retention]. *Pravo, teorija i praksa*, *32*(7/9), pp. 25–36. Downloaded 2024, January 10 from https://scindeks-clanci.ceon.rs/data/pdf/0352-3713/2015/0352-37131509025P.pdf
22. Pavićević, A. (2016). *Pravo retencije – doktorska disertacija* [*Right of retaining possession – doctoral thesis*]. Kragujevac: Univerzitet u Kragujevcu, Pravni fakultet Downloaded 2023, December 20 from http://phaidrakg.kg.ac.rs/o:842
23. Pavićević, A. (2019). Retencija u srpskom pravu i u Nacrtu okvirnih pravila u oblasti privatnog prava [Right of Retaining Possession in Serbian Law and in the Draft Common Frame of Reference]. *Zbornik radova Pravnog fakulteta, Novi Sad*, *53*(4), pp. 1287–1301 doi: 10.5937/zrpfins53-23746.
24. Pavićević, A. (2019). Similarities and differences between Ius Retentionis and related Institutes of Roman Law, *Ius Romanum,* (2), pp. 764–783.

Downloaded 2023, December 5 from http://iusromanum.info/wp-content/uploads/2020/10/IUS_ROMANUM_2019_2_OFFICIAL.pdf
25. Petrić, S. (2004). Institut prava retencije u hrvatskom i usporednom pravu [Institute of Retention in Croatian and Comparative Law]. Split: Pravni fakultet Sveučilišta u Splitu
26. Planojević, N. (2012). *Stvarno pravo u praksi* [*Real law in practice*]. Kragujevac: Univerzitet u Kragujevcu, Pravni fakultet
27. Prednacrt Građanskog zakonika Republike Srbije [Preliminary Draft of the Civil Code of the Republic of Serbia]. Downloaded 2023, December 18 from https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html
28. Simler, P. & Delebecque, P. (1989). *Droit civil: Les suretes; La publicite fonciére,* [*Civil law: Security Rights, Land advertising*]. Paris: Dalloz
29. Srpski građanski zakonik iz 1844. [Serbian Civil Code from 1844]. Downloaded 2024, January 5 from https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf
30. Stanković, O. & Orlić, M. (1996). *Stvarno pravo* [*Real law*]. Beograd: Nomos
31. Stanković, O. & Vodinelić, V. (2007). *Uvod u građansko pravo* [*Introduction to Civil Law*]. Beograd: Nomos
32. Stipković, Z. (1972). Pravo retencije i neki slični instituti [The right of retention and some similar institutes]. *Zbornik Pravnog fakulteta u Zagrebu*, *22*(3), pp. 285–297
33. Stojanović, D. (1998). *Stvarno pravo* [*Real law*]. Kragujevac: Pravni fakultet
34. Švajcarski građanski zakonik, Schweizerisches Zivilgesetzbuch from 1907. [Swiss Civil Code]. Downloaded 2023, December 9 from https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en
35. Tuor, P. & Schnyder, B. (1979). *Das Schweizerische Zivilgesetzbuch* [*Swiss Civil Code*]. Zürich: Schulthess
36. Von Bar, C. et al. (2009). *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR*), Full Edition, Vol. 5. Downloaded 2023, December 6 from: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf
37. Westermann, H. (1960). *Sachenrecht*. [*Real law*]. Karlsruhe: C. F. Müller
38. Zakon o izvršenju i obezbeđenju [Law on Execution and Security]. *Službeni glasnik RS*, br. 106/15, 106/16 – autentično tumačenje, 113/17

– autentično tumačenje, 54/19, 9/20 – autentično tumačenje i 10/23 – dr. zakon
39. Zakon o obligacionim odnosima [Law on Obligations]. *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 – Ustavna povelja i *Službeni glasnik RS*, br. 18/20
40. Zakon o osnovama svojinskopravnih odnosa [Law on the Basics of Property Relations]. *Službeni list SFRJ*, br. 6/80 i 36/90, *Službeni list SRJ*, br. 29/96 i *Službeni glasnik RS,* br. 115/05 – dr. zakon
41. Zakon o stečaju [Bankruptcy Law]. *Službeni glasnik RS*, br. 104/09, 99/11 – dr. zakon, 71/12 – odluka US, 83/14, 113/17, 44/18 i 95/18

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DEPRIVATION OF PARENTAL RIGHTS AND "THE BEST INTEREST OF THE CHILD"

ABSTRACT: In contemporary times, children are recognized as holders of their own rights, which is a departure from past practices. The state delegates authority to participate in and intervene in family matters through designated guardianship bodies and local courts. The deprivation of parental rights carries significant and enduring consequences for both parents and children, with the entire process governed by the legal principle of the best interest of the child. Unfortunately, the "best interest of the child," while a widely used concept, lacks precise legal definition, potentially leading to adverse effects on the child's psychological and physical development.

Keywords: *child, exercise of parental rights, state intervention, deprivation of parental rights.*

1. Introduction

"Family today can be defined as the 'basic unit of society, in which spouses, children, unmarried partners, and other relatives, living in a community of life, create natural and legally established conditions for the development and well-being of all family members, especially children" (Šarkić & Počuča, 2014, p. 60).

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The development of the nuclear family, prevalent today, was initiated by the first family cooperatives. Influenced by economic and social factors, family cooperatives formed the first family communities.

