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Articles

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Implications of Russia's war in Ukraine for Belarus and its society: what exactly is written in the EU documents?

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Abstract: This article provides an assessment of the relevant EU documents pertinent to the restrictive measures against Lukashenka's regime after the 2020 fraudulent presidential elections in Belarus and since the beginning of 2022 Russia's aggression against Ukraine. The text identifies relevant concepts and provides their contextual analysis vis-à-vis their linkage with Belarus in general, its society and Lukashenka's regime. The article reveals that Belarus did not become a priority of the EU and its pre-war critical engagement policy failed to contribute to the development of a unified EU-wide vocabulary addressing the Belarusian case. With the start of the war, it was internationalised and placed within a binarity "victim of aggression – (co-) aggressor" with little evidence of an unequivocal shift towards a primary focus on the contextual interpretation of the domestic developments in Belarus.

Keywords: Belarus, war in Ukraine, EU sanctions, illegitimate regime, EU eastern neighbourhood

1. Introduction

On 24 February 2022, the political realities in a wider Europe changed dramatically. In different ways, Russia's war against Ukraine has affected other countries. Belarus was one of them. Since the beginning of the war, Belarus's territory was used by Russia's military troops as one of the bases of their operations. In turn, there has been no evidence of the direct involvement of the Belarusian army in this war. At the same time, the involvement of Belarus in this war resulted in a strong condemnation and restrictive measures towards this country from the European Union. Specifically, in its conclusions of 24 February 2022, the European Council "strongly condemn[ed] the involvement of Belarus in this aggression against Ukraine and call[ed] on it to refrain from such action and to abide by its international obligations".[1] Issued on the same day, the Declaration

[1] European Council conclusions on Russia's unprovoked and unjustified military aggression against Ukraine, EUCO 18/22. 24-02-2022 (https://bit.ly/3RMAtbx).

by the High Representative on behalf of the European Union on the invasion of Ukraine by armed forces of the Russian Federation contained very similar wording about Belarus.[2] Subsequently, on 2 March 2022, the EU introduced restrictive measures against several high-level officials of Lukashenka's regime.[3] Thus, the EU recognised Belarus as a participant in the Russian military aggression against Ukraine through

allowing Russia to fire ballistic missiles from Belarus into Ukraine, enabling transportation of Russian military personnel and heavy weapons, tanks, and military transporters in Belarus (road and railway transportation) to Ukraine, allowing Russian military aircraft to fly over Belarusian airspace into Ukraine, providing refuelling points in Belarus for Russian military aircraft engaged in activities against Ukraine, and storing Russian weapons and military equipment in Belarus.[4]

Later, on 9 March, 8 April and 3 June 2022,[5] the EU adopted further restrictive measures affecting Belarus's businesses and financial sector. This trend toward sanctions became even more evident at the level of some EU Member States. For instance, Czechia interpreted the events in Ukraine as "a Russian and Belarusian aggression"[6] and introduced a very restrictive approach towards issuing visas for Belarusian citizens.[7]

Based on the case of Belarus under Lukashenka's regime during Russia's aggression in Ukraine, this text seeks to answer two interrelated questions. The first one is to what

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[2] Ukraine: Declaration by the High Representative on Behalf of the European Union on the Invasion of Ukraine by Armed Forces of the Russian Federation. Press Release, 24 February 2022 (https://bit.ly/3RIwwEB).

[3] Council Implementing Regulation (EU) 2022/353 of 2 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (https://eur-lex.europa.eu/eli/reg_impl/2022/353/oj); Council Decision (CFSP) 2022/354 of 2 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (https://eur-lex.europa.eu/eli/dec/2022/354/oj).

[4] Ibid.

[5] Council Regulation (EU) 2022/398 of 9 March 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (http://data.europa.eu/eli/reg/2022/398/oj); Council Decision (CFSP) 2022/399 of 9 March 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (http://data.europa.eu/eli/dec/2022/399/oj); Council Regulation (EU) 2022/577 of 8 April 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (https://eur-lex.europa.eu/eli/reg/2022/577/oj); Council Decision (CFSP) 2022/579 of 8 April 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (https://eur-lex.europa.eu/eli/dec/2022/579/oj); Council Regulation (EU) 2022/877 of 3 June 2022 amending Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (http://data.europa.eu/eli/reg/2022/877/oj); Council Implementing Regulation (EU) 2022/876 of 3 June 2022 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (http://data.europa.eu/eli/reg_impl/2022/876/oj).

[6] Usnesení vlády České republiky ze dne 30. března 2022 č. 260 k přípravě sankčních opatření vlády České republiky v reakci na ruskou a běloruskou agresi na Ukrajině [Resolution of the Government of the Czech Republic No. 260 of 30 March 2022 on the preparation of sanction measures of the Government of the Czech Republic in response to the Russian and Belarusian aggression in Ukraine] (https://apps.odok.cz/attachment/-/down/IHOACD98E6W3).

[7] Usnesení vlády České republiky ze dne 30. března 2022 č. 254 o přijetí krizového opatření [Resolution of the Government of the Czech Republic No. 254 of 30 March 2022 on the adoption of a crisis measure] (https://apps.odok.cz/attachment/-/down/IHOACD98DREY).

extent the deeds of an authoritarian *de facto* ruler with no clear public mandate from the society can be equated to the actions of the polity he claims to represent. The second question is to what extent the society that did not provide the ruler with a clear public mandate to speak on its behalf could be responsible for his deeds. This analysis is not an advocacy piece. It does not address legal or technical aspects of the sanctions against Lukashenka's regime. Nor does it discuss their legality, scope and possible efficiency. Instead, it focuses on the socially significant wording of the relevant documents. The article is composed accordingly. After this short background information about the political configurations in Belarus and relevant conceptual framework, the above questions are answered in the relevant chronologically designed empirical sections.

The text has another substantial limitation as it describes the situation shaped by ongoing events. The above developments have already made a significant impact on the situation of the Belarusians in a cross-border context and produced a considerable self-reflection within the society. Thus, the transboundary societal implications for Belarusians triggered by the stance of Lukashenka's regime in Russia's war against Ukraine add value to this article and thereby contribute to the existing knowledge.

2. The factual background of Belarus's situation

After over 30 years of existence as an independent state, Belarus remains one of Europe's least known countries, particularly in the northern and western parts of the continent (Kotljarchuk, 2020, p. 45; Sierakowski, 2020, p. 6). The trajectories of Belarus's post-Soviet development can be explained by a combination of the country's Soviet legacy and paternalistic political system (Kascian, 2018, p. 87). The former is attributed to the country's image as "a perpetual borderland" (Savchenko, 2009)" with its "denationalized nation" (Marples, 1999) that strives to overcome an internal "struggle over [its divided] identity" (Bekus, 2010) and actively participates in the integration projects led by Russia. The latter involves the personality of Aliaksandr Lukashenka, its first and so far, the only president who has ruled the country since 1994. Under his rule, Belarus never had a free and fair election,[8] and got the reputation of Europe's last dictatorship (Bennett, 2011; Wilson, 2011).

The mass and durable protests following the 2020 fraudulent presidential election are crucial for understanding the current developments within and around Belarus. They posed an unprecedented challenge for Lukashenka's regime. In many ways, the protests could be interpreted as the society's attempt to terminate the existing social contract between Lukashenka and Belarusians (Kascian & Denisenko, 2021). As Korosteleva & Petrova (2021, p. 9) summarise, the 2020 protests were "a mesh made of the totality of all relations" within and around Belarus that expand beyond nation-building issues, democracy deficits, or specifics of the country's post-communist transition. Yet, the post-electoral tactics of Lukashenka's regime resulted in the escalation of human rights

[8] Urgent need for electoral reform in Belarus. Resolution 2371 (2021). Parliamentary Assembly of the Council of Europe. April 21 (https://pace.coe.int/en/files/29170/html).

violations, a crackdown on independent civil society, and the adoption of the new repressive and restrictive legislation.[9] These legal novelties not only contained clear patterns of the authorities' strategy to mitigate protest sentiments in the society but, in some cases, provided "room for politically motivated and foregone decision-making aimed at banning certain symbols" (Kascian, 2021). This was backed by the drift of the official discourse towards a further hegemonic dominance model with Lukashenka as the regime's central element, both institutional and symbolic (Chulitskaya & Matonytė, 2018; see also Kascian & Denisenko, 2021).

The resistance of the Belarusian society after the 2020 fraudulent election generated considerable support in the neighbouring EU countries. For many eastern Europeans, this solidarity was merely a combination of moral responsibility and common belonging (Bekus, 2021, pp. 4–5). The former echoed the late 1980s when the people in central and eastern Europe fought for their freedom and independence. The latter was based on "a shared legacy of tyranny and common aspirations for democracy and freedom" (Bekus, 2021, p. 4). This sympathy towards the resisting Belarusian society also confirms that there is a common understanding of the need to clearly differentiate between Lukashenka's regime and the Belarusian society. This discrepancy between Lukashenka's regime and the country's civil society is also essential for the understanding of Belarus–EU relations.

Placed within the framework of the Eastern Partnership track of the EU Neighbourhood Policy[10] Belarus–EU relations could be described as limited and formalised critical engagement measured through the prism of domestic human rights and democracy quality (Bosse, 2021, p. 202; Kascian, 2018, p. 88). Yet, the EU's restrictive measures and sanctions against the individuals and business entities affiliated with Lukashenka's regime described above was not a new approach. As Bosse (2021, p. 204) summarises, "[o]ver recent decades, the effects of the EU's restrictive measures on Belarus have been ambiguous" as they did not affect its cooperation with Russia, China and other countries beyond western democracies. Premised on human rights conditionality, all previous EU sanctions emphasised a clear distinction between Belarus's population and members of Lukashenka's regime responsible for the violation of democracy and human rights in the country (Portela, 2008, p. 6).

In turn, support of Belarus's civil society was one of the key elements of the EU policies towards this country considering Belarus's domestic political configurations (Vilpišauskas et al., 2021, p. 71). Crucial for many civil society organisations in Belarus, this support "featured prominently in the [Belarus-focused] EU's discourse" (Bosse, 2021, p. 205). For Belarusian CSOs, the EU-backed initiatives provided essential infrastructural support that contributed to their capacity-building, and guided their development strategies toward the promotion of the EU values and daily practices in Belarus (Mazepus et al., 2021, pp. 51–52). Thus, Belarus's CSO sector could be seen as the main ally of the EU in its endeavours to promote reforms and democracy in Belarus. In this context, its role

[9] For details see, for instance, monthly public reports on Human Rights Situation in Belarus prepared by the Human Rights Center "Viasna" (https://spring96.org/en/publications).

[10] On 28 June 2021, Belarus's MFA announced that the country suspended its participation in the Eastern Partnership initiative. For details see BelTA (2021). Belarus Suspends Participation in Eastern Partnership Initiative. 28 June 2021 (https://bit.ly/3SLY1ys).

hardly differed from those played by the CSO sectors in other countries of the EU's eastern neighbourhood (Vilpišauskas et al., 2021, p. 76). The capacities of Belarusian CSOs have always been essentially limited by the political climate in the country. However, their actual and potential role in society explains the persistence of Lukashenka's regime to systematically eradicate independent CSOs after the 2020 presidential election.[11]

3. Conceptual framework

The use of Belarus's territory by Russian military forces to attack Ukraine triggered debates about the nature of Belarus's involvement in ongoing Russia's aggression. The available evidence confirms that it also provoked cross-border and intragroup emotional reactions towards Belarusians as a group, defined through the joint application of citizenship, ethnicity, language, culture and background criteria. In some cases, these external reactions were limited to contempt or anger, while in other cases they contained clear patterns of hate speech, discrimination, or intentionally harmful conduct. The conceptualisation of the present case of Belarus, its society and its political regime goes beyond the scope of the analysis within purely legal categories and brings three elements to the puzzle.

First, as Luhmann (2004, pp. 142–143) argues, "[t]he function of law deals with expectations that are directed at society and not at individuals" and involves "the possibility of communicating expectations and having them accepted in communication". Every socially significant legally binding instrument communicates a specific message to society by the available linguistic means. Embodied in a textual form, it forms "a shared system of codified values" in which "the exact wording of the text matters" (Radwanska Williams, 1993, p. 91, 95). This confirms that the exact wording of the documents is particularly important when a definable community becomes a subject of a cross-border discourse on moral responsibility for the deeds of any government or administration that claims to be their representatives (cf. Räikkä, 1997).

Second, the war triggered a set of emotional black-and-white thinking patterns that urged specific groups and their members to act swiftly and thereby make an ethical choice. As Beu & Buckley (2004) summarise, the activities of the group members are motivated by self-generated and external sources, while the complexity of social factors extends their ethical decision-making beyond the dichotomy of a simple choice between good and evil. As a result, group members "shape the rules of moral judgment and the nature of moral standards", "provide collective support for adherence to moral standards", and "aid in the selective activation and disengagement of moral self-regulation" (Beu & Buckley, 2004, p. 555). It presupposes mobilisation of the members of the affected group, inter alia, by addressing and eventually challenging the causative effect of the legally relevant restrictive measures. Thus, the situation of a definable community, i.e. Belarusians in this particular

[11] Human Rights Center "Viasna" (2021). Joint Statement of Belarusian Human Rights Organizations on Violations of Freedom of Association and Pressure on Human Rights Organizations. 07 October 2021 (https://spring96.org/en/news/105252).

case, needs a more comprehensive analysis than the assessment of the exact wording of the legal documents. Hence, it requires a nuanced contextual focus on the relevant legal concepts.

Third, the 2020 protests in Belarus were the society's attempt to discontinue the existing social contract with Lukashenka (Kascian & Denisenko, 2021). In turn, the regime's post-electoral official discourse and its activities to liquidate independent CSOs provide additional evidence that Lukashenka's regime has for a long time seen domestic political and societal actors through the prism of Schmitt's friend/enemy groupings (Schmitt, 2007, p. 26). Therefore, the events around the 2020 presidential election in Belarus confirm the insurgent type of the country's civil society as a platform that brings together "social movements and other organisations that resist authoritarian rule and under certain circumstances [could] successfully replace it with democratic rule" (Bernhard, 2020, p. 341). At the same time, it cannot still terminate the existing social contract being subject to the regime's ongoing repressive policies. In turn, the scale and durability of the protests confirm that Lukashenka also lacks a clear public mandate to speak on behalf of the Belarusian society and therefore uses excessive violence to prevent the democratic transition of power. Despite the long-term symbiotic coexistence of Lukashenka's regime and Belarus's society, these two actors should be considered two different elements of the puzzle when it comes to the analysis of the EU and its member states' policies towards Belarus.

Sanctions are primarily policies and actions (Galtung, 1967). Yet, the EU sanction policies towards authoritarian regimes in its neighbourhood demonstrate that they constitute a decision that is a result of the EU normative performance. The finalised content of the relevant documents is based on an argumentative discourse of all involved actors and allows to determine "how the EU defines the *right* or *just* principles guiding its foreign policy" (Bosse, 2017, p. 60, 68). Referring to ethnic context (i.e. definable social groups), Van Dijk (1993) demonstrates that there is a mutual impact between the political and popular discourse and opinion formation with the media as an enabler of this cycle. This mutual impact is merely top-down as the agendas are primarily defined by politicians which result in the influence and legitimation of the relevant "policies and legislation" (Van Dijk, 1993, p. 50). Yet, the fields of actions of political and social discourses comprise "segments of the respective societal 'reality', which contribute to constituting and shaping the 'frame' of discourse" (Wodak, 2001, p. 66). It implies a chronological analysis adjusted "to accelerating social dynamics" (Krzyżanowski, 2010, p. 201). Based on the three above elements of the puzzle, a two-level model was applied for the analysis (Krzyżanowski, 2010, pp. 81–89). The entry level was focused on the analysis of the relevant Belarus-related European Council documents,[12] significant political statements. At this stage, relevant concepts were identified vis-à-vis their linkage with Belarus in general, its society, and Lukashenka's regime. The second stage comprised an in-depth contextual analysis of the specific units within the above concepts with the identification of their implications

[12] Following the 2020 presidential election, the European Parliament adopted five resolutions on the situation in Belarus. Because of their non-binding legal nature, these resolutions serve as supplementary sources in this analysis as they can be regarded merely as "a primary tool for attracting attention and raising public and political awareness of important issues, though not always with a specific legislative goal in mind" (Kreppel & Webb, 2019, p. 388).

based on the interpretation of the wording of the relevant documents. This text omits the analysis of legally-binding acts adopted by the EU Member States in compliance with the EU-level documents making an illustrative exception for the case of Czechia, as its approach towards Belarusian society at large was designated by the Belarusian political opposition as "discriminatory" and "toxic experience".[13] Yet, the focus on the individual Member States, their reasoning and interpretation of the events, and apparent advocacy strategies deserve a special article.

The factor of time is another important element of the analysis. It contains two important dates that are essential for the design of the two subsequent empirical sections. The first date is 9 August 2020, the day of the fraudulent presidential election in Belarus. At the foreign policy level, it discontinued the path of improved Belarus–EU relations. At the domestic level, it signified the start of a gradual shift of Lukashenka's regime towards more repressive policies against society under the pretext of social cohesion and unity. The second one is 24 February 2022, the day when the Russian invasion of Ukraine started. At the foreign policy level, it became a clear marker that Belarus under has been losing its sovereignty because of his regime's total dependence on Russia in the military, security and foreign policy spheres, inter alia, by the fact that the Lukashenka Administration allowed Russia to use its territory to attack Ukraine. At the domestic level, it coincided with the completion of the regime's repressive transformation aimed at the reduction of potential risks of being challenged by protest activities formalised by the adoption of a new constitution in a fraudulent referendum on 27 February 2022. The following two empirical sections apply the above model to answer the two research questions. The first of them addresses the period between the 2020 election in Belarus and the start of the war in Ukraine. The second focuses on the period after the war's outbreak.

4. Between fraudulent election and war: Formalised and non-prioritised approach

Until October 2020, the EU reaction was limited to the statements of the EU's High Representative for Foreign Affairs confirming that the election was "neither free nor fair", acknowledging that "the people of Belarus have demonstrated the desire for democratic change", and calling the "Belarusian political leadership" upon the launching of "a genuine and inclusive dialogue with broader society", and conditioning bilateral relations upon Belarus's progress on human rights and the rule of law.[14] Thus, the initial reaction of the EU was based on a standardised critical engagement approach that clearly distinguished Belarus's society and Lukashenka's political regime. The delay in the institutionalised reaction was caused by the need to compromise the diverse domestic political interests of the EU Member States on topics unrelated to Belarus (Bosse,

[13] Anatol Liabiedzka's Facebook page (post of 12 May 2022) (https://bit.ly/3RLW1Fk).

[14] Council of the EU (2020). Belarus: Declaration by the High Representative on Behalf of the European Union on the Presidential Elections. Press Release, 11 August 2020 (https://bit.ly/3fVXdst).

2021, p. 203). It merely confirms an assumption that the situation in Belarus was not perceived as one of the EU's top foreign policy priorities.

In its conclusions of 12 October 2020, the Council of the EU followed the same path of critical engagement with a clear distinction between the country's society and political regime.[15] Yet, its content analysis reveals two key concepts. The first is Lukashenka's legitimacy as the president of Belarus. While confirming that the election was "neither free nor fair", the Council concluded that Lukashenka "lacks any democratic legitimacy", and supported the "legitimate calls [of the Belarusian people] for new, free and fair presidential elections in line with international standards and under the OSCE/ODIHR's observation".[16] At the same time, the Council Implementing Decision[17] and Council Implementing Regulation[18] of 2 October 2020, as well as all further similar documents adopted on 6 November[19] and 17 December 2020,[20] contain the phrase about restrictive measures "against Belarus" or "in respect of Belarus" in their titles. Hence, at first glance, no distinction between the regime and society is made. Yet, the contents of these documents clearly indicate the difference between the regime and society. Specifically, the documents adopted on 6 November inform that Lukashenka "lacks any democratic legitimacy" and expect that "the Belarusian authorities" will stop "repressions and violence directed against the Belarusian people". The documents adopted on 17 December mention the "brutality of the Belarusian authorities" and "support of the democratic rights of the Belarusian people".

Further deterioration of the Belarus–EU relations was caused by the forced landing of a Ryanair flight in Minsk on 23 May 2021. In its conclusions from the following day, the European Council condemned it proposing a further tightening of the restrictive measures against Lukashenka's regime and banning Belarusian Airlines from flying to the EU. These conclusions did not offer many units to assess, yet the document on one occasion used the form "Belarusian authorities".[21] Thus, it is not possible to understand whether the EU treats Lukashenka's regime as not legitimate based only on this document and without knowing the previous context. The relevant Council Decision and Council

[15] Council of the EU (2020). Council Conclusions on Belarus 11661/20. 12 October 2020 (https://bit.ly/3fUmoLZ).

[16] Ibid.

[17] Council Implementing Decision (CFSP) 2020/1388 of 2 October 2020 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus (http://data.europa.eu/eli/dec_impl/2020/1388/oj).

[18] Council Implementing Regulation (EU) 2020/1387 of 2 October 2020 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg_impl/2020/1387/oj).

[19] Council Implementing Decision (CFSP) 2020/2130 of 17 December 2020 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus (http://data.europa.eu/eli/dec_impl/2020/2130/oj); Council Implementing Regulation (EU) 2020/2129 of 17 December 2020 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg_impl/2020/2129/oj).

[20] Council Implementing Decision (CFSP) 2020/1650 of 6 November 2020 implementing Decision 2012/642/CFSP concerning restrictive measures against Belarus (http://data.europa.eu/eli/dec_impl/2020/1650/oj); Council Implementing Regulation (EU) 2020/1648 of 6 November 2020 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg_impl/2020/1648/oj).

[21] Council of the EU (2021). European Council Conclusions on Belarus 395/21. 24 May 2021 (https://bit.ly/3SPKyG2).

Regulation adopted on 4 June 2021[22] also operates the term "Belarusian authorities". The Regulation further specified that the Ryanair accident "constituted a further step in the repression of civil society and democratic opposition in Belarus". While imposing a criterion for individuals and legal entities to be subjects of economic restriction if they, inter alia, for the economic restrictions "benefit from or support the Lukashenka regime". Another peculiarity is that the titles of these documents slightly altered refer to the restrictive measures "in view of the situation in Belarus" and "in respect of Belarus", and not "against Belarus" as before. This also presupposes a higher level of acknowledgment of the difference between the regime and the society. The documents adopted on 21 June largely repeated the rhetoric of its predecessors, yet their titles uniformly spoke about restrictive measures "in respect of Belarus".[23]

The conclusions of 25 June 2021 called for the release of political prisoners and to stop repressions. They also acknowledged "the democratic right of the Belarusian people to elect their president through new, free and fair elections".[24] Thus, they implicitly made a distinction between Lukashenka's regime and Belarusian society by acknowledging one of the major systemic problems of the Belarusian society that derives from the lack of transparent and competitive elections.

The conclusions of 22 October 2021 designated a migrant crisis on the Belarus–EU border as "the ongoing hybrid attack launched by the Belarusian regime" with the need to adopt relevant restrictive measures against those in charge of it.[25] At the same time, while confirming the strategic importance of the Eastern Partnership region for the EU, the Council again called on "the Belarusian authorities to release all political prisoners". Yet, the concepts of "regime" and "authorities" imply a somewhat different degree of legitimacy for those who are referred to in these ways.

The relevant Council Implementing Regulation and Decision adopted on 2 December 2021,[26] inform about an "ongoing hybrid attack launched by the Belarusian regime" by the instrumentalisation of the migrant crisis at the Belarus–EU border. They also designate restrictive measures against those who are involved in "organising or contributing to activities by the Lukashenka regime that facilitate the illegal crossing of the external borders of the Union" and other related issues. Yet, the titles of these

[22] Council Decision (CFSP) 2021/908 of 4 June 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (http://data.europa.eu/eli/dec/2021/908/oj); Council Regulation (EU) 2021/907 of 4 June 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (https://eur-lex.europa.eu/eli/reg/2021/907/oj).

[23] Council Implementing Regulation (EU) 2021/997 of 21 June 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg_impl/2021/997/oj); Council Regulation (EU) 2021/996 of 21 June 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg/2021/996/oj).

[24] Council of the EU (2021). Council Conclusions EUCO 7/21. 24 and 25 June 2021 (www.consilium.europa.eu/media/50763/2425-06-21-euco-conclusions-en.pdf).

[25] Council of the EU (2021). Council Conclusions EUCO 17/21. 21 and 22 October 2021 (www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf).

[26] Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (http://data.europa.eu/eli/reg_impl/2021/2124/oj); Council Implementing Decision (CFSP) 2021/2125 of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (http://data.europa.eu/eli/dec_impl/2021/2125/oj).

documents refer to the above restrictive measures "in view of the situation in Belarus" and "in respect of Belarus".

A similar approach can be found in the conclusions of 16 December 2021.[27] While condemning the humanitarian crisis at the Belarus–EU border, the Council refers to "the Belarusian regime". In the next sentence, it confirms the EU's readiness "to counter the hybrid attack launched by Belarus". Finally, while raising the issue of a new election in Belarus, the Council speaks about "the democratic right of the Belarusian people". Hence, the wording of these conclusions makes a controversial impression within one document. The phrase "launched by Belarus" implicitly equates Lukashenka's regime with the entire country and, thus, indirectly suggests the regime's full legitimacy as if it possesses a sufficient public mandate to instrumentalise the migration crisis. Yet, the references to the "Belarusian regime" and the "Belarusian people" suggest the opposite.

The EU based the logic of its Belarus-related policies on the coupling of the concepts of democracy and legitimacy. Hence, between August 2020 and February 2022, the EU continued to pursue its critical engagement policies toward Belarus. It was quite dynamic, as it addressed the ongoing changes, but predictable. Yet, the Belarus-related agenda was not a priority for the EU. The pre-war EU approach generally distinguished the deeds of Belarus's authoritarian *de facto* ruler from the society, and in most cases did not equate the actions of the Lukashenka Administration with the policy it claims to represent. While the EU documents generally addressed the difference between Lukashenka's regime and the Belarusian people, some of the formulations contained patterns of inconsistency implying a different degree of the regime's legitimacy or even equating it with the entire country. This diverse approach neither contributed to the consistency of the evaluation of the situation in Belarus, nor to the development of a unified EU-wide vocabulary on how to address the situation in Belarus and other accompanying issues. Interestingly, the word "authorities" in the EU documents seems to be predominantly used when referring to the capacity of the Lukashenka regime to effectively exercise power and issue the decisions binding within the territory of Belarus and affecting its population. This was merely based on the logic that any authority, be it legitimate or not, is capable to issue legitimate decisions, like the release of political prisoners.

5. The 2022 wartime: Does an apparent victim deserve to be punished?

The previous inconsistencies in distinguishing between Lukashenka's illegitimate regime and the policy it claims to represent became even more evident after 24 February 2022 when Russia started the war against Ukraine. As cited above, the European Council's conclusions of 24 February "strongly condemn[ed] the involvement of Belarus in this aggression against Ukraine and call[ed] on it to refrain from such action and to abide by its international obligations". This formulation rather refers to Belarus as a polity

[27] Council of the EU (2021). Council Conclusions EUCO 22/21. 16 December 2021 (www.consilium.europa.eu/media/53575/20211216-euco-conclusions-en.pdf).

without any insight or specification of what is taking place there and whether its political regime is legitimate. Another phrase of the conclusions about the need for "further individual and economic sanctions package that will also cover Belarus" also suggests a blurring of contexts, involving the country, its citizens irrespective of their political positions, and the *de facto* ruling regime.

Further EU documents from the early period of the war continue this trend. The quotation from Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy, available in the EU press release of 2 March 2022 contains a very strong normative evaluation. Borell spoke about "Belarus' involvement" in the aggression that "will come at a high price".[28] The next sentence of the quotation specified that the countermeasures would focus on "those in Belarus who collaborate with these attacks against Ukraine". However, the analysis of this press release reveals a lack of divisive line between the political regime in Belarus and the country's civil society. An alternative interpretation of this could suggest that various spokespersons in charge of these types of documents might have different degrees of awareness about Belarus's domestic contexts and evaluation of the gravity of the situation there. In any case, its message was widely distributed in the mainstream media, implicitly affecting public opinion and creating additional opportunities for its interpretation. As mentioned in the introduction, the Council Implementing Regulation and Decision of 2 March 2022 claimed that "Belarus is participating in the Russian military aggression against Ukraine" by providing Russia with the possibility to use its territory to fire missiles, transport weapons and personnel, use airspace, providing its refuelling points and storing Russia's weapons and equipment.[29] Again, this wording removed any context of Belarus's domestic political situation from the discussion focusing on the activities of the illegitimate regime and equating it with the entire country. In practical terms, this type of narrative resulted in numerous examples of hate speech and other manifestations of discrimination against Belarusians[30] as a group jointly defined by the criteria of citizenship, ethnicity and language. Many of those who experienced it were forced to flee the country after the 2020 presidential election escaping from the repressions and arbitrary persecution. It is worth returning to the example of Czechia specified above. For instance, an explanatory note of Law 175/2022 Sb of 22 June 2022 on further measures in connection with the armed conflict on the territory of

[28] Council of the EU (2022). Belarus' Role in the Russian Military Aggression of Ukraine: Council Imposes Sanctions on Additional 22 Individuals and Further Restrictions on Trade. Press Release, 02 March 2022 (https://bit.ly/3rEWI8E).