Child upbringing represents the autonomy of parental will. Child rearing is a long-term process that is reflected in the agreement of parents on everyday as well as significant issues of parental rights. The legitimacy of interference and limitation of parental autonomy in decision-making is only drawn by the state regarding significant parental rights issues. Decisions that entail or may have lasting consequences on the psycho-physical development, survival, education, or health of the child imply decisions on matters that significantly affect the child's life. The key balance between these two seemingly opposing sides, with the same goal – the best interest of the child and society, is represented by the family.

"Parenting as the primary basis for exercising parental rights in various legal and life situations is an expression of the idea of the necessity for both parents to care for the child, regardless of their mutual relationship."[1] The reason for this is the necessity of the influence and participation of both parents for the normal and proper psycho-physical development of the child.

2. The journey from child as "property" to child as holder of rights

"The history of parent-child relationships indicates that, starting from Roman law, they were based on the authority of the father over the children. The paternal power of the head of the family over the household, expressed as patria potestas, encompassed unlimited parental authority over the person and property of the child" (Vujović, 2019).

Children did not have the status of rights holders but rather of property, where they could be sold, abused, and even killed during their lifetime.

Under *patriam potestatem*, one obtained authority through birth, adrogation, adoption, and legitimization.

"Throughout much of Roman history, the Roman family was large, consisting of all individuals under the authority of the pater familias: sons, daughters, daughters-in-law, grandchildren, great-grandchildren, adopted and

[1] In contemporary societies, there is a tendency towards creating conditions where the marital union can always be dissolved if one or both spouses feel dissatisfaction, mutual intolerance, discomfort, and similar issues within that union. For more detailed insights into this topic, please refer Počuča M. (2011). p. 252.

adrogated individuals" (Malenica, 2007, pp. 86–87). "During the Principate era, rulers sometimes compelled fathers to emancipate sons who were mistreated, and there were cases where fathers were punished with death for killing their sons" (Stanojević, 1989, p. 131). The justification for this method and the relationship between father and child/authority and property was long derived from principles of natural law.

"The institution of paternal authority outlived the slaveholding social order, as it can be encountered, for example, in medieval German customary law under the name mundium" (Draškić, 2007, p. 155). With the development of all branches of law and the significant social changes that followed, the first limitations."

"The patriarchal model of organizing family relations has been definitively abandoned, establishing equality between women and men in acquiring and exercising all family rights, and children born outside of marriage are granted all rights guaranteed by the legal system to children born within marriage" (Draškić, 2007, p. 156.).

The family structure and the functions performed by the family as a social unit have changed over time. Such changes have also reflected on the legislative approach and the manner of regulating family relations on paternal powers gradually began to emerge.

"The family is finally understood as a social institution that performs important social tasks – population reproduction, raising and educating children, which has necessarily shifted the focus from paternal authority over the child to the duty of both parents to care for the child and provide protection" (Vujović, 2019, p. 25).

The first documents proclaiming children's rights emerged in the 20th century, but the establishment of a distinct body of law within international human rights law undoubtedly had the most impact with the adoption and almost universal ratification of the Convention on the Rights of the Child.[2]

According to the Convention, a child is defined as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (Article 1 of the Convention on the Rights of the Child).

"The Convention clearly opposes the traditional understanding of the child as a being in development, immature, incompetent, and incomplete future adult" (Vranješević, 2006, p. 4). In all activities concerning children,

[2] The Law on Ratification of the United Nations Convention on the Rights of the Child, Belgrade, December 18, 1990.

according to the Convention on the Rights of the Child, the guiding principle is the best interests of the child.

"At the core of the Convention lies the idea of the child as a subject, an active participant in their own development process, as opposed to the view of the child as an object, i.e., a passive recipient of care and protection from adults" (Vranješević, 2006, p. 4).

3. The term "parental legal relationship"

"The family is commonly defined as the basic social unit and one of the most complex, oldest, and earliest social groups. The family is a universal community consisting of adult, reproductive-capable partners and their offspring" (Počuča, 2010, p. 49).

The parental relationship differs from other legal relationships due to the specificity of the subjects involved in that relationship. Its establishment and termination fall under the category of family status. The concept of parental rights comprises the liabilities and rights of parents towards their children, as well as the rights and liabilities of children towards their parents. Previously, the term "parental rights" was characterized by a restrictive interpretation referring only to the relationship between parents and children. Nowadays, there is a broader concept adopted known as the "parental legal relationship," which includes not only the parent-child relationship but also all other legal powers arising from this relationship. Although the term "parental rights" remains unchanged, the legislator has explicitly defined the meaning of parental rights in this context and subsequently imposed sanctions for their non-realization (Vujović, 2019). When parents live together in marital or non-marital cohabitation, parental rights are exercised jointly and by mutual agreement.

Parental rights, in terms of content, encompass all rights and responsibilities belonging to both father and mother jointly, such as child care and upbringing, representation, guardianship, child maintenance, and management of their property, all in accordance with the best interests of the child.

Child rights are defined as personal and independent rights. Unlike them, parental rights and duties towards children have a derivative character, as they arise and are exercised in those cases when necessary for the child's adequate psycho-physical development and best interests.

In relation to this, the manner and quality of fulfilling the duties of exercising parental rights affect the possibility of losing or continuing to

exercise these rights. According to the Family Law, the guardianship of the child (Article 68) includes: custody, raising, upbringing, education, representation, maintenance, and management and disposal of the child's property.