[29] Council Implementing Regulation (EU) 2022/353 of 2 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Decision (CFSP) 2022/354 of 2 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

[30] For details see Belsat TV (2022). Nie zlamanyja dyskryminacyjaj. Jak pačuvajucca bielarusy ŭ emihracyi pasla pačatku vajny [Not Broken by Discrimination. How Do Belarusians in Emigration Feel after the Start of the War] 26 August 2022 (https://bit.ly/3Chy9nb); Onet.pl (2022). Fala nienawiści i hejtu w sieci wobec obywateli Białorusi [A Wave of Online Hatred and Hate against Belarusian Citizens] 05 March 2022 (https://bit.ly/3rEDHmT).

Ukraine caused by the invasion of the troops of the Russian Federation (known as Lex Ukraine II)[31] claims that:

> From the point of view of international law, the Russian Federation and the Republic of Belarus committed aggression against Ukraine in violation of para 4 Article 2 of the UN Charter, which was confirmed by the UN General Assembly Resolution No. A/RES/ES-11/1.

The text of this resolution[32] mentions Belarus just once deploring its involvement in "this unlawful use of force against Ukraine, and calls upon it to abide by its international obligations". However, it does not contain any specification of this involvement and the reasons thereof. In turn, Resolution No. A/RES/ES-11/1 contains the reference to Resolution No. A/RES/3314(XXIX) of 14 December 1974 which defines aggression.[33] Among other things, this Resolution establishes that "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case". Consideration of all circumstances and addressing Belarus's domestic contexts allowed representatives of the Belarusian opposition to pursue an advocacy campaign claiming that Belarus has been occupied by Russia.[34] The demonstrated clash of possible approaches towards Belarus reveals that the literal and contextual interpretations of the same situation can lead to antipodal assessments – (co-)aggressor v. victim of aggression. In respect thereof, the question arises whether the literal justifications, like in the case of Czechia, should decouple the concepts of the state and legitimacy of its political regime considering the capabilities of a given society to freely elect its political leadership in a transparent and fair election. If it overtly or implicitly bounds these two concepts, it *de facto* acknowledges the responsibility of the society of a given country for any political regime that exists in it regardless of whether it is legitimate or not.

The documents adopted on 9 March, 8 April and 3 June 2022[35] did not offer anything conceptually new in terms of the interpretation of Belarus's involvement in Russia's war in Ukraine. Yet, their titles and content are more balanced in terms compared to the statements from the early days of Ukraine's war. They address two important issues. First, the titles of all relevant documents (2022/398, 2022/399, 2022/577, 2022/579, 2022/876 and 2022/877) refer to "the restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine". In other words, Russia's aggression against Ukraine was just one part of the puzzle that triggered them.

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[31] Chamber of Deputies of the Parliament of the Czech Republic (2022). Sněmovní tisk 221/0 Vl.n.z. o někt.opatř. v souv. s ozbroj.konfliktem – Ukrajina [Parliamentary Press 221/0 Government Bill on Some Measures in Connection with the Armed Conflict – Ukraine] 05 May 2022 (www.psp.cz/sqw/historie.sqw?o=9&t=221).

[32] Resolution adopted by the General Assembly on 2 March 2022, A/RES/ES-11/1 Aggression against Ukraine. UN Documents. March 18 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf).

[33] Resolution adopted by the General Assembly on 14 December 1974, A/RES/3314(XXIX) Definition of Aggression against Ukraine. UN Documents. March 18 (https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf).

[34] National Anti-Crisis Management (2022). Russia has occupied Belarus. 16 March 2022 (https://belarus-nau.org/en/news/tpost/zx8sj4nal1-russia-has-occupied-belarus).

[35] For details see note 5 above.

Moreover, participation of Lukashenka's regime in it is qualified as "involvement". Belarus is neither directly labelled as a (co-)aggressor, nor the issue of the legitimacy of its political regime is raised. The reference "Belarus" in the documents also implies a lack of clear distinction between the de facto administration and the Belarusian society. The other one was caused by the domestic developments in Belarus. Second, items 1(b) of Article 1w of the Council Regulation 2022/398 and 5(b) of Article 2u of the Council Decision (CFSP) 2022/399 of 9 March 2022 suggest that the restrictions on Belarus-based individuals and legal entities in the EU-based credit institutions may be lifted if the relevant deposits are "necessary for civil society activities that directly promote democracy, human rights or the rule of law in Belarus". The above titles and formulations, therefore, confirm that the EU is concerned by the domestic developments in Belarus and committed to promoting human rights, democracy and rule of law in this country. Yet, the above documents also mean that certain individuals and businesses non-affiliated with Lukashenka's regime might be affected by the sanctions.

A partial shift toward a more balanced approach between Belarus's domestic developments and the war in Ukraine can be identified in the Declaration by the EU High Representative on the second anniversary of the fraudulent presidential elections issued on 8 August 2022, which serves as an example of the aforementioned inconsistency of approaches.[36] This document acknowledges that the fraudulent election has "stripped Belarusians of the opportunity to freely choose their own future" and confirms that Lukashenka's regime "lacks any democratic legitimacy". It mentions over 1,200 political prisoners and numerous others who went through repressions or were forced to leave the country, as well as the crimes committed by the regime against its opponents after the 2020 election. Yet, Lukashenka's regime is labelled as "an accomplice" of Russia's aggression against Ukraine. It follows this path "against the will of the vast majority of the Belarusian people" and "persecutes Belarusians for standing up against the war". While claiming that the EU's "determination to support the people of Belarus remains unchanged" and the country's sovereignty and independence, the document, on two occasions, designates Lukashenka's regime as "the authorities in Belarus". This formulation deals with a call to the regime to respect human rights, stop collaborating with Russia in its aggression against Ukraine, and maintain an inclusive dialogue within Belarus's society resulting in a free and fair election.

Russia's military aggression against Ukraine changed a wider Europe. Because of its gravity, it became one of the key points of the EU policies. For Belarus, its society, and Lukashenka's regime it had two major implications. First, all previous EU restrictive measures remained in force, being updated based on the principle of critical engagement; Belarus-related agendas also failed to become one of the EU's top priorities. Second, the Belarusian agenda was put into the context of the armed conflict between Russia and Ukraine which was largely determined by the position of Lukashenka's regime in it. As the above analysis demonstrated, it partially resulted in the coupling of the illegitimate Lukashenka's administration with the state with little to no focus on the domestic

[36] Council of the EU (2022). Belarus: Declaration by the High Representative on Behalf of the EU on the Second Anniversary of the Fraudulent Presidential Elections. Press Release, 08 August 2022 (https://bit.ly/3CJApoD).

developments in the country that resulted in this situation. This attitude also produced clashing approaches to the Belarusian case ranging within the binarity "victim of the aggression – (co-)aggressor". For the Belarusian political opposition and the civil society, it posed additional challenges to lobby the view of Belarus as a victim of Russia's aggression and a more pronounced focus on the distinction between the Belarusian society and Lukashenka's regime. Yet, as the evidence shows there is no unequivocal shift from the literary coupling of the state and political regime in the EU and some individual Member States towards a more comprehensive approach based on the contextual interpretation of the situation within Belarus.

6. Conclusion

The analysis of the EU documents pertinent to the situation in Belarus after the 2020 presidential election reveals two chronological periods. The first one ranges from the elections till the end of February 2022 when Russia's aggression against Ukraine and the so-called constitutional referendum in Belarus chronologically coincided. This period was determined by the domestic developments in Belarus and the EU's critical engagement policies that promptly addressed the dynamics of the changes. Yet, Belarus never became a priority for the EU policies and it had very limited capacities to effectively influence the situation in the country. Yet, the analysis provides evidence that the EU generally made a distinction between the illegitimate regime centred around Lukashenka and the Belarusian society that was involved in massive and durable protests against the fraudulent election and repressive nature of the regime. However, these differences were not always consistent and failed to develop a common vocabulary among the EU bodies and individual Member States pertinent to the comprehensive assessment of the internal developments in Belarus. Apparently, by doing so the EU might have expected that the illegitimate Lukashenka Administration could issue some legitimate decisions such as the release of political prisoners.

After February 2022, the situation changed significantly. Belarus-related agendas became inscribed into the context of Russia's war in Ukraine due to the involvement of Lukashenka's regime in this unlawful act. Yet, this had negative implications for the Belarusian society. It is evident that in a partial coupling of Belarus as a polity with the activities of Lukashenka's regime that de facto rules the country is substantially backed by the Kremlin. As a result of this attitude, the patterns of the literal interpretation of the regime's action become evident and even dominant, as the Czech example demonstrates. Hence, it is not uncommon that Belarus is perceived as a co-aggressor which implies the responsibility of the entire society with little to no consideration of its actual capacities to change the repressive political regime. Thus, the concept of the state, legitimacy of the political regime, and accountability of the society for its deeds are at least implicitly linked.

A more comprehensive approach to decouple the regime and society is present in the EU documents but it still fails a clear pronounced focus affecting practical measures aimed at countering Russia's aggression in Ukraine. In this regard, the view of Belarus as another victim of Russia's aggression (or a country occupied by Russia) is not unreasonable as

it considers all the circumstances of Belarus's particular case including the domestic political context before and after the 2020 presidential election. Yet, the Belarusian political opposition must advocate a comprehensive approach to achieve a clear shift to acknowledge a pronounced focus at the EU and its individual Member States levels on the distinction between the Belarusian society and Lukashenka's regime. Overall, the case of Belarus demonstrates the vulnerability of smaller states with authoritarian regimes vis-à-vis huge political turbulences, like the war in Ukraine, as its civil society and political opposition have to be mobilised to simultaneously counter both domestic and international challenges caused by the actions of the illegitimate authoritarian regime. The success of these endeavours significantly depends on the international solidarity and ability of the EU and other international actors to decouple the state as a polity, its political regime, and the society both in official rhetoric and legislative documents.

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Anti-Crisis Fiscal Adjustment under the Conditions of Martial Law and Post-War Recovery in Ukraine

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Abstract: In global practice, uncontrolled imbalances in the fiscal space are a real threat to a country's financial security in the context of the new economic reality; destabilisation challenges as well as the risks of the spread of crisis phenomena under the conditions of uncertainty and geopolitical conflictogenity. Applying the results of theoretical and practical research based on the methods of factual and statistical analysis, it was determined that under conditions of modern full-scale turmoil, all components of fiscal regulation should be focused on the priorities of resilience in the period of martial law and sustainable development in post-war recovery. As a candidate for acceding the European Union, Ukraine will carry out reforms that will bring the country closer to world standards in all areas of financial relations. Therefore, the processes of reforming tax systems, including administrative regulations, should be focused on solving systemic institutional problems of change management.

Keywords: fiscal regulation, taxation, crisis, monetary policy

1. Introduction

The processes of reforming tax systems, including administrative regulations, should be focused on solving systemic institutional problems of change management. The general vector of state regulation in Ukraine, as well as in other countries with transition economies (see Economics Online, 2020; UNECE, 2022), should, as in national interest, be aimed at balancing the function of redistributing newly created values, in accordance with the priorities of countering the threats of wartime and with the aims of post-war sustainable development. It comes to the proportionality of the scale of mandatory payments to the revenue part of the budgets of all levels to the necessary military expenditures, as well as to the volume of services rendered to households, economic agents and other subjects of legal relations, which is guaranteed by the Constitution of a particular country. At the same time, the coordination of the network of structural divisions of global multinational companies (MNCs), and their financial and banking divisions should be built in such a way that fiscal planning is used in compliance with the law (Iefymenko, 2020), as well as in order to mobilise significant resources for innovative renewal of production through the use of high technologies. The opportunistic

behaviour of stakeholders in the shadow sector, as well as of many taxpayers, often prevents the transparent rules of compliance with international norms and regulations accepted in the world from receiving support in a society and in parliamentary structures. This is often facilitated by inertia in the effective legislation regarding the predominance of formal procedures over the substance of taxable transactions; unfair tax burden, problems of carrying out accounting and reporting; and the lack of accountability of representatives of fiscal authorities for losses of legal entities, for example, in the case of untimely reimbursement of value added tax.

In connection with the acquisition of the status of a candidate for accession to the European Union, the strategic goals of Ukraine's future membership in the EU have been determined in the space-time dimension, which, in particular, provide for compliance with the European conceptual framework for tax policy coordination. Over the past ten years, the implementation of the EU – Ukraine Association Agreement (see Official Journal of the European Union, 2014), as well as other international obligations, has been accompanied by the consistent implementation of the following provisions: fiscal management on the principles of transparency, information exchange, fair tax competition; improvement and development of the tax system and tax authorities of Ukraine (enhancement of collection and control capacities with emphasis on VAT refund procedures, tax fraud control, tax evasion); exchange of experience and harmonisation of policies to combat tax fraud; gradual approximation to the tax structure defined in the EU acquis. Modern transformations in the fiscal and monetary sectors of the economy must take place on the basis of established supranational postulates, norms and regulations: stability, predictability, effective administration; supporting the competitiveness of economic agents in the world; coordinating taxation with the main principles of developing the market economy; regulating transfer pricing; and harmonising national and fiscal policies with EU directives and treaties. At the same time, if due to martial law, legislative acts (for example in the field of taxation), which differ from European standards, are adopted, it is necessary to introduce relevant procedures for their approval by the EU and the international community.

In global practice, uncontrolled imbalances in the fiscal space are a real threat to a country's financial security in the context of the new economic reality, uncertainty and modern geopolitical conflictogenity. The risks of the spread of crisis phenomena demonstrate complex interactions with political measures from a short-, medium and long-term perspective.

Sustainability of public finance is impeded by soaring interest rates, guaranteed protection of vulnerable social strata from the aftermath of high food and energy prices or by rising defence expenditure. At the same time, vulnerability to the shocks of prices on natural resources, which add to inflation and economic instability, is enhanced by delays in measures to counteract the climate crisis. Moreover, investments in climate transition face obstacles due to the reduction of budget opportunities.

2. Fiscal regulation in Ukraine in the context of modern geopolitical challenges and growing uncertainty

The interpretation of the phenomenon of uncertainty and its most essential components is discussed in the works of classic (Bernanke, 1983; Romer, 1990; Ramey & Ramey, 1995), as well as modern scientists (Bachmann & Bayer, 2013; Berger et al., 2016; Ilut & Schneider, 2014; Basu & Bundick, 2017), which focus on unpredictable financial and price market factors, the spontaneous influence of which, within the framework of the global and national economic space of the 20th and early 21st century, led to large-scale cyclical shocks. As a result, a sharp drop in production, job losses, a slowdown in investment processes, decreasing in demand, and level of well-being were periodically observed. Many researchers (Arellano et al., 2016; Caggiano et al., 2017) in addition, emphasised that, in the conditions of financial crises, effects multiplying the turbulent consequences of uncertainty became widespread.

After the inevitable failure in 2020, the International Monetary Fund (2021) estimated that global and regional recovery continued in 2021, but, due to the difficult epidemiological situation, its pace slowed down amid high levels of uncertainty.

During this period, uncertainty declined due to the spread of Covid-19, though its trends were less intensive. At the same time, many countries experienced the long-term negative consequences of the pandemic: a decrease in household incomes, an increase in the level of poverty, inflation, a shortage of financial resources, etc. In Ukraine, against the background of crisis disruptions due to pandemic phenomena, it was expected that in 2021 the fall in GDP of previous years would be covered, and the steady development of the economy in the forecast periods would make it possible to reduce inflation to the desired mark of 5% by the end of 2022.

Back in January, reputable international organisations predicted an intensification of the global economic recovery from the second quarter of this year after the short-term impact of the "omicron" stem (International Monetary Fund, 2022a).

In 2022 the war in Ukraine, as well as targeted sanctions, not only shattered the expectations of economic agents regarding economic recovery, but also caused another significant slowdown in world economic growth.

At the beginning of the current year, the global economy had not yet fully improved after the Covid-19 pandemic, but was regenerating with significant differences between the recovery paths of developed economies, on the one hand, and emerging and developing markets on the other. In addition to the war, the epidemiological consequences also led to a slowdown in business activity. Structural relationships in global integrated supply chains have been disrupted, exacerbating the risks of cascading global failures. In turn, accelerating inflation has led to a tougher monetary policy in many countries. Undoubtedly, the war will greatly delay the recovery of the world economy, slowing down development, and further accelerating rising prices, as well as risks to economic prospects.

It is important to note that the spring forecast of the International Monetary Fund (2022b) assumed that the conflict will not go beyond the borders of Ukraine, that further sanctions against Russia will not affect the energy sector (although the base scenario took into account the consequences of the decision of European countries to gradually abandon Russian energy resources and the embargo announced before 31 March 2022). At the same time, it suggested that the impact of the pandemic on health care and the economy will weaken during 2022. Life has confirmed that the tendencies of increasing conflict in various dimensions significantly hinder the search for compromise solutions in the field of economic policy. In addition to the direct humanitarian consequences, the significant reduction in the economy of many countries will lead to the spread of negative secondary effects all over the world through resource markets, trade and financial channels. According to international analysts, a tentative recovery in 2021 has been followed by increasingly gloomy developments in 2022 as risks began to materialise. Global output contracted in the second quarter of this year, owing to downturns in China and Russia, while U.S. consumer spending undershot expectations.

It is obvious that there will be a sharp double-digit decline in Ukraine's GDP (according to various forecasts, from 30 to 45% – depending on the scenario of further developments), as well as rising inflation (at least 20%).

Global economic growth is projected to slow from 6.1% (estimated) in 2021 to 3.6% in 2022 and 2023. That is by 0.8 and 0.2 percentage points respectively lower than the forecast for 2022 and 2023 in the January issue of the World Economic Outlook (International Monetary Fund, 2022c). After 2023, the world economy is projected to decline to about 3.3% in the medium term.

The crisis associated with the war in Ukraine is significantly different from many economic crises that we observed in the second half of the 20th and early 21st century. Russia's military invasion is accompanied by losses of human capital, and destabilisation of commodity markets. Long-term losses are expected to be much higher in emerging and developing countries than in developed economies.

Fiscal policy plays a special role when the situation develops unfavourably. It can protect the most vulnerable from the impact of high and rising food and energy prices on household budgets. More generally, government responses will be shaped against a challenging backdrop of high and rising inflation, economic slowdowns, high levels of debt and tightening credit conditions. Fiscal constraints are getting tighter as central banks raise interest rates to fight inflation.

At the complex background of high and soaring inflation, the slowing pace of economic development, high indebtedness levels and tightened loan conditions, the government will have to shape its countermeasures. As central banks increase interest rates to curb inflation, budget restrictions become even tougher. Tax and monetary policy is of special importance in the event of unfavourable outcomes. It can protect the most vulnerable household budgets from the results of high and rising food and energy prices.

At present the uncertainty is still visible, but now it originates from war rather than the pandemic.

Taking into consideration the current forecast scenarios of the IMF regarding the war on the territory of Ukraine, sanction measures against the Russian Federation, the further impact of Covid-19 on health care and the economy, stagflation threats, production volumes and employment in the world will mostly remain lower until 2026 than those that existed before the pandemic.

The probability of new shocks, and a qualitative deterioration of the structural consequences of economic turbulence at the mega-, macro- and micro-level due to the growth of uncertainty (Altig et al., 2020; Coibion et al., 2021; Johri et al., 2020) are caused by, among other things, factors of behavioural origin. Well-known authors consider the term "ambiguity" (Ilut & Schneider, 2022), which identically reflects the ambiguity of the influence of beliefs, expectations, intuition, electoral and political events on economic decision-making under standard conditions of expected utility. Precautionary behaviour, as an element of uncertainty within business cycles, contributes to increased savings, reduced staffing, and reduced debt obligations, which coincides with fluctuations in asset prices.

It is therefore clear that, in the near future, the role of the regulatory function of taxes will grow. However, this trend will only be acceptable if the fiscal function of taxes is balanced with the interests of the world community, united around the goals of an early end to the war and innovative plans for post-war reconstruction.

3. Anti-crisis tax policy in the conditions of martial law and post-war recovery in the context of balancing the national financial and economic space

3.1. Conceptual principles of determining the size of the state through fiscal normalisation of the redistribution of newly created value in the economy

The national resource potential largely depends on the degree of balance of state finances.

The unstable character of the trends of the ratio of budget revenues and expenditures and GDP often proves the fragility of the potential for the development of the social and economic system. The dynamics of such kinds of indicators in different countries and in Ukraine (see Figures 1 and 2) fully reflect the global shocks, destabilisation caused by borrowing, currency, tax and budget turbulence, as well as social disorder. Decrease in income with a simultaneous increase in expenditures is typical of the crisis period of 2009–2010 and the peak of the 2020 pandemic. The last crisis two years ago showed the importance, in the context of globalisation, of the common accord and responsibility of all nations to contribute to the just recovery and resilience of the post-pandemic world.

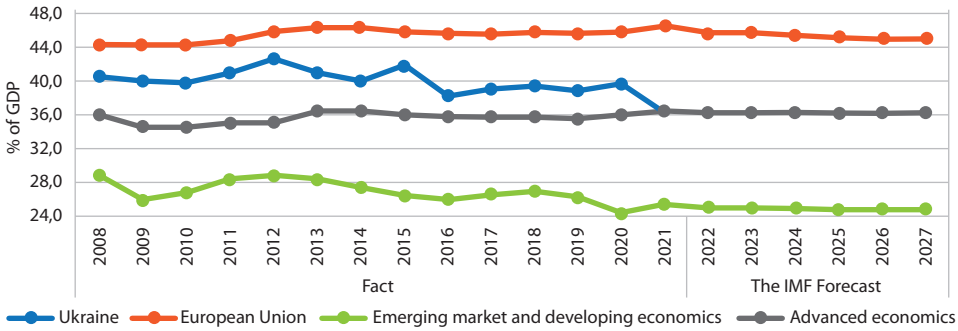

Figure 1. General Government Revenue, % GDP

Source: Compiled by the author.

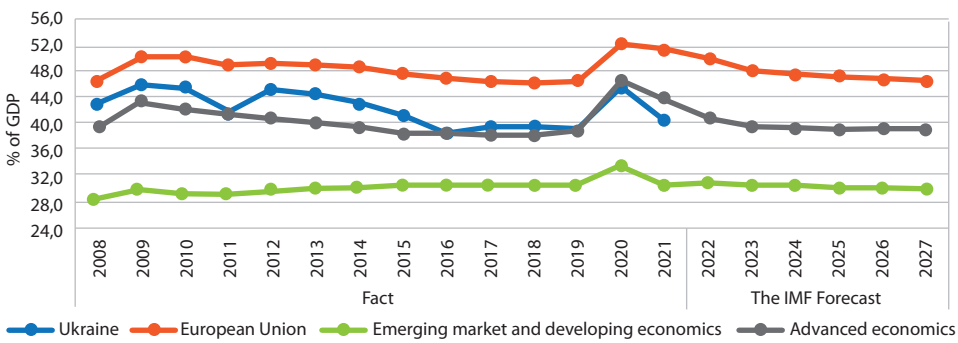

Figure 2. General Government Expenditure, % GDP

Source: Compiled by the author.

In 2021, the basic components of the new world policy started to form.

Compared to previous crises last year, Ukraine has shown greater resilience to global and national shocks. The recovery of the economy was observed, which made it possible to compensate almost completely for the decline the year before last. The domestic financial system demonstrated its resilience to shocks.

Forecasts and expectations of global stabilisation were destroyed in February this year. In the near future, we are likely to see a recession at both global and national levels. Accordingly, governments are likely to be forced to increase their debt burdens as well as consolidated budget deficits. The sharp rise in inflation, together with the manifestations of stagnation, is one of the key factors influencing decisions on the appropriateness of regulating the tax burden, taking the factors of income inequality and human well-being into account.

Indicators of the redistribution of newly created value through state and local budgets characterise the size of existing states to some extent.

For instance, in the European Union, where the share of the state is consistently higher than 40%, which is primarily characteristic of "welfare states", the transformation of various areas of government demonstrates a productive impact on the market environment through developed economic institutions based on political consensus. At the same time, the crises of the 21st century have shown that, despite the growing importance of centralised management decisions, a number of basic functions of many states have been performed with low efficiency. The gap between the benefits of the population from public spending on free services and high taxes and the dynamics of debt obligations grew, which was often accompanied in various countries by a low efficiency of government programs. Life has confirmed the veracity of the famous professor Ariely (2010) axiom that "free services are often the most expensive".

All this led to the unification of the world community around the need to strengthen the principles of transparency and accountability in the field of public financial management to a significant degree (International Monetary Fund, 2019).

In Ukraine, at the beginning of the war, companies operating in the Russian-occupied zones accounted for almost half of GDP. It is obvious that neither they nor their employees will be able to pay taxes in the near future.

Due to the efforts of the global community, large Ukrainian ports on the shores of two seas have been unblocked in order to transport Ukrainian grain to deal with the food crisis. However, Ukraine's logistic potential for export is extremely limited.

Taking into account the role of the economy in counteracting aggression, tax and customs rules have been simplified. The country's financial capabilities have almost reached zero, while needs have grown exponentially. The mode of operation of public finances under martial law is therefore radically different from the usual. The government is allowed, at its discretion, to redistribute any expenditure to priority military areas if necessary. Bonds of domestic government loans, including military ones, are being issued. Within the framework of balancing with inflation risks, along with business entities and citizens, the National Bank of Ukraine will acquire them at the expense of money emission.

Our state under war conditions greatly depends on external financing and external borrowings. In the near future, almost half of the government spending will be covered by such borrowings and grants. The current need for external support is about $5 billion a month.

As such, we can conclude that Ukraine is currently undergoing economic degradation. The country will lack its own financial resources that are needed for its rapid post-war recovery. Ukraine's economic dynamics will critically depend on external financial revenues.

It is obvious that the prospects for providing international assistance may sometimes be limited due to some objective factors of a political, economic and electoral nature, so, private foreign investment will be key to a speedy recovery. Receiving it requires a new economic doctrine. It can be assumed that Ukraine should already start getting ready for a corresponding reduction in budget funding, and large-scale restructuring of the entire system of public administration.

Within the state and local budgets of all levels, the challenges of destabilisation restrain the growth of expenses, despite the objective need to strengthen the administrative measures of economic uplift and social support.

The action of market forces, which for centuries prevailed at all levels of the economy (in rural markets, in industry, trade, on capital stock exchanges), is rapidly transferred across state borders. Undoubtedly, the convergence of national economies with the help of foreign trade and financial flows, as well as the mobility of labour, knowledge and technologies, requires new approaches to anti-crisis regulation.

The public finances of Ukraine, compared to other developing European countries, are characterised by high levels of both revenues and expenditures.

Currently and in the future until 2023, the ratio of income and expenditure parts relative to GDP in Ukraine will be preserved with a gradual increase in the level of debt security. At the same time, it should be noted that, on average, the values of these indicators in EU countries are now and in the future higher than in Ukraine, by approximately 3–4%.

Strengthening the role of the state in evaluating and supporting positive processes of developing certain sectors of the economy is extremely important. In this context, the directions of national anti-crisis tax regulation should be considered. State support should be provided to enterprises of machine building, and the aerospace industry, which has the potential for a full technological cycle of creating space complexes, as well as passenger, military transport and civil transport aircraft. Equally important are the development and implementation of tax preferences for small and medium-sized businesses.

Although among the EU countries, their worst debt obligations are consistently high and exceed the average European indicators, it is not correct to compare their general state of affairs with others.

In the euro zone, they are protected by macroeconomic stabilisation measures from the sole regulator of the monetary sector, the European Central Bank.

In other words, in our opinion, despite the presence of many conflicting opinions regarding the future of the single currency in the European economic space, the gradual European movement of integrating Ukraine will in any case be a significant institutional factor in countering external and internal threats of destabilisation.

3.2. Tax risks of the state and organisations in conditions of martial law and turmoil of the national economy due to crisis[1]

Fiscal and budgetary regulation provides a set of institutional and political measures for the state with the aim of supporting business activity, curbing fluctuations in aggregate demand, and its impact on the level of employment, inflation and other macroeconomic indicators of the economy. It is clear that, in the current crisis, emerging market countries and low-income developing countries, which are net importers of energy and food,

[1] See European Commission, 2016; OECD, 2004.

will suffer from higher world prices, which will put pressure on both economic growth and public finances.

In recent years, under the influence of internal and external factors, the impact of risks on the development of public finances has increased in most countries.

As a result, the tendency to unbalance them, to consolidate the balance sheets of the general public administration sector with significant deficits, and to accumulate public debt, have strengthened. The general stability of the national financial space is closely related to the state of the budget, the existing optimisation of financial flows and settlement operations, as well as the degree of protection of the interests of the participants in contractual relations.

The security of the country largely depends on the organisational possibilities of preventing administrative and criminal offenses in the monetary and financial sector; large-scale outflows of capital abroad; and its "erosion" from the real sector of the economy.

It is necessary to take the established habits of taxpayers into account.

In particular, we are talking about socio-cultural traditions: whether it is worth taking this or that risk for the sake of immediate or long-term benefits, or if it is necessary to insure against any potentially unexpected situations.

Therefore, the experience of the fiscal services of developed countries is of great importance for countries with a low tax culture from the point of view of strengthening the tax institution as a whole. For example, it is a well-known practice when regulatory acts single out transactions that are legal in themselves and do not entail taxation, but are carried out in aggregate only in order to avoid it. That is, it is considered that actions based on this technology of tax evasion, in fact, differ from a tax crime or its planning, as well as from sham contracts. In order to prove the incompatibility of this behaviour with the spirit and essence of tax rules, although it is absolutely legal in form, it is necessary to provide arguments that this or that operation was carried out without any significant consequences for business.