"When it comes to the status and rights of the child, especially the obligations of parents towards children, whether born within or outside of marriage, the equalization of their status is often explicitly mentioned in constitutions. This can be either through a general and principled constitutional provision or with a specification of the content encompassing the obligations of parents towards children" (Pajvančić, 2012, p. 205).

In addition to parents, certain institutions also have this obligation towards children as rights holders. "This is done to ensure the most complete realization of all child rights and the most efficient protection of the rights for which the child is the titular holder" (Ponjavić & Vlašković, 2019, p. 285).

4. Deprivation of parental rights

In contemporary law, parents who abuse or seriously neglect their duties outlined in parental rights, or who irresponsibly exercise their rights or duties outlined in parental rights, (Article 81–82 of the Family Law) may face measures that involve depriving them of the authority to exercise parental rights.

"The extent of deprivation can vary – a parent may be deprived of the legal capacity to exercise all rights and duties outlined in parental rights, or only of certain rights they have towards the child (partial deprivation of parental rights)" (Vujović, 2019, p. 50).

5. Complete deprivation of parental rights

A parent who abuses rights or grossly neglects duties outlined in parental rights may be completely deprived of parental rights. The second and third paragraphs of the same article provide examples of the abuse of rights and gross neglect of duties from the content of parental rights (Article 81 of the Family Law). In paragraphs 2 and 3 of Article 81 of the Family Law, the legislator has listed examples of gross neglect, such as physical or emotional abuse of the child, forced labour contrary to the child's morals, health, and education, and similar circumstances.

"Child abuse is manifested in the behaviour of an adult, which can be expressed in neglecting the child, both in terms of their physical needs

(providing food, clothing, and hygiene) and emotional well-being (lack of love); it also includes neglecting the child's educational development (preventing the child from attending school). Child abuse can be divided into different types: physical, sexual, and psychological abuse" (Počuča, 2010, p. 52).

According to research conducted in recent years, unfortunately, there is frequent violence against children in our country. The various forms and environments in which violence against children occurs attest to the current relevance and prevalence of the issue itself.

"Children in the Republic of Serbia are daily exposed to various forms of direct, interpersonal violence such as physical, sexual, and emotional abuse, neglect, or less direct but complex forms, such as structural violence manifested in different ways – for example, through various forms of discrimination (child marriage, child labour, or other types of exploitation) or through multiple social exclusions" (The Strategy for the Prevention and Protection of Children from Violence for the period from 2020 to 2023).

The specificity of the first form of deprivation of parental rights – abuse of parental rights – lies in the intentional and conscious actions taken, whereas the second form – gross neglect of duties outlined in parental rights – manifests through neglect and inaction.

6. Partial deprivation of parental rights

Partial deprivation of parental rights is linked to the legal standard of "negligent exercise of rights and duties." "Since there is no precise definition, the court fills the content of this legal standard with its own value judgment" (Vujović, 2019, p. 68).

Article 82 of the same law stipulates that a parent who negligently exercises rights or duties outlined in parental rights may be partially deprived of parental rights. The court decision on partial deprivation of parental rights may deprive the parent of one or more rights and duties outlined in parental rights, except for the duty to provide maintenance for the child. A parent exercising parental rights may be deprived of the right and duty to care for, raise, educate, represent the child, as well as manage and dispose of the child's property. A parent not exercising parental rights may be deprived of the right to maintain personal relationships with the child and the right to make decisions that significantly affect the child's life.

"During partial deprivation, a parent can be deprived of one or more rights, but not the right to child maintenance" (Delibašić, 2006). "The European

Court of Human Rights ("ECtHR") unanimously concluded that there was no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights in the case of Wunderlich v. Germany."[3]

In the specific case of partial deprivation of parental rights, it involves the removal of four children from their family home for a period of three weeks. The decision of the German authorities for partial deprivation of parental rights was based on the endangerment of the best interests of the children due to the persistent refusal of the parents to send their children to school.

"Citing Article 8, the applicants complained about the decision of the German authorities to partially deprive them of parental rights and assign them to the Youth Welfare Office (German: Jugendamt)." [4]

Mandatory school attendance in terms of adequate psychophysical, emotional, and social aspects of children in society is a relevant reason for depriving parental rights, according to the ECtHR decision. Prolonged isolation of children would create the potential for endangering proper development and the best interests of the child.

"The court must at all times ensure that it achieves an optimal balance between, on the one hand, safeguarding the best interests of the child, and on the other hand, ensuring that the parental capacity of the parents is preserved to the greatest extent possible. Depending on the circumstances of the case, the court is authorized to partially deprive a parent who is not exercising parental rights of the right to decide on issues that significantly affect the child's life, if they negligently exercise rights or duties outlined in parental rights" (Draškić, 2012, p. 368)

In its reasoning, the Supreme Court of Serbia stated:[5] "In the view of the Supreme Court, the court is not authorized to decide on the place of residence of a minor child instead of the parents or to make decisions that replace joint decisions of parents on essential issues related to exercising parental rights – which significantly affect the life of the minor child, such as the child's education, major medical procedures on the child, changing the child's place of residence, or disposal of the child's high-value property. Preventive and