According to Coase and Williamson (1993), the amount of transaction costs largely depends on the quality of the mechanisms of adaptation to the changed conditions. The nature of adaptation to changes depends on the characteristics of the interaction between the contract participants. It is about either the market or the administrative order of interaction. At the same time, the transition from autonomous to coordinated adaptation is accompanied by an increase in costs and, also, the risk of so-called post-contract opportunism, when any of the participants can abandon their original intentions, convinced that, under new circumstances, it is no longer profitable for them. In other words, for the formation of norms and rules of behaviour within the framework of the fiscal space in order to avert the threats associated with the "tragedy of commons" (Hardin, 1968), it is necessary to create social institutions that can help to prevent difficulties caused by social dilemmas based on cooperative interactions.

Moreover, the desire to minimise the tax burden can be explained by the so-called rational expectations of the taxpayer. It is generally accepted that paying taxes is not beneficial to entrepreneurs from an economic point of view, and therefore, comparing estimates of the scale of the benefit received and the risks of punishment, they tend to hide the income that should be taxed. Rates of the tax burden, the probability of detection of

the fact of evasion and the amount of fines are factors that determine the choice in the decision-making process by rational taxpayers (Allingham & Sandmo, 1972). Some foreign scientists expanded this model, taking the specifics of the effect of various types of taxes, utility functions and the influence of corruption into account (Cremer & Gahvary, 1994; Boadway, 1994).

Compliance with formal taxation rules is closely related to solving the problem of improving the tax culture. An important area of improvement of national fiscal systems is therefore the formation of tax planning norms, not so much related to the optimisation of taxation, but to the need to manage tax risks. For the organising and planning on-site inspections in accordance with the best global practice, tax authorities currently use various technologies to identify risky areas in the activities of economic entities bordering on tax offenses. At the same time, the taxpayers are motivated to refuse tax minimisation tools voluntarily, as tax authorities make assessment criteria generally accessible. Therefore, comprehensive support for actions that improve the culture of tax planning is urgent. First of all, the key is increasing the level of economically justified tax legislation that meets the needs of modern development, reflecting in it the achievements of social sciences, significant for the practice of regulation, which contribute to the achievement of important social results. The technical and legal improvement of the general state of legality needs to contribute to the gradual convergence with European supranational rules, to relieve the employees of the tax department of the task of minimising taxation, despite possible tax risks.

In this regard, the state's policy in the field of tax planning should provide for methods of influencing business entities so that their behaviour corresponds to the public interests of the state. It is necessary to influence how the reaction of entrepreneurs to regulatory guidelines is formed both individually and in a group, and characteristic of a certain social group, industry, or mode. If the action of tax levers is accompanied by noticeable redistributive consequences, it is necessary to monitor the probability of generating signals that lead to the emergence of opportunistic behaviour related to non-payment of taxes on a constant basis. In the latter case, we are talking about the risks of a reduction in savings offers, which negatively affects the processes of forming share capital and the company's activities as a whole. In any case, regardless of one or another regulatory sphere of the fiscal space, tax forecasting and administration are accompanied by both value criteria and cognitive processes.

In this context, it is important to develop certain standards of behaviour in the field of taxation among society, which will over time allow the internal needs of individuals to observe the laws to form.

To do this, the attitude of taxpayers to the work of fiscal authorities and tax legislation must be constantly assessed.

No less important are the features of the state and social system. The fact is that, with large amounts of shadow capital and the spread of corruption, as well as the presence of an oligarchic social class at the state level, completely asymmetric decisions can be made on the problems of the tax burden.

Therefore, one of the first positions in terms of post-war reconstruction in Ukraine is to comply with the European principle of tax justice. Such actions should be

accompanied by the cohesion of society and the authorities around the goals of building a sustainable and resilient national socio-economic system.

The risks of non-payment of taxes depend on the rational, pragmatic choice of entrepreneurs with awareness of the possible threat of punishment or on the perception of taxes as a necessary source of public welfare (Becker, 1978; Pass et al., 1988; Buchanan, 1999).

In the period after the introduction of the martial law regime in Ukraine, the approach to the provision of tax benefits was changed. The emergence of force majeure at the national level required the regulatory function of taxes on business activities to be strengthened. Such innovations should be accompanied by a certain reformatting of measures to combat non-compliance with current norms and rules. It is an issue of strengthening standardised procedures for neutralising of such probable risks.

Since a number of systemic changes aimed at reducing the tax burden, primarily for small and medium-sized businesses, have been introduced, the strengthening of preventive measures is foreseen to prevent fake transactions in the field of activity of large and multinational companies, which are associated with aggressive tax planning. Undoubtedly, in the same context, on the basis of transparency and accountability based on modern digital technologies in the administration, analytical and control functions will be strengthened in relation to the quantitative and qualitative components of financial and non-financial information flows. This, on the one hand, will make it possible for the number of on-site tax audits not to increase, and on the other hand, it will contribute to the timely detection of probable fraudulent schemes for tax evasion.

It is considered appropriate to exempt from paying mandatory payments to the state and provide tax reporting to the subjects of the simplified taxation system with small volumes of business activity during martial law, when their activities cannot continue. At the same time, it is necessary for such taxpayers to resume reporting and paying of mandatory dues when it becomes possible to produce goods and services under martial law, or thereafter. In addition, precautionary measures are needed so that such benefits cannot be used by entrepreneurs whose activity in value terms exceeds the established limits.

In essence, the same reservations apply to entrepreneurs in the fields of big business and multinational companies, as it is possible for large business to pay 2% sales tax instead of corporate income tax and value added tax.

Within the framework of risk management, monitoring the use of such benefits must include the results of a quantitative assessment of the use of preferences under martial law. It should be borne in mind that, for example, the share of taxes from the activities of small business entities in Ukraine was up to 10% of local budget revenues before the war. In addition, with significant amounts of financial assistance from friendly states, Ukraine will demonstrate that domestic taxpayers are conscientious about their obligations.

A sharp decline in tax revenue during wartime in Ukraine has been accompanied by the growth of international financial support. Undoubtedly, to maintain a high level of trust in our state, the principles of transparency and accountability should be enhanced. Further cooperation between business and public authorities will require common approaches to counteracting compliance risks. Hence, adopting and implementing further fiscal innovations should be based on better-informed decisions.

Such functions are usually entrusted to independent fiscal bodies created, for example, by the state Parliament, or to authoritative public organisations.

At the same time, it is worth considering that, according to Pillar 2 of the large-scale plan to reform the international tax system for large business – Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalization of the Economy (OECD, 2021) – the global minimum tax rate is 15%.

Figure 3 shows the data on the level of provision of expenditures of the consolidated budget of Ukraine with tax revenues in January–June 2022, which indicate a general trend of a decrease in the absolute amount of tax revenues and an increase in state expenditures.

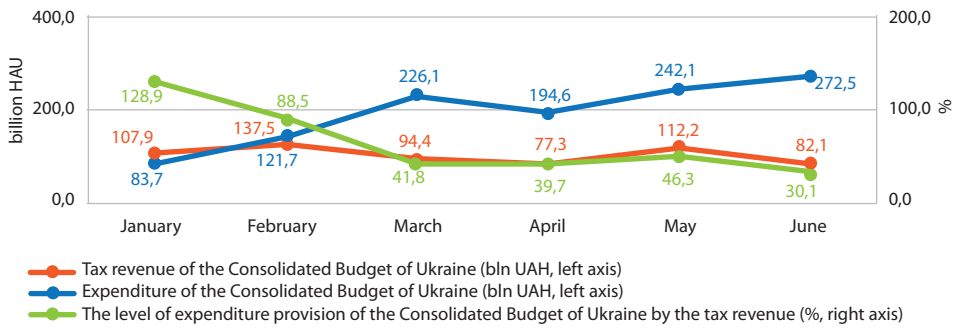

Figure 3. Level of ensuring the expenditures of the Consolidated Budget of Ukraine by tax revenues in January–June 2022, %

Source: Compiled by the author based on the indicators of the implementation of the Consolidated Budget of Ukraine in January–June 2022 (www.mof.gov.ua/uk/budget_2022-538).

The indicator of ensuring expenditures of the consolidated budget of Ukraine align with tax revenues has a general tendency to decrease. If, in January 2022 tax revenues exceeded consolidated budget expenditures by 28.9%, then already in February the level of expenditure coverage by these revenues was 88.5%, in March – 41.8%, in April – 39.7%, in May – 46%, 3%, and in June – 30.1%. Such low provision indicators indicate that, in the period analysed, non-tax revenues, in particular borrowing and international transfers, play a large part in financing expenditures. The trend that has developed is extremely threatening from the perspective of ensuring the fiscal security of the state.

4. Harmonisation of fiscal and monetary policy: strengthening the resilience of the national economy

After the crises in 2008–2009 and 2020, the conceptual principles of the formation and implementation of monetary and fiscal policies, and their harmonisation as components of the protection of the financial security of the state were defined and improved.

Standardised immune mechanisms of diagnostics, independent examination, including public standards of correcting threatening signs in the activity of world and national financial and banking structures were implemented in modern management practice.

In accordance with threshold values identified with established and recognised quantitative as well as qualitative indicators of operational activity, mandatory for the introduction of adapted monitoring and regulatory procedures, *inter alia,* has been provided. The problematic issue has become the need to standardise compliance control systems at all stages of the functioning of economic entities, as well as to impose fines or sanctions on those guilty of non-compliance with the rules in the regulatory and legal framework.

It should be emphasised that the strategic goals in the field of financial management are already being considered by the world community, in close connection with an in-depth analysis of financialisation trends.

Flexible exchange rates, where possible, can help cushion shocks. Excessive volatility or disorderly fluctuations in the value of the national currency can cause negative consequences for the economic and financial balance. Therefore, we emphasise that it is also important to refrain from competitive devaluation and using exchange rate targets to obtain benefits. Thus, reliable economic determinants, sound policy and support for the stability of the international monetary system will contribute to active and sustainable economic growth based on balanced investment decisions.

Under the current conditions of martial law and the future post-war reconstruction in Ukraine, it is highly necessary to strengthen the resilience of the components of the fiscal and monetary space to exogenous shocks.

The dynamics of the discount rate of the National Bank of Ukraine rose from 10 to 25% in June. At the beginning of the war, the transition from a flexible exchange rate policy to a fixed one was quite justified, as it made it possible to maintain stability in the foreign exchange market. However, fixing the official exchange rate has led to the risk of the money market falling apart into segments with the possibility of collecting speculative rents. In fact, there is a gap in exchange rate levels between the cash and non-cash markets, which creates incentives for exporters to seek offsetting schemes when disposing of foreign exchange earnings. In this way there are threats to increase the pressure of demand in the foreign exchange market as well as to adopt appropriate and inevitable decisions regarding the sale of currency from reserves. Therefore, during martial law and the aggravation of the budget deficit, a clear but painful step was taken for the market with a 2.5-fold increase in the discount rate.

To prevent the economy from falling into vicious spiral of degradation, namely: rate increase – reduction of investments – technological lag – decrease in competitiveness – devaluation of the hryvnia – surge in inflation, unprecedented measures are being taken in the field of interaction between independent fiscal and monetary regulators, with the aim of a synergetic effect from this interaction. This applies primarily to interest rates on military bonds, stimulating import substitution and expanding domestic production with an increase in targeted lending to domestic businesses at acceptable interest rates. It should be borne in mind that the devaluation of the national currency, and the rise in world prices for food and raw materials have made a significant contribution to the current wave of inflation in Ukraine. The management of structural changes in the country will therefore

be aimed at compliance with the principle of complementarity by the Government, central executive bodies and the National Bank.

Ukraine already has a program to support agricultural producers, as well as small and medium-sized businesses. It is also worth introducing special investment contracts or investment protection agreements between the state and enterprises as borrowers or other well-known instruments in world practice.

5. Conclusions

The signing of the EU – Ukraine Association Agreement in 2014 marked a new stage in the development of European–Ukrainian contractual relations, which provided for their transition to a qualitatively new level – from partnership and cooperation to political association and economic integration. The entry into force of this Agreement, especially of the part related to accession to the free trade zone, and its ratification, have set new challenges for the state, including those in the context of improving existing regulations in the field of taxation.

Even taking into account all the risks of the new economic reality, broad international support for tax reforms in Ukraine, as well as consistent activities by all branches of government, together with the public sector, have made it possible to unite all stakeholders around progressive change.

In modern conditions, the key priorities of Ukraine's tax policy are ensuring an anti-crisis tax policy under the conditions of martial law and post-war recovery; ensuring an anti-crisis tax policy in the context of the spread of the Covid-19 pandemic; harmonising the tax legislation of Ukraine with the norms of the European Union, taking Ukraine's acquisition of EU candidate status into account.

In connection with the lingering nature of hostilities on the territory of Ukraine, threats of destabilisation are increasing in the world. In the era of the pandemic, during forced quarantines to ensure social support in the USA and European countries monetary resources were issued, which led to an increase in inflation. Because of the war, prices for energy resources and food products are rising, Central Banks are forced to raise interest rates; there is an increase in the price of credit resources. The market problems of successful adaptation of the states to new crisis phenomena are accompanied by the risks of a possible food shortage, which will probably lead to another wave of migration from poor countries. In addition, in the autumn–winter period, an extra factor complicating the situation may be an increase in the incidence of the coronavirus.

The country has already shaped a confident course for the transformation of strategic directions for countering wartime geopolitical challenges, namely ensuring economic and social resilience to future upheavals in the post-war recovery process. In contrast to the approaches of Public Finance Management provided for in the Strategy for Reforming the State Finance Management System for 2022–2025 and the Plan of Actions for Its Implementation (see Cabinet of Ministers of Ukraine, 2021), monetary and credit regulation by various branches of government will take place covering the public sector as a whole. At the same time, Strategic Public Finance Governance (Marchenko, 2022) will

make it possible to obtain a synergistic effect from the coordination of management actions, both during the period of martial law and during post-war recovery. *During systemic turmoil, the practical implementation of such a concept will be accompanied by the cohesion of society around countering the challenges and threats facing the country and its financial and economic system under the new reality, through the consistent introduction of relevant institutional changes within the framework of national characteristics.* In order to meet the needs of economic agents of all forms of ownership during the post-war recovery, within the framework of close cooperation with international partners, ways of countering the consequences of the growing war debt burden as well as the threats of destroying Ukraine's national economy have been roughcast (Ash, 2022). The financial policy of all branches of the Ukrainian Government as well as the National Bank is aimed at increasing the effectiveness of monetary transmission, minimising emission sources of financing the state budget deficit. The potential for stability and resilience of the economy will be strengthened on the basis of a balanced policy of growth of macroeconomic stability (Fukuyama, 2022) and stimulation of entrepreneurial activity (Mackinnon, 2022).

The maximum expansion of economic opportunities in Ukraine is provided on a legal basis through the complete modernisation of state institutions. This will increase tax payments, as well as registered employment.

A significant reserve to replenish the State Budget of Ukraine is a resource that can be obtained as the shadow sector of the economy shrinks.

A risk-oriented approach to combating money laundering has already been applied in Ukraine. At the legislative level, the Standards of the Financial Action Task Force on Money Laundering (see FATF, 2012–2022; Verkhovna Rada of Ukraine, 2019) are successfully implemented.

Further measures are planned to counteract the risks and threats of the operational activities of economic entities in the credit and financial sphere, including the creation of conditions for legalising (laundering) the proceeds from crime. These include conducting effective financial and economic activities, preventing the transfer of non-cash funds into shadow cash circulation, as well as the illegal withdrawal of cash and other valuable assets abroad.

Due to the implementation of the BEPS Action Plan by the world community, specific risks are of crucial importance, in particular in the field of information security. It is planned to implement the updated conceptual principles of tax expenditures (Heady & Mansour, 2019). Strengthening of the target nature of tax benefits will be used in the process of developing, approving and implementing the country's budget. The basis for the consistent institutionalisation of the international data exchange system will be the implementation of the requirements of the Common Reporting Standard (CRS) (OECD, 2022) in the legislation of Ukraine. Thus, against the background of reduced risks of tax evasion, trust in Ukrainian fiscal regulations will be strengthened. In Ukraine, the proper and voluntary fulfilment of tax obligations will be ensured by the complete elimination of informal rules in force in the shadow economy. According to the guidelines of reputable international organisations, risk assessment and management become one of the key links in the activities of tax administrations (OECD, 2017). At the same time, the political guidelines of society in the context of combating corruption and organised crime will also be considered.

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Are Changes in (Czech Direct) Tax Law Necessary, or Is It Just a Politicum?

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Abstract: This contribution disproves the hypothesis that most of the changes in Czech direct tax law are adopted to minimise negative aspects connected with the Covid-19 pandemic and the Ukrainian war. On the contrary, most of the significant changes in the Czech tax law adopted in the last three years (abolition of the super-gross wage, lump-sum tax, tax relieves, etc.) had no connection to the SARS-CoV-2 coronavirus causing Covid-19 illness or the war in Ukraine. These tragic incidents were just a pretext to advance political goals.

Keywords: the Czech Republic, Covid-19, war in Ukraine, personal income tax, property transfer tax

1. Introduction

Tax law is a specific branch of law, mainly because of many amendments to the existing legal acts dealing with taxation. The reasons for these changes are primarily economic, or at least should be. Last years were specific: the SARS-CoV-2 coronavirus causing Covid-19 illness and the war in Ukraine have changed our lives and behaviour. They also meant the changes in the economy and law. One of the most affected legal areas was the tax law. The explanatory reports to the amendments very often argued that changes are necessary to overcome the negative effects caused by the Covid-19 pandemic or the war in Ukraine. However, not only the tax law is being created by the politicians who know that tax regulation might affect the voters. In these circumstances, it is necessary to ask whether the reasons for tax law amendments as stated in the explanatory reports or presented in the Parliament are objective or misleading, serving as an excuse for the political decisions in the area of taxation. This article aims to decide which changes in the direct tax acts in the Czech Republic are really a possible solution to the negative economic consequences associated with the SARS-CoV-2 coronavirus causing Covid-19 illness and the war in Ukraine and which are purely political. In line with statements of politicians (and legislators at the same time), the hypothesis to be confirmed or disproved states that most of these changes are adopted to minimise negative aspects connected with the Covid-19 and the Ukrainian war.

To achieve the aim, it is necessary to search all amendments to the tax law acts regulating direct taxes adopted in the last three years and assess their importance for the economy and society. In the case of essential amendments, it is necessary to study the explanatory reports and arguments presented by the politicians during the parliamentary proceedings if the Covid-19 pandemic or war are the reasons for proposed changes. These amendments are also critically analysed, including the historical consequences and economic and political debates. Synthesising the gained knowledge, it is possible to evaluate whether adopted changes in the direct tax acts are really a possible solution to the negative consequences associated with the SARS-CoV-2 coronavirus causing Covid-19 illness and the war in Ukraine or purely politically motivated. It should also allow for confirming or disproving the set hypothesis and possibly proposing possible changes de lege ferenda.

This article is partially based on the research and findings presented by Radvan & Svobodová dealing with "Covid-19" tax law amendments (Radvan & Svobodová, 2021) and by Radvan & Papavasilevská concerning the abolition of the property transfer tax in the Czech Republic (Radvan & Papavasilevská, 2020). The other authors dealing with these issues in the Czech Republic are Kozieł (Tyniewicki & Kozieł, 2021; Kozieł, 2021), Papavasilevská (Papavasilevská, 2021), or Semerád & Semerádová (Semerád, Radvan, & Semerádová, 2021). There is no other professional legal scientific literature on the subject. Most of the texts are published in nonprofessional journals and newspapers; they are only brief and do not have the ambition to analyse the adopted changes critically; their aim is only to describe these changes. This is the reason why the presented research is innovative, and its conclusions might be used both in theoretical and legal research and in legislative practice.

The following text categorises the direct tax regulation changes into two groups. The first deals with income taxes, and the second focuses on property taxes.

2. Income taxes

Most of the changes in tax law in the last three years were adopted as a reaction to the economic consequences more or less connected to the SARS-CoV-2 coronavirus causing Covid-19 illness and the war in Ukraine. No wonder the income taxes were the most affected ones – they represent an instrument that affects the economically active population across the board. Besides the minor, usually technical amendments, the crucial changes were: the abolition of the super-gross wage, the lump-sum tax, the loss carry-back, changes in depreciation rules and the relief for stopped recovery.

2.1. Abolition of the super-gross wage

To deal with the concept of the super-gross wage as the tax base for the incomes from dependent activities, it is necessary to return to history. Before the Parliament elections in 2007, the right-wing opposition parties were promising the 15% personal income tax

rate: the only linear percentage tax rate replacing the progressive tax rate between 12 and 32%. When they succeeded and created the government, they had to realise this most visible promise. However, to only replace the progressive tax rate with the linear one would mean a decrease in tax revenues and even higher taxes for the poorest workers. It should also be stated that the tax base was set as the brutto salary (brutto wage) reduced by social and health contributions paid by the employee at 12.5%. In fact, the tax was payable from 87.5% of the brutto salary.

That is why the new government, implementing a linear 15% tax rate, set the tax base as the brutto salary increased by social and health contributions paid by the employer at 34% (later 33.8%). This tax base is called super-gross wage, and it was introduced into the Czech legal system with effect on 1 January 2008 by the Act on Stabilization of Public Budgets.[1] To secure that everybody pays lower taxes, the basic tax relief was also set.

The concept of super-gross wage was completely unfortunate, non-transparent and unique worldwide. The only benefit might have been seen in the fact that workers could see the price of their work, but this was not enough to justify this way of taxation. The concept of super-gross wage cannot be considered fair: assuming that we consider social and health contributions as taxes sensu lato, de facto, it means that a tax is paid on a tax. Such a concept also led to unequal taxation of income from dependent and independent (self-employed) activities as the tax base for incomes from independent activities was set as an income reduced by expenses with a possibility to replace real expenses with lump-sum expenses up to 80% of the income. Many employers and employees decided for the schwarz system: to conclude a commercial contract instead of an employment contract to obscure the actual content of the contract between the worker and the entity that outsources the work (see Liška, 2016; Radvan & Neckář, 2016; Radvan, 2015; Radvan, 2016a).

Although almost every successive government has had the abolition of the super-gross wage in its program statement, it has never happened. On the contrary, a second tax rate appeared in 2013 with the confusing name of a solidarity tax increase of 7%. This was a mere, but not officially recognised, switch from a linear tax rate to a progressive tax rate.

The super-gross wage was abolished almost accidentally at the end of 2020. It was not the government's bill amending certain tax laws but the amendment to this government's bill tabled by Prime Minister Babiš as an MP (Chamber of Deputies, 2020a). Thus, there is no detailed Explanatory Report and Regulatory Impact Assessment. By doing so, the Prime Minister bypassed all possible discussions at the level of the Ministry of Finance, with the relevant expert bodies in the external comment procedure, with the committees of the Legislative Council of the Government, and the Legislative Council of the Government itself, etc. It is startling that the most costly change in the Czech tax system did not go through the standard legislative process. It supports the assumption that this change was also politically motivated.

The amendment meant that the gross wage had become a partial basis for personal income tax on dependent activities since 1 January 2021. The tax rate remained at 15%, and instead of a solidarity tax increase, a second tax rate of 23% was introduced for the

[1] Act no. 261/2007 Sb. For details see Radvan (2016, p. 87).

part of the tax base exceeding 48 times the average wage (CZK 141,764 in 2021). Ironically, an opposition proposal to increase the basic taxpayer relief by CZK 3,000 for 2021 and a further CZK 3,000 for subsequent years was also voted through.

The Czech Fiscal Council's study estimated that the abolition of the super-gross wage and the introduction of two rates of 15% and 23% meant a loss of tax revenue of up to CZK 88 billion, two-thirds of which would be missing from the state budget and one-third from municipalities and regions (Hlaváček & Pavel, 2020). The study did not include an increase in basic tax relief; with this change, a shortfall of more than CZK 100 billion is assumed. The loss of local government revenue was partly compensated for by an increased share of shared tax revenue.

The abolition of the super-gross wage could be considered a good step. However, it could and should have been taken at any time before, regardless of the pandemic and the economic crisis. In times of crisis, the abolition of the super-gross wage means a huge shortfall in public budget revenues. It was possible at least to reflect the changes in tax base construction adequately in tax rates and increase them. The argument that abolishing the super-gross wage is a recipe for kick-starting the economy, increasing household consumption, and supporting those most affected by the coronavirus crisis is false (Fischer, Mazouch & Finardi, 2020; Kalíšková et al., 2020). It is clear that the abolition of the super-gross wage alone, without affecting the tax rate, is unfortunate from the point of view of public funds, nota bene when an increase in the basic tax relief has been approved at the same time. It is impossible to believe politicians who claim that such a low tax rate is only temporary, that the new system without the super-gross wage is intended to be a long-term concept, and that each government will just adjust the rates to suit its own needs. Unfortunately, the tax rate is the most visible to the public, and any increase is sensitively perceived, regardless of changes to other structural components and a possible overall reduction in the tax burden. Therefore, it is unlikely to expect tax increases from future governments (Radvan & Svobodová, 2021, pp. 79–80).

2.2. Lump-sum tax

The lump-sum tax is an entirely new institute introduced with effect from 1 January 2021. This regime is based on a voluntary basis. There are many benefits for both taxpayers and tax offices, mainly a significant reduction in the administrative burden. The taxpayer pays the personal income tax and social and health contributions in one payment to the tax office without having to file tax returns and contribution statements. The risk of any public control is significantly reduced as there is no need to control expenses. There are also no obligations in the acts to keep any specific records for the lump-sum taxpayers.

The conditions to pay the lump-sum tax are simple: the taxpayer must be a self-employed person, not subject to VAT, with incomes not exceeding CZK 1,000,000. The taxpayer willing to pay the lump-sum tax must submit a notification of entry into the lump-sum tax no later than 10 January for each taxable period – calendar year. Subsequently, the taxpayer pays monthly a lump-sum advance payment to the tax

authorities in lieu of the standard income tax and social and health contributions advance payments. If all the statutory conditions are met, there is no need to file the tax return and contribution statements and repay anything after the end of the tax year. The lump-sum advance payment is due by the 20th day of the month. It includes the personal income tax (CZK 100), the pension insurance premiums and the contribution to the state employment policy (CZK 3.267 in 2022), and health insurance premiums (CZK 2,627 in 2022). The total lump-sum advance payment thus amounts to CZK 5,994 per month in the calendar year 2022.

The lump-sum tax seems to be the ideal tool for small businessmen. However, there are still several obstacles. In 2022, the lump-sum tax will be used by about 80,000 businessmen, although the Tax Administration estimates that up to 120,000 Czechs could potentially use this option. The minor reason might be the income higher than CZK 1,000,000 or the risk that the income at the end of the year may exceed this amount. That is why the limit of CZK 2,000,000 is being discussed for the following years. At this point, it is also necessary to remind that there is no duty of revenue registry in the Czech Republic that allows businessmen to hide their real incomes.

The more probable reason the lump-sum tax regime is not as broadly used as expected is the construction of the "regular" taxation of incomes from business (independent) activities. Every taxpayer has the possibility to deduct lump-sum expenses instead of real expenses: up to 80% for agricultural production, forestry, and fish farming and handicraft industry, 60% for other industries and trades, 40% for other businesses (lawyers, doctors, etc.) and other incomes (e.g. incomes from the intellectual property), and 30% for business property rents. The maximum value of lump-sum expenses is limited in the way that it is most profitable for those with an annual income up to CZK 2,000,000. Taking into account the lump-sum expenses for the tax base, 15% tax rate, a basic tax relief of CZK 30,840, other relieves, and tax preferences for children, the personal income tax might be close to zero or even negative. The negative tax in the Czech Republic is not a theoretical issue. Still, it occurs in practice: the tax office considering tax preferences for children pays the negative tax back to a taxpayer.[2]

In spite of the fact that many politicians argued that a lump-sum tax regime is a useful tool for helping entrepreneurs to overcome difficulties connected with the Covid-19 pandemic, I cannot see any connections. The lump-sum tax is an instrument to reduce administrative burdens; however, the stimulating impact on the economy is zero.

3. Loss carryback

According to the Czech legal regulation, the tax loss is the difference between the taxpayer's expenses and taxable income. Generally, the tax loss may be fully or partially deducted from the tax base in the five tax periods immediately following the period for which the tax loss is determined. As a reaction to the pandemic crisis, the Parliament adopted an amendment in 2020: it is possible to (fully or partially) deduct a tax loss

[2] For details see Radvan (2020, pp. 39–41).

that has been finally determined in the two tax periods immediately preceding the tax period for which the tax loss is determined. The aggregate amount to be deducted on these tax periods from the tax base is set to CZK 30,000,000.

The loss carryback is in line with the Commission Recommendation (EU) 2021/801 of 18 May 2021 on the tax treatment of losses during the Covid-19 crisis, according to which the Member States should allow the carry back of losses at least to the previous tax year, i.e. at least to 2019. This instrument allows taxpayers an earlier refund of the money they paid in tax for the prior taxable year and boosts cash flow which seems necessary during the pandemic situation. It is without any doubt a reasonable solution to the negative consequences associated with the SARS-CoV-2 coronavirus causing Covid-19 illness. On the other hand, this new rule might be risky as the measure could also be used by entities that will no longer be able to generate profits in future periods and, therefore, will not contribute to the economy in the desired way.