[3] Petition no. 18925/15 dated January 10.2019, https://www.rolplatform.org/delimicno-lisavanje-roditeljskog-prava-zbog-odbijanja-roditelja-da-njihova-deca-pohadjaju-skolu/

[4] Petition no. 18925/15 dated January 10.2019, https://www.rolplatform.org/delimicno-lisavanje-roditeljskog-prava-zbog-odbijanja-roditelja-da-njihova-deca-pohadjaju-skolu/

[5] Review no. 2557/06 dated March 1, 2007, by which the Supreme Court of Cassation (VKS) annulled the judgment of the District Court in Sremska Mitrovica Gž.1146/06 dated June 14, 2006, and the judgment of the Municipal Court in Sremska Mitrovica P. 914/05 dated March 17, 2006, and remanded the case to the first-instance court for retrial. For more details, refer to Draškić M. (2012).

corrective oversight of the exercise of parental rights is performed by the guardianship authority and not the court."[6] "Resorting to partial deprivation of parental rights of a parent who is not exercising parental rights solely because they refuse to consent to a change in the child's place of residence is certainly problematic" (Palačković & Ćorac, 2022 p. 748).

The most serious question raised in this paper is the concept in which the Law governing enforcement and security issues stipulates that the enforcement of a decision will be entrusted to the guardianship authority by taking the child away, and whether such a method of execution can be in the best interest of the child.

It seems that this provision is contrary to the concept of the judicial enforcement procedure. By using the provisions of the Law on Enforcement and Security, the court delegates one of the most severe family law sanctions, the procedure of taking away a child, from itself.

"For decades, the concept implied that taking a child away, due to its specificity, falls exclusively under the jurisdiction of the court, and that this procedure cannot even be performed by auxiliary court organs (such as court bailiffs or expert associates, court assistants, etc.), but exclusively by a judge."

"The courts in the Republic of Serbia, as mentioned earlier, almost without exception take the stance that in case of a dispute between parents regarding a change of a child's residence, the parent who does not exercise parental rights "must" be partially – concerning the right to change residence – deprived of parental rights in order to allow the other parent to independently make a decision about it" (Palačković & Ćorac, 2022 p. 749).

"It is undisputed that by refusing to grant consent for the change of residence, particularly for relocation abroad, by a parent who does not exercise parental rights, a dispute arises from family law relations, which, according to the provisions of the Law on Civil Procedure, falls within the jurisdiction of regular courts. It is also undisputed that both the procedure for protecting the child's rights and the procedure for exercising parental rights are separate civil procedures. (Palačković & Ćorac, 2022, p. 749 p.749) The procedure for protecting the child's rights is subsidiary to all other procedures provided for in the Family Law" (Poznić & Rakić Vodinelić, 2015, p. 563).

[6] Perhaps the most important task of the guardianship authority in the enforcement judicial process is defined in the section of the Enforcement and Security Law that regulates the execution of decisions in family relations. This section is divided into three groups of articles: child custody transfer, enforcement for maintaining personal relations with the child, and enforcement for protection against family violence, protection of the child's rights, and other decisions related to family relations. More details can be found in Počuča, M., & Šarkić, N. (2020).

7. Procedure for deprivation of parental rights

The procedure for deprivation of parental rights is a judicial procedure regulated by the Civil Procedure Act, which begins with a lawsuit as the initial action. In disputes for the deprivation of parental rights, the competent court is the basic court, while the territorial jurisdiction is determined based on the residence or domicile of the parent. "A child aged 15 and capable of discernment may decide alone with which parent they will live, maintain personal relationships, which high school to attend, and consent to medical procedures" (Article 60 of the Family Law). "Due attention is paid to the child's opinion when deciding on the manner of exercising parental rights, considering their age and needs, although the child's opinion is not the sole determining factor in making decisions about the exercise of parental rights."[7]

"Additionally, a child under the age of 14 can independently undertake minor legal transactions, legally beneficial, and neutral. Finally, a child who has entered into an employment relationship can independently manage and dispose of their earnings, as well as property acquired through work" (Ponjavić & Vlašković, 2019, p. 296).

In proceedings related to family relationships, the principle of urgency of the procedure is prescribed, as well as the investigative principle, and above all, there is a duty of the court to be guided by the best interests of the child in disputes for the protection of the child's rights and in disputes concerning the exercise or deprivation of parental rights (Article 204–206 of the Family Law).

"The best interests of the child are a legal standard assessed based on a series of objective and subjective circumstances, which, among other things, implies that a loving, trusting, mutually respectful, affectionate, mutually supportive, and personality-and dignity-respecting relationship is developed and nurtured between the minor child and the non-custodial parent. Such a relationship between parents and children also serves the interest of the entire social community, which is why everyone is obliged to be guided by this interest in all activities concerning the child."[8]

Preserving the relationship between a child and their parents, as well as addressing the reasons and consequences that led to the deprivation of parental rights, is of great importance both for the individual and for society as a whole. The state responds legitimately through adequate measures of preventive and

[7] The judgment of the Supreme Court of Cassation Rev2340/21 dated June 3, 2021.

[8] Rev 3712/2022, p. 4 https://www.vrh.sud.rs/sr-lat/rev-37122022-31411.

corrective supervision to preserve the family. However, if in a specific case, through the use of evidence during the proceedings, it is determined that depriving parental rights is necessary, its legitimacy is reflected in the legal standard of the best interest of the child.

8. Conclusion

Parents always make all decisions related to the life of their child. The aim of both theory and practice is to ensure a happy childhood for the child with both parents, which is extremely important for their development and progress. However, when there is complete negligence in exercising rights or duties, abuse of rights, or gross neglect of duties by the parents, the solution is deprivation of parental rights. In this regard, the legislator has envisaged a number of institutes regulating and influencing the state's role in this phase of parent-child relationships, which previously enjoyed complete autonomy.

In addition to the circumstances presented by the parents as parties in the proceedings, there are also those determined by the court through the application of the investigative principle. Although the court takes into account all circumstances when making a decision on deprivation of parental rights, the best interest of the child is a legal standard insufficiently defined in our legislation. The very fact of insufficient definition and criteria carries the possibility of incorrect application and interpretation, which in the case of adequate psychophysical and emotional development of the child leaves lasting consequences.

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LIŠENJE RODITELJSKOG PRAVA I STANDARD „NAJBOLJI INTERES DETETA“

APSTRAKT: Od potpune vlasti nad detetom danas je dete titular prava. Država legitimnost učešća i mešanja u porodične odnose delegira i ostvaruje putem organa starateljstva, funkcionalnih i mesno nadležnih sudova. Lišenje roditeljskog prava stvara trajne posledice na roditelje i

decu, gde se ceo postupak sprovodi kroz pravni standard najbolji interes deteta. Nažalost, "najbolji interes deteta" kao jedan zakonski neprecizan pojam stvara mogućnost prouzrokovanja najtežih posledice za dalji pshiofizički razvoj deteta.

Ključne reči: *dete, vršenje roditeljskog prava, intervencija države, lišenje roditeljskog prava.*

References

1. Delibašić, Z. (2006.) Prava deteta u sporu za zaštitu prava deteta i u sporu za vršenje odnosno lišenje roditeljskog prava [Children's Rights in Proceedings for Protection of Children's Rights and in Proceedings for Exercise or Deprivation of Parental Rights]. *Bilten Okružnog suda u Beogradu*, *74*, pp. 20–30
2. Draškić, M. (2012). Obavezno lišenje roditeljskog prava prilikom odlučivanja suda o vršenju roditeljskog prava – sporno stanovište Vrhovnog suda Srbije [Mandatory Deprivation of Parental Rights when Deciding on the Exercise of Parental Rights – a Controversial View of the Supreme Court of Serbia]. *Anali Pravnog fakulteta u Beogradu*, *60*(1), pp. 366–381
3. Draškić, M. (2020). *Porodično pravo i prava deteta* [*Family Law and Children's Rights*]. Beograd: Pravni fakultet
4. Golić, D., & Logarušić, D. (2023.) Children's Rights – International Standards and Their Implementation in the Legal System of the Republic of Serbia. *Pravo – teorija i praksa*, *40*(2), pp. 34–56
5. Jović, O. (2012). Pravo deteta na kontakt sa roditeljem sa kojim ne živi [Child's Right to Contact with the Parent with whom They Do Not Live]. In: Marković, G. (prir.), *Prava djeteta i ravnopravnost polova – između normativnog i stvarnog – zbornik radova* [*Children's rights and gender equality – between normative and real – collection of papers*]. (pp. 102–115). Pale – Istočno Sarajevo: Pravni fakultet Univerziteta u Istočnom Sarajevu
6. Malenica, A. (2004). Rimska pravna tradicija u Srpskom pravu [Roman legal tradition in Serbian law]. *Zbornik radova Pravnog fakulteta u Novom Sadu*, *38*(2), pp. 117-139
7. Novaković, U. (2020). *Preseljenje deteta i roditelja koji vrši roditeljsko pravo – relocation slučajevi* [*Child and Parent Relocation Cases*]. Beograd: Pravni fakultet Univerziteta u Beogradu

8. Pajvančić, M. (2012). Posebna prava deteta u komparativnoj ustavnosti [Special Children's Rights in Comparative Constitutional Law] In: Marković, G. (prir.), *Prava djeteta i ravnopravnost polova – između normativnog i stvarnog – zbornik radova* [*Children's rights and gender equality – between normative and real – collection of papers*]. (pp. 203–212). Pale – Istočno Sarajevo : Pravni fakultet Univerziteta u Istočnom Sarajevu
9. Palačković, D. & Ćorac, S. (2022). Ne saglasnost roditelja o promeni prebivališta deteta,[Parent's disagreement to changing the child's permanent residence: Procedural dilemmas and possible solutions*]. Anali Pravnog Fakulteta u Beogradu*, *70*(3), pp. 745–763
10. Počuča, M. & Šarkić, N. (2011). *Porodično pravo i porodičnopravna zaštita* [*Family law and family law protection*]. Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
11. Počuča, M. (2010). Nasilje u porodici [Family violence]. *Pravo – teorija i praksa*, *27*(9–10), pp. 49–61
12. Počuča, M. (2011). Razvod braka u uporednom pravu [Dissolution of marriage in comparative law]. *Strani pravni život*, (2), pp. 267–283
13. Ponjavić, Z., & Vlašković, V. (2019). *Porodično parvo* [*Family Law*]. Beograd: Službeni glasnik
14. Porodični zakon [Family Law]. *Službeni glasnik RS*, br. 18/05, 72/11 – dr. zakon i 6/15
15. Poznić, B., & Rakić Vodinelić, V. (2015). *Građansko procesno pravo* [*Civil Procedure Law*]. Beograd: Pravni fakultet Univerziteta Union i Službeni glasnik
16. Šarkić, N. & Počuča, M. (2020). Ovlašćenja organa starateljstva prema izmenama i dopunama zakona o izvršenju[Authority of Guardianship Authorities According to Amendments and Supplements to the Enforcement Law]. *Pravo – teorija i praksa*, *37*(1), pp. 21–33.
17. Stanojević, O. (1989). *Rimsko pravo* [*Roman Law*]. Beograd: Službeni glasnik
18. Strategija za prevenciju i zaštitu dece od nasilja za period od 2020. do 2023. godine [Strategy for the Prevention and Protection of Children from Violence for the Period 2020–2023]. *Službeni glasnik RS*, br. 80/20
19. Vlašković, V. (2014). *Načelo najboljeg interesa deteta u porodičnom pravu – doktorska disertacija* [*Best interes of child in Family law – doctoral thesis*]. Kragujevac: Pravni fakultet
20. Vranješević, J. (2008). *Razvojne kompetencije kao osnova prava deteta na participaciju – doktorska disertacija* [*Developmental competencies as*