4. Charitable donations

Both personal and corporate income taxes have a list of items deductible from the tax base. One of the most frequent ones is charitable donation: the value of the gratuitous performance for science and education, research and development, culture, education, police, fire protection, support and protection of youth, protection of animals and their health, social, health and ecological purposes, humanitarian, charitable, religious purposes, physical education and sports, political parties for their activities, the elimination of the consequences of a natural disaster. Generally, natural persons are allowed to deduct the aggregate value of the gratuitous supplies in the tax period between 2% (at least CZK 1,000) and 15% of the tax base. Legal persons can deduct the aggregate value of the gratuitous supplies between CZK 2,000 and 10% of the tax base. However, in taxable periods 2020 and 2021 (respectively in taxable periods ending in the period from 1 March 2020 to 28 February 2022 in the case of legal persons), the upper limit was increased up to 30% of the tax base.

Such a temporary increase of items deductible from the tax base seems to be a good tool for increasing aid to those in need. However, from the legal technique perspective, it is difficult to accept time-limited changes in tax legislation.

5. Asset depreciations

From 1 January 2001, the rules for asset depreciation were significantly changed. The category of intangible assets (research and development results, software, valuation rights, and other assets with an entry price of more than CZK 60,000 and useful life of more than one year) was abolished, which is related to the abolition of tax depreciation of this property. The transitional provisions give the opportunity to use this rule even retroactively as of 1 January 2020.

In the case of tangible property acquired in the period from 1 January 2020 to 31 December 2021 classified in the first two depreciation groups, the taxpayer got a new possibility of choice: to use existing rules or extraordinary depreciation with shorter depreciation periods. The period might then be shortened in group 1 from 3 years to 12 months and in group 2 from 5 years to 12 months (60% of the cost of the tangible property for the first 12 months and 40% for the immediately subsequent 12 months). According to the draft bills discussed in Parliament, the extraordinary depreciation should be prolonged till the end of 2023. Also, the limit for determining tangible assets subject to depreciation was increased from CZK 40,000 to CZK 80,000.

Undoubtedly, the new asset depreciation rules were adopted in response to the Covid-19 crisis. This measure is intended to motivate entrepreneurs to acquire new intangible and tangible assets by allowing them to reduce the tax base immediately (intangible assets) or within a short period after the acquisition. Of course, these new rules may not be profitable for all entrepreneurs, especially if their profit is lower than in the taxable periods before the Covid-19 crisis. That is why the taxpayer may choose a new method of depreciation as an alternative method of depreciation for tangible assets classified in depreciation group 1 or 2, possibly even only for certain items of property.

6. Tax relieves

Above in this contribution, the increase of the basic taxpayer relief by CZK 3,000 for 2021 and a further CZK 3,000 for subsequent years was mentioned. Generally, the regular increase of all fixed amounts in tax law corresponding to inflation growth is desirable. However, the increase of the basic taxpayer relief in connection with the abolition of the super-gross wage was not a proper tool in the pandemic crises, and the need for higher public revenues to cover increasing demands to finance public goods and services, including new types of subsidies and donations. The same applies to the abolition of maximal tax bonus (the amount the taxpayer receives in case the tax preferences for children are higher than the tax; used mainly by those with lower incomes and more children).

From 1 January 2022, new tax relief for stopped recovery was introduced. The Enforcement Act allows the suspension of long-lasting (more than three years) enforcement proceedings involving small claims not exceeding CZK 1,500. In these cases, the executor should call on the beneficiary (usually the creditor) to make a deposit for the costs of the recovery. If the creditor fails to deposit the recovery costs, the executor shall stop the recovery. The creditor is then entitled to compensation for such stopped recovery in the amount of 30% of the recovered claim. However, this compensation is not provided in monetary form but in the form of an income tax relief for the stopped recovery. The amount of the tax relief for the stopped recovery itself corresponds to the amount of the compensation granted to the creditor by the executor when the recovery is stopped. The compensation for a stopped recovery corresponds to 30% of the debt recovered. The tax relief for stopped recovery might be used by both natural persons and legal entities. Especially during the economic crisis, it seems to be a good tool to help creditors with bad

debts. The only weakness is that the relief is not transferrable to the following tax periods in the case the taxpayer does not declare tax in the taxable period in question against which the relief could be deducted (e.g. has declared a tax loss) (Greiff & Doškářová, 2021).

7. Property taxes

In a time of crisis, the GDP is decreasing, and so are the VAT and income tax revenues. In these bad times, property taxes might play a significant role, as the property cannot disappear and still has its value. While the recurrent property tax regulation in the Czech Republic remained the same during the crisis connected with the Covid-19 illness and war in Ukraine, the property transfer tax was abolished.

7.1. Abolition of the property transfer tax

There is a clear trend in CEE countries to abolish property transfer taxes, particularly inheritance and gift taxes (e.g. Slovakia in 2004, the Czech Republic in 2014). Property transfer taxes have also been abolished, e.g. in Estonia, Romania, Lithuania and Slovakia (McCluskey, Plimmer & Franzsen, 2021, p. 5; Brzeski, Románová & Franzsen, 2019). The Czech Government proposed the abolition of the tax on the acquisition of immovable property in the spring of 2020, and the law was approved with effect on 26 September 2020. The primary argument was to simplify and clarify the tax system. The pandemic caused by the spread of the SARS-CoV-2 virus is mentioned only subsequently, but only in very general terms. Among other reasons for abolition, the government cites a reduction in the incentive to set up special-purpose business corporations owning immovable property and for special-purpose transfers of shares in them, an increase in investment in immovable property due to a reduction in acquisition costs, and a reduction in the administrative burden for taxpayers and the state (Chamber of Deputies, 2020b). The bill provided for the retroactive effects of the abolition of the tax by fixing the decisive date at 31 March 2020: if the deadline for filing the tax return expires from 31 March 2020, the tax liability arising before the date of entry into force of the abolition law will cease on the date of entry into force of this law. In view of the rule that the tax return is to be filed by the end of the third month following the month in which the entry was made in the Land Registry (cadastre), all tax obligations where the entry was made in December 2019 or later will thus be extinguished. Such a procedure may be referred to as super-retroactivity. In addition, such an approach may create inequality between taxpayers who could not foresee the cancellation of the tax at the end of 2019 and could not influence in any way the length of the administrative procedure after filing the petition for registration. It is very likely that some taxpayers submitted a deposit application as early as October 2019, for example. Still, the deposit was not made until December, while others submitted a deposit application later in November 2019, and the

deposit was made promptly in the same month. Paradoxically, those who submitted the application for registration earlier (and therefore acquired the ownership right earlier) will not be subject to the tax (Radvan & Svobodová, 2021, p. 73).

The government assumed that the shortfall in state budget revenues from the abolished property transfer tax of about CZK 14 billion would be partially compensated by partial adjustments to the income tax. Thus, it proposed to extend the time test for the exemption of income from the sale of immovable property not used for housing purposes from five to ten years, effective from 1 January 2021, and to abolish the item deductible from the personal income tax base in the form of interest on housing loans, effective from 1 January 2022. While the first proposal was approved, the second was significantly changed by the legislators: the item deductible from the tax base was retained, and only the maximum amount was reduced from CZK 300,000 to CZK 150,000 per household per year, effective 1 January 2021. This change has no negative effect on most households, given the comparison of the actual and maximum amount of deductible interest (Radvan & Svobodová, 2021, p. 73–74).

It is necessary to mention that the stimulating effect of the abolition of the property transfer tax was not and could not be so large also for the reason that the new buildings were already exempted from the taxation. It means that the abolition of this tax was reflected only in the second-hand real estate market. This is another reason why it is possible to say that the property transfer tax abolition is a political decision. It is obvious that the real estate market did not stagnate even during the pandemic; however, this state of affairs is not necessarily linked to the abolition of the property transfer tax. The growth in investment in real estate is evident, but it has had the effect of raising prices. In order to reduce the incentive to set up special-purpose business corporations owning immovable property and to transfer shares in them for the purpose, it was certainly not necessary to abolish the tax; it was sufficient to modify the construction components of the tax and to define the object of taxation differently. In any event, the abolition of the property transfer tax has no obvious connection with dealing with the negative consequences of the SARS-CoV-2 coronavirus causing Covid-19 illness; the tax could have been abolished at any time before the pandemic. In this context, it should also be pointed out that the abolished tax also applies to transfers that took place in the autumn of 2019, when the world was not yet familiar with the SARS-CoV-2 coronavirus and the Covid-19 disease. The retroactivity option, tied to the entry of the right into the cadastre, also causes a form of inequality that can mean disputes between taxpayers and the state.

The mere abolition of the property transfer tax without other related changes in the tax law is a missed opportunity. It was possible to abolish the item deductible from the personal income tax base in the form of interest on housing loans. In the short term, combining these changes would bring buyers on the property market the necessary cash flow needed in times of crisis, while in the long term, there would be no reduction in public fund revenues. Another option was to increase the recurrent property tax, one of the world's lowest in the Czech Republic. This change would also make up for the shortfall in revenue in municipal budgets and would not require a change in the share of shared taxes in individual public budgets (Radvan & Svobodová, 2021, p. 79).

8. Conclusions

The above-mentioned and analysed changes in Czech tax law having any (real or political) link to the SARS-CoV-2 coronavirus causing Covid-19 illness and the war in Ukraine are not the only amendments. Indirect taxes should also be mentioned (VAT waiver on energy, exemption from customs duties and VAT on imports of selected products necessary to combat the effects of the spread of Covid-19, movements between VAT rates) as these changes were generally helpful for the increase of cash flow and the reduction of final prices for the customers. Many useful amendments were adopted in the area of tax administration, specifically the postponement of the deadline for filing a tax return and postponement of the tax due date. In spite of the fact that technically there were no changes to the legal deadlines, and only accessories related to the late filing of tax claims or late payment of tax (interest on late filing or penalty for late tax claims) were waived, these changes meant an increase of cash flow.

On the other hand, I consider suspending the obligation to register sales under the Electronic Revenue Registry Act illogical and unsystematic. Even the title of the act (Act on certain adjustments in the field of revenue registration in connection with the declaration of a state of emergency) indicates that the suspension was planned only as a short-term "relief" related to the state of emergency in the Czech Republic. De lege lata, the obligation to register sales is currently suspended until 31 December 2022. This change has no direct or indirect relation to the SARS-CoV-2 coronavirus causing Covid-19 illness or the war in Ukraine. It might serve as proof the proposal of the act abolishing the Electronic Revenue Registry Act. It was prepared by the government, and without any doubt, it will be adopted by the Parliament, entering into force on 1 January 2023.

To summarise, most of the significant changes in the Czech tax law adopted in the last three years (abolition of the super-gross wage, lump-sum tax, tax relieves, etc.) had no connection to the Covid-19 illness or the war in Ukraine. These tragic incidents were just a pretext to advance political goals. The hypothesis of this contribution was then disproved. I am afraid that de lege ferenda it is not possible to expect any improvements in that direction. E.g. the government proposed the draft bill reducing motor vehicle taxation to the minimum required by the EU directives and started a dialogue at the EU level to abolish the directives dealing with the minimal standards of motor vehicle taxation in the EU Member States.

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Excise Tax Reform in Poland on Electronic Cigarettes and Heated Tobacco Products and Personal Income Tax Reform

How Laws Should Not Be Amended

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Abstract: The purpose of the paper is to present the most important changes to the laws on excise tax and personal income tax (PIT) made in Poland in 2022. Due to the importance of these changes, they can be considered tax law reforms. The changes to the excise tax may not only affect the amount of taxes levied but may also influence the health-related behaviour of Poles in the coming years. The changes to the PIT may affect as many as 18 million taxpayers.

The main purpose of this paper is to verify two research hypotheses: first, that public consultations do not have any impact on the shape of the tax law being developed; and second, if the legislator adopts a tax law quickly, it will very likely contain many errors, the consequences of which may be serious.

Keywords: tax reform, public consultations, excise tax, electronic cigarettes, heated tobacco products, personal income tax

1. Introduction

An excise tax reform has been in force since 1 January 2022, based on the Act of 29 October 2021 amending the Act on excise tax and certain other acts.[1] This act concerns changes made to the taxation of traditional cigarettes and innovative products (electronic cigarettes). It is all the more important, as it defines the rules of taxation in this regard for the next few years.

Until recently, personal income tax law had not been significantly modified in Poland for a long time. A huge change was made in this respect with the adoption of the Act of 29 October 2021 amending the Act on Personal Income Tax and some other acts[2]. In their

[1] Journal of Laws of 2021, no. 2313.

[2] Journal of Laws of 2021, no. 2105 (hereinafter referred to as First Act on Personal Income Tax).

essence, the changes that took effect on 1 January 2022 affect a very large group of persons. According to the Ministry of Finance, about 18 million taxpayers will benefit from the new law and about 9 million of them will not pay any personal income tax (Ministry of Finance, Podatkowy Polski Ład w pigułce, 2022).

The main purpose of this paper is to verify two research hypotheses. First, in the practice of the tax law-making process, public consultations are treated only as a formal obligation, and the legislators adopting a tax law do not take the results of public consultations seriously. As such, public consultations are in fact just a token procedure.

Second, tax law should not be adopted too quickly without due attention and concentration. If the legislator adopts tax law quickly, it will very likely contain many errors, the consequences of which may be serious.

The study used the dogmatic method, which involves an analysis of the new regulations related to both taxes discussed herein. The paper also contains information based on an analysis of individual hypothetical cases, which was used to evaluate the new regulations on the PIT. An assessment of the new regulations for the excise tax was carried out on the basis, among other things, of the results of empirical research conducted by representatives of various sciences (chemistry and medicine), which was necessary to assess the impact on the health of traditional and so-called innovative products. Therefore, the paper not only fits within the scope of legal science, but can also be considered interdisciplinary.

2. Excise tax reform

Excise tax reform has been in force since 1 January 2022. The main changes were made in two areas. The first area is a 10% increase in the excise tax on cigarettes, smoking tobacco and innovative products. The second area is the proposed so-called Excise Tax Map: a schedule of changes in the rates of this tax for the coming years, a 10% increase every year between 2023 and 2027 (also for cigarettes, smoking tobacco and innovative products).

Formally, public consultations were carried out for these changes. This means that representatives of science were also consulted on the bill related to these changes (Popławski & Michalak, 2021). Public consultations are a very important component of the democratic system (Woźniczko, 2019). A discourse between representatives of the public, entities representing various interests, and bodies equipped with law-making powers should be reasonably reflected in the content of adopted legislation (Bobrus-Nowińska, 2019).

Public consultation of bills is a formal requirement. There are many regulations in Poland that impose the obligation to conduct public consultations on proposed bills. The Constitution of the Republic of Poland of 2 April 1997 provides that the supreme power is vested in the Nation and is exercised either through representatives or directly. In particular, Article 61 specifies, among other things, the right to be informed of the actions taken by, *inter alia,* public authorities and their effects. The Rules of Procedure of the

Council of Ministers[3] include Section III entitled *Handling Draft Government Documents,* the third Chapter of which, *(Arrangements, Public Consultations and Evaluations of Draft Government Documents),* includes provisions concerning this issue. At the same time, these consultations show a fundamental connection with the problem of the so-called assessment of expected socio-economic effects. In the Resolutions of the Sejm of the Republic of Poland of 30 July 1992 on the Rules of Procedure of the Sejm of the Republic of Poland, it is indicated that the explanatory statement for a bill should also present the results of consultations held and should inform the reader of the views and opinions presented, particularly if the obligation to obtain such opinions arises from the provisions of the law.