the basis of the child's right to participation – doctoral thesis]. Beograd: Univerzitet u Beogradu, Filozofski fakultet
21. Vujović, R. (2019). *Lišenje roditeljskog prava* [*Deprivation of Parental Rights*]. Beograd: Službeni glasnik
22. Zakon o ratifikaciji Konvencije ujedinjenih nacija o pravima deteta [Law on the Ratification of the United Nations Convention on the Rights of the Child]. *Službeni list SFRJ – Međunarodni ugovori*, br. 15/90 i *Službeni list SRJ – Međunarodni ugovori*, br. 4/96 i 2/97

REGISTAR
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THE REGISTER
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EXPLANATION: The first number refers to the issue number, the second number indicates the page in that issue of the journal, while the third number stands for the year of publication.

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THE INSTRUCTION TO THE AUTHORS
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The Editorial board of the "Law – theory and practice" journal asks the authors to write their manuscripts to be published according to the following instruction.

In the journal there are being published the pieces of work referring to legal, economic and social disciplines. Namely, in the journal there are published: scientific articles, surveys, reviews, the analyses of regulations, the comments on the court decisions, students' papers and other additional texts. The manuscripts are to be sent in English through OJS online platform.(http://casopis.pravni-fakultet.edu.rs/index.php/ltp/about/submissions)

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General information about writing the manuscript:

The manuscript should be written in the Microsoft Word text processor, Times New Roman font of the value of 12 pt, in Latin letters, with a spacing of 1,5. One is supposed to use the value of 25 mm for all margins. The scope of the manuscript can be of 12 pages at most in an A4 format including a text, tables, pictures, graphs, literature and other additional material.

The title-page of the paper should contain the title of the paper work in English, and below it there should be written the same thing in Serbian of the font size of 14 pt, Bold. After that, there is a spacing and, then, there should be stated the author's name and surname, his/her title, affiliation (the work place **with obligatory stating the name of the country too)**, an e-mail address and contact phone, the font size of 12 pt. If the author has his/her ORCID number, it should be stated immediately after his/her name and surname. For more information about ORCID iD, please visit https://orcid.org and after the registration insert your ORCID iD number.

Then, there is a spacing, and after that there should be written an abstract of the length to 250 words in English, and in Serbian below it of

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Key words are stated after one line of a spacing below the abstract written in English, and, also, in Serbian below it. There should maximally be five of them, of the font size of 12 pt, Italic. Then comes a two-line spacing and the text of the paper work.

Manuscript should be written concisely and intelligibly in a logical order which, according to the rule, includes the following: an introduction, the working out of the topic and a conclusion. The letters of the basic text should be of the font size of 12 pt. Titles and subtitles in the text are supposed to be of the font size of 12 pt, Bold.

The name and number of illustrations (diagrams, photographs, graphs) should be represented in the middle of the line above the illustration, the font size of 12 pt. The name and number of a table should also be represented in the middle of the line above the table, the font size of 12 pt. Below the illustration or table, it is obligatory the source to be stated ("Source:…"), the font size of 10 pt. If the results of the author's research are represented in the form of a graph or table, there should be stated as a source below the illustration or table: Author's research.

If the author of the text writes a thank-you note or states the project references within which the text has been written and the like, he/she does it in a special section – Acknowledgments, which, according to the ordinal number, comes after the Conclusion, and before the author's affiliation and the summery of the text written in Serbian.

Use APA style to write references (The hand book for publishing, the American Psychological Association) as an international standard for writing references. Remarks, namely footnotes, may contain additional explanations or comments referring to the text. Footnotes are written in a font size of 10 pt.

Within the APA style, the used source is stated **inside the text,** in the way the elements (the author, the year of publication, the page number where the quoted part is) are indicated in parentheses immediately before the full stop and separated by a comma.

Citing rules inside the manuscript

If the cited source has been written by one author:

When a sentence contains the author's name and his/her cited words, then, after the author's name, there is stated the year of publication of the cited text in the brackets. At the end of the sentence, it is necessary the page number on which there is a sentence from the cited text to be indicated:

There is an example:

As Besermenji (2007) points out, "it is especially present the problem of the air pollution, which is explicitly a consequence of an extremely low level of ecological awareness as well as the lack of professional education in the field of environment" (p. 496).

In the case when the author is not mentioned in the sentence, his/her surname, the year of publication of the paper work and the page number in the paper should be put in brackets and at the end of the sentence.

There is an example:

Also, "rural tourism is expected to act as one of the tools for sustainable rural development" (Ivolga, 2014, p. 331).

A note: If a citation has been made by paraphrasing or resuming, then it is not necessary the page number to be stated.

There is an example:

The environment represents everything that surrounds us, namely everything with which a human's living and producing activity is either directly or indirectly connected (Hamidović, 2012).

If the cited source has been written by two authors:

There should be put "and" or "&" between the authors' surnames depending on the fact whether the authors are mentioned in the sentence or not.

There are some examples:

Chaudhry and Gupta (2010) state that as many as 75% of the world's poor live in the rural areas and more than one-third of rural areas are in arid and semiarid regions.

Hence, "rural development is considered as a complex mesh of networks in which resources are mobilized and in which the control of the process consists of interplay between local and external forces" (Papić & Bogdanov, 2015, p. 1080).

If the cited source has been written by three to five authors:

When such a source is cited for the first time, all the authors should be stated:

There is an example:

(Cvijanović, Matijašević Obradović & Škorić, 2017)

When this source is later cited again, there should be stated only the first author's surname and added "et al.".

There is an example:

(Cvijanović et al., 2017)

If the cited source has been written by six and more authors:

By the first and all further citations, the first author's surname should be stated and added "et al.".

There is an example:

(Savić et al., 2010)

If the author of the cited text is an organization:

In the case when the author of the cited text is an organization, then its name should be put in brackets as an author of the text. If the organization has a known abbreviated name, then one has to write this abbreviated name in a square bracket, after the full name, in the first citation, while any further citation should be marked by this abbreviated name.

There is an example:

the first citation: (Serbian Academy of Sciences and Arts [SASA], 2014)

further citations: (SASA, 2014)

If the authors of the cited text have the same surname:

In the case of the authors having the same surname, there should be used the initials of their names in order to avoid the confusion.

There is an example:

The attitude made by D. Savić (2017) is presented...

If there are cited several references of the same author from the same year:

If there are two or more references cited from the same author and from the same year, then, after the fact of the year, there have to be added the marks "a", "b", etc.

There is an example:
(Dragojlović, 2018a)
(Dragojlović, 2018b)

If there exist two or more texts in one citation:

When one cites two or more texts in one citation, then, in brackets, there are stated the surnames of the authors of original texts in the order of publication and they are separated by a semicolon.

There is an example:

Obviously, living and working in rural areas has always been connected with specific material and symbolical relations to nature (Milbourne, 2003; Castree & Braun, 2006).

If there is cited the newspaper article with the stated author:

There is an example:

In *NS uživo* there was published (Dragojlović, 2021) that...

In the list of the used references, this reference should be written in the following way: Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.

If there is cited the newspaper article without the author being stated:

There is an example:

Published in *Politika* (2012)

In the list of the used references, this reference should be written in the following way: *Politika*. (2012). Straževica gotova za dva meseca [Straževica finished in two months]. February 1.

If the personal correspondence is cited:

The example: According to Nikolić's claims (2020),

In the list of the used references, this reference should be written in the following way: Nikolić, A. (2020). Pismo autoru [Letter to the author], 21. novembar.

If it is cited the text in press, at the end of the reference, and before the full stop, it is obligatory to add "in press".

If the court decisions, the praxis of the European court for human rights, and other sources from both national and international court praxis are cited, a reference should contain as much precise facts as it is possible: the type and number of the decision, the date when it was made, the publication where it was published.

The example in the text: (The Decision of the Superior court in Belgrade – A special department K.Po1 no. 276/10 from 26th January 2012)

The example in the text: (Borodin v Russia, par. 166.)

A note:

The sources from the court praxis **are not stated** in the list of the used literature. A full reference from the court praxis **is stated** in a footnote. While citing the European court for human rights praxis there should be indicated the number of the submitted petition.

There is an example of a reference in a footnote:

As it is stated in the Decision of the Superior court in Belgrade – A special department K.Po1 no. 276/10 from 26th January 2012 Intermex (2012). Bilten Višeg suda u Beogradu [Bulletin of the High Court in Belgrade], 87, p. 47.

Borodin v Russia, the petition no. 41867/04, the sentence ECHR, 6. 2. 2013, par. 166.

If the laws and other regulations are cited:

When citing a legal text or other regulation, in the text there should be stated a full name of law or other regulation including the year when the law or regulation was enforced.

There is an example:

(The Code of criminal procedure, 2011)

(The Book of rules on the content of the decision on conducting the procedure of public procurement made by several consignees, 2015)

This rule is also applied to laws and other regulations not being in force any longer.

There is an example:

(The Criminal law act of Republic of Serbia, 1977)

When citing the international regulations, in the text it is enough to state a shortened name of the document together with its number and year when it was accepted.

There is an example:

(Regulation No. 1052/2013) ili (Directive 2013/32)

If there is cited the text of the unknown year of publication or the unknown author's paper work:

In the paper work, such a kind of text should be cited in the way that in the place of the year there is stated "n.d." (non dated).

There is an example:

Their significance for parliamentary processes is unmeasureable (Ostrogorski, n.d.).

If there is a paper work of the unknown author used in a manuscript, there will be stated the title of the paper being cited together with the year, if it is known.

There is an example:

All these are confirmed by a mixed, objective-subjective theory (The elements of a criminal offense, 1986, p. 13).

An important note:

The cited sources (regardless the fact in which language they have been written) are not supposed to be translated into English, except the title of the paper work (publications, a legal act or bylaw) which should be translated and written in a square bracket.

The example:

1.) Matijašević Obradović, J. (2017). Značaj zaštite životne sredine za razvoj ekoturizma u Srbiji [The importance of environmental protection for the development of ecotourism in Serbia]. *Agroekonomika*, *46* (75), pp. 21-30.

2.) Jovašević, D. (2017). *Krivična dela ubistva* [*Murder as a Crime*]. Beograd: Institut za kriminološka i sociološka istraživanja.

3.) Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, no. 102/10

4.) Zakon o turizmu [The Law on Tourism]. *Službeni glasnik RS*, no. 17/19

At the end of each text, in the section under the name of "**References**", it is obligatory to state the list of all cited references according to an alphabetical order. The titles in foreign languages beginning with definite or indefinite articles ("a", "the", "Die", ...) are ordered as if the article does not exist. The reference list should only include the works that have been published or accepted for publication.

The editorial board insists on the references of recent date, which will specially be taken into account while choosing the manuscripts to be published. At the end of each reference, it is obligatory to state a DOI number, if the cited reference contains it. If the cited reference does not contain a DOI number, the author can refer to the URL address.

The example of the stated reference together with a DOI number:

Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2

The example of the stated reference together with an URL address:

Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf

The examples of the used references being stated at the end of the paper work:

References:

1. Agencija za privredne registre. *Privredna društva* [*Companies*]. Downloaded 2020, January 10 from https://www.apr.gov.rs/o-agenciji.1902.html
2. *California Secretary of State*. Downloaded 2020, December 15 from https://www.sos.ca.gov/business-programs/
3. Dukić-Mijatović, M. (2011). Korporativno upravljanje i kompanijsko pravo Republike Srbije [Corporate Governance and Companies Business Law of the Republic of Serbia]. *Pravo -teorija i praksa*, *28* (1-3), pp. 15-22.
4. Dragojlović, J., & Bingulac, N. (2019). *Penologija između teorije i prakse* [*Penology between theory and practice*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
5. Dragojlović, J. (2021). Anketirani Novosađani za vraćanje smrtne kazne u Ustav [Novi Sad residents surveyed to return the death penalty to the Constitution]. *NS uživo*, January 22.
6. Gopalsamy, N. (2016). *A Guide to Corporate Governance*. New Delhi: New Age International.
7. Jesover, F., & Kirkpatrick, G. (2005). The Revised OECD Principles of Corporate Governance and their Relevance to Non-OECD Countries. *Corporate Governance: An International Review*, *13* (2), pp. 127-136. DOI: 10.1111/j.1467-8683.2005.00412.x
8. Milosavljević, B. (2015). Pravni okvir i praksa primene posebnih postupaka i mera za tajno prikupljanje podataka u Republici Srbiji [Legal framework and practice of application of special procedures and measures for secret data collection in the Republic of Serbia]. In: Petrović, P. (ured.), *Posebne mere tajnog prikupljanja podataka: između zakona i sudske prakse* [*Special measures for secret data collection: between law and case law*] (pp. 5-33). Beograd: Beogradski centar za bezbednosnu politiku. Downloaded 2021, January 15 from https://bezbednost.org/wp-content/uploads/2020/06/posebne_mere_tajnog_prikupljanja_podataka_-_vodic_.pdf
9. Počuča M., & Matijašević Obradović, J. (2018). The Importance of Evidence Collection in Procedures for Criminal Acts in the Field of Economic Crime in Serbia. In: Meško, G., et al. (eds.), *Criminal Justice and Security in Central and Eastern Europe: From Common Sense to Evidence-based Policy-making* (pp. 671-681). Maribor: Faculty of

Criminal Justice and Security and University of Maribor Press. DOI: 10.18690/978-961-286-174-2
10. Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013.
11. Škorić, S. (2016). *Uticaj poslovnog imena privrednog društva na njegovo poslovanje – doktorska disertacija* [*The influence of the business name of the company on its business – doctoral thesis*]. Novi Sad: Pravni fakultet za privredu i pravosuđe u Novom Sadu.
12. Škulić, M. (2007). *Krivično procesno pravo* [*Criminal Procedural Law*]. Beograd: Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.
13. Uredba o ekološkoj mreži Vlade Republike Srbije [The Ecological Network Decree of the Government of the Republic of Serbia]. *Službeni glasnik RS*, br. 102/10.
14. Veljković, N. (2017*). Indikatori održivog razvoja: Srbija i svet* [*Sustainable development indicators: Serbia and the world*]. Downloaded 2017, October 22 from http://indicator.sepa.gov.rs/o-indikatori
15. Zakonik o krivičnom postupku [Criminal Procedure Code]. *Službeni glasnik RS,* no. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19.