It should be emphasised that the bill amending the excise tax law was submitted for public consultations. This means that the following actions were taken: opinions and comments could be sent by e-mail, the proposal to change the rules of tobacco taxation was the subject of consultations with representatives of the tobacco industry as part of the Online Excise Forum (12–13 October 2021), and the forum's deliberations were publicly available on websites (Ministry of Finance, Powstanie Forum Opodatkowania Wyrobów Akcyzowych, 2022).

There are other questions that arise at this point: What do public consultations look like in practice? And were the propositions submitted as part of the above-mentioned public consultations, including those by representatives of science, taken into account? In the practice of the decision-making process, the consultation of social partners on bills is considered one of the stages of the procedure. This stage is not particularly relevant in practice from a substantive point of view. It is considered only a formal condition for assessing the legislative correctness of a normative act. In the practice of state authorities, dialogue and social discourse serve only to provide information, not to shape decisions. Unfortunately, this was the case in the development of the above-mentioned changes to the excise tax laws, as the comments made by specialists and researchers in this field were not taken into account. The latter confirmed that the use of traditional cigarettes is more harmful to health compared to electronic cigarettes (Niezgoda, 2020).

Novelty products are, generally speaking, electronic cigarettes where certain chemicals are heated but there is no combustion process. For this reason, it is assumed that innovative products are less harmful to health. The U.S. Food and Drug Administration (FDA) clearly advocates the use of tested smokeless alternatives to cigarettes by adult smokers, while maintaining a ban on their promotion and advertising (Niezgoda, 2020). Research in this area has also been carried out in Germany, among other countries. The aerosol from one of the tobacco heating systems was analysed and it was found that there was a reduction of the toxic substances analysed in the range of 80 to 99% compared to cigarette smoke (Mallock et al., 2018). The results, published in 2018, were consistent with the results previously presented by the manufacturer of this system. The final findings stated that while research is still needed in the area of reduction, the values already recorded "lead to legitimate questions about the presumed reduced health risk" (Mallock et al., 2018). A department of Japan's National Institute of Public Health (NIPH)

[3] Consolidated text: Monitor Polski of 2016, no. 1006, as amended.

conducted a comparative study of aerosol concentrations of chemicals from a tobacco heating system and cigarette smoke. This study shows, among other things, that the concentration of harmful compounds in the main stream of the aerosol is much lower than in traditional cigarettes (Bekki et al., 2017). The International Association on Smoking Control and Harm Reduction (SCOHRE) is an institution established by a group of 40 scientists (including doctors) from 21 countries (Niezgoda, 2020). SCOHRE argues that advances in reducing harm from smoking can no longer be ignored. The experts of the institution emphasise that although quitting smoking remains an absolute priority for the doctor and their patient, when this goal cannot be achieved and the patient continues to smoke, tested and regulated alternative methods of nicotine delivery may prove to be "the lesser evil" for them (Niezgoda, 2020). Electronic cigarettes can be one of the tools of harm reduction policy that contribute to a positive transformation of the public health landscape. The results of 44 clinical studies on the use of e-cigarettes and tobacco heaters, published in international scientific journals, confirmed a significant reduction in exposure of users to harmful substances compared to smoking (Akiyama & Sherwood, 2021).

Smoking traditional cigarettes kills over 8 million people a year, of which 1.2 million are so-called passive smokers (WHO, 2021). Addiction to tobacco carries enormous economic costs: USD 1.4 trillion (WHO, 2021), or approximately 1.8% of the world's GDP. On the other hand, tobacco smoking remains one of the leading causes of death (approximately 67,000 cases per year) and the cost of treatment of diseases caused by tobacco smoke constitutes 15% of total medical expenses in Poland (Ministry of Finance, Wspieramy, 2021). The number of teenagers who smoke cigarettes is also alarmingly high. 15% of adolescents have smoked at least once in the last 30 days, and nearly 1 out of 3 have smoked at some point (WHO 2020).

An analysis of the Polish Constitution (Constitution, Article 5) seems to prove that the elimination of traditional cigarettes, as harmful products, is a means to achieve the goal of protecting citizens' safety and health (Popławski & Michalak, 2022a). Despite the fact that the hypothetically most emphatic method of counteracting the above-mentioned problem would be a ban, it should be stated that, currently and to a greater extent, a more socially realistic option seems to be the use of the so-called innovative products (Popławski & Michalak, 2022b). Therefore, in the short-term legislative perspective, the legislator's goal should be to "promote" the use of these alternatives, for example in the form of electronic cigarettes (Popławski & Michalak, 2022a). Innovative solutions in the field of innovative products may take the form of excise tax mechanisms, which will burden certain categories of less harmful goods to a proportionally lower degree compared to much more dangerous tobacco products (Popławski & Michalak, 2022b). That is why there should be a demand to differentiate between the increase in the taxation of traditional products, which are more harmful to health, and the increase in the taxation of innovative products (a negative attitude towards these products was adopted without referring to the accepted and known global achievements in the taxation of this category). In my opinion, it is also justified to tax innovative products at lower rates than traditional cigarettes. At the same time, we should focus primarily on a higher taxation of traditional cigarettes (Reiwer-Kaliszewska & Nowak, 2019). Moreover, increasing the price of

tobacco products is globally one of the most effective methods of motivating people to quit smoking, which significantly limits the access of young people to tobacco products.

In the light of the collected data, also with reference to the research that has been conducted, it should be concluded that one of the most effective ways to counteract addiction is to limit the economic availability of specific stimulants, e.g. by a progressive increase of the excise tax rates applicable to traditional cigarettes.

Under certain conditions, it is actually an effective legal solution when it involves a progressive, i.e. continuous, plan to increase the tax burden on specific products with proven harmful effects. Periodic and regular tax increases are thus aimed at a permanent (not one-time) increase in the price of certain goods. They are thus supposed to "accustom" the consumers of these products to a permanent increase in their retail prices, in other words, to create the upward price trend for specific goods.

3. Purpose and direction of the changes to the PIT regulations

Looking at the general direction of the changes made to the regulations, it is clear that they are driven by specific political needs (Górski, 2019; Kimla, 2017). The ruling political group (government) had concluded that changes were needed that would result in a reduction of taxes for a large group of taxpayers. From this point of view, it is fully justified for the Polish Government to adopt laws that are considered appropriate for the majority of voters supporting the political parties that form the parliamentary majority (Myl, 2021). A parliamentary majority exists to allow the government to make decisions that are considered valuable and valid from the standpoint of the largest possible segment of voters who support it.

I would like to present now some details related to these changes, starting with the new tax preferences. The first very important change is raising the annual tax-free amount. Until the end of 2021, the tax-free amount in Poland was, in principle, equal to PLN 3,000 (EUR 640). It was the amount set for each year. In order for a taxpayer not to pay the PIT, his or her income could not exceed a certain threshold, e.g. PLN 3,000 in 2021. After the analysed legal changes were introduced, this amount is 10 times higher. In 2022, a person will not pay personal income tax if his or her income is not higher than PLN 30,000 (EUR 6,380).

Another important change is an increase in the level of the first tax threshold on the tax scale. Until 2021, this amount was PLN 80,000 (EUR 17,000) and now, since January 2022, that amount has been raised to PLN 120,000 (EUR 25,500). This means that a higher income will be taxed at a lower tax rate, which is obviously more advantageous for the taxpayers.

Additionally, a lot of new tax preferences were introduced. These are important and beneficial changes for taxpayers. An additional annual tax-free amount for large families was introduced at the level of PLN 115,000 (Ministry of Finance, 2022, Podatkowy Polski Ład w pigułce). A family with at least four children will benefit from the tax-free amount raised to the level of (EUR 24,500). In simple terms, a family with three children will be

able to benefit from the tax-free amount of PLN 30,000 per year, while a family with four children will benefit from a tax-free amount almost four times greater.

Already in the 2022 tax year, spouses filing their returns jointly will benefit from a double tax-free amount equal to as much as PLN 60,000 (EURO 12,700) and spouses with a salary of PLN 3,010 and PLN 3,500 gross a month respectively will gain about PLN 4,000 a year from the new tax law (Ministry of Finance, 2022, Podatkowy Polski Ład w pigułce). If they file their tax returns separately, they will save a total of PLN 3,600 per year on taxes as a result of the new law. Parents with two children earning PLN 6,500 gross jointly will gain roughly PLN 4,000 (EUR 850) (Ministry of Finance, 2022, Podatkowy Polski Ład w pigułce). Not only will they not pay any tax at all, but they will also receive a refund from the government of their unused child allowance, in the amount of approximately PLN 2,000 (EUR 425) (Ministry of Finance, 2022, Podatkowy Polski Ład w pigułce). Parents with one child where one of the spouses earns PLN 4,000 (EUR 850) and the other PLN 3,000 (EUR 640) a month will gain PLN 3,500 (EUR 745) per year if they file their tax return jointly. Families will also benefit from the tax threshold being raised to PLN 120,000 (EUR 24,500). As a result of the raised threshold, families with three children where one of the spouses earns PLN 18,000 (EUR 3,830) and the other earns PLN 5,000 (EUR 1,060) a month will not pay a higher tax (Ministry of Finance, 2022, Podatkowy Polski Ład w pigułce).

Large families will benefit additionally from the new law establishing the so-called PIT-0 (zero PIT rate) for families with at least four children. According to the new law, as much as PLN 85,528 (EUR 18,200) of income for each parent is tax-free. In addition, for taxpayers paying their taxes according to the tax scale (17 and 32%), there is another tax-free amount of PLN 30,000 (EUR 6,400).

According to simulations carried out by the Ministry of Finance, over 110 thousand people will benefit from the zero PIT rate for families with four or more children and will save approximately PLN 335 million in taxes (Ministry of Finance, 2022, Polski Ład wspiera rodziny). The discussed tax preference is intended to cover not only parents, but also foster parents and legal guardians with at least four children. It should be mentioned that the tax relief will be available to parents who receive income from work, contract of mandate, or a business activity taxed according to the tax scale, regardless of whether they raise children together or are single parents.

Families with at least four children where the spouses jointly earn PLN 11,500 (EUR 2,450) per month will gain as much as PLN 8,945 (EUR 1,900) per year and the spouses will not only not pay approximately PLN 2,000 (EUR 425) of the tax they paid before the reform, but will also receive approximately PLN 6,900 (EURO 1,470) from the government (reimbursement of unused child allowance) (Ministry of Finance, 2022, Polski Ład wspiera rodziny).

Another important tax preference applies for working seniors. It will be awarded to working seniors, i.e. people who – despite having reached retirement age – decide to continue working. In this case, the relief is similar to that for large families: the tax-free amount has been raised to PLN 115,000 (EUR 24,500). The next significant change is the preferences for selected groups of professionals. Self-employed professionals (IT specialists, physicians, architects and engineers) can opt for a flat-rate tax on registered

income and benefit from lower tax rates. Instead of 17%, which could be applied in 2021, they can pay as little as 12%. In this case, however, it is revenue, not income, that is taxed. This means that taxpayers are not able to take into account the expenses incurred in connection with their business activity.

4. Different tax satisfaction levels among different groups of PIT taxpayers

The provisions of the First Act on Personal Income Tax have resulted in different levels of tax satisfaction. On the one hand, there is certainly a group of taxpayers who are very happy with the changes (people earning up to EUR 700 per month, because they will not pay any PIT at all). However, it should be noted that there are groups of taxpayers who are less satisfied with the changes and who may even be required to pay more PIT. Less satisfaction is rather obvious for taxpayers with higher incomes, earning more than EUR 3,000 per month; most of their income will be taxed at the 32% rate. Moreover, it must be emphasised that the changes are generally disadvantageous for entrepreneurs, due to the new rules for calculating health insurance contributions. This is due to the fact that the amount of health insurance contributions generally depends on the taxpayer's income tax liability. Until January 2021, there had generally been one flat rate for calculating health insurance contributions. Moreover, health insurance contributions are no longer tax-deductible, which is very disadvantageous.

5. Lack of a systemic approach to entrepreneurs in the PIT, legislative errors and Second Act on Personal Income Tax

It should also be emphasised that the legal changes made by the First Act on Personal Income Tax contained many legislative errors, since nobody knew how to apply some of the new tax law regulations. These shortcomings were the subject of a serious discussion held, among other places, in the media, but also in legal journals (Popławski, 2022; Popławski & Michalak, 2022b). This led the government to take urgent action to change the new law. Moreover, the First Act on Personal Income Tax lacked a systemic approach to entrepreneurs, not only those who invest, but also those who want to conduct their operations in Poland and benefit from the income they generate. I hope that the Polish legislator will decide in the future on a significant reduction of the tax rates, from which Polish entrepreneurs will be able to benefit to a larger extent than at present (Popławski, 2022). We should call for a reduction of the tax rates, both in the flat-tax PIT and in the CIT, to the level of about 10%. In my opinion, this would bring enormous benefits in the long run, not only for taxpayers but also for Poland as a state.

A lot of work was carried out to eliminate the above-mentioned shortcomings and legislative errors. However, it did not change much in terms of the lack of a systemic approach to entrepreneurs. The new law, with some additional changes, took effect on 1 July 2022. The Act of 9 June 2022 amending the Act on personal income tax and certain

other laws introduced[4] changes that relate to the following issues: a reduction of the PIT rate from 17% to 12%; allowing entrepreneurs to change the form of income taxation during the year; partial restoration of eligibility for deducting health insurance contributions from the tax for entrepreneurs; restoration of the preferential calculation of PIT for single parents; ability to take the tax-free amount into account by several payers simultaneously; elimination of tax relief for the middle class; and introduction of an equalisation mechanism.

The new law provides for a reduction of the PIT rate from 17% to 12% in the first tax threshold of the tax scale for taxpayers taxed according to the general rules. This applies both to entrepreneurs paying the PIT according to the tax scale and to persons earning revenue from contracts of employment and contracts of mandate. The lower tax rate is already applied at the time of collection of advance payments. Importantly, the 12% PIT rate is also to apply to the period from January to June 2022, with taxpayers benefiting from the change in 2023 after they file their annual tax returns for 2022 (tax offices are expected to refund the overpaid tax).

In connection with the reduction of the PIT rate for taxpayers taxed according to the tax scale, the Second Act on Personal Income Tax introduced a special possibility for those entrepreneurs who chose income taxation in the form of a general flat-rate tax or a flat-rate tax for specific professions in 2022. They may change the form of taxation to taxation according to the general rules which, in connection with the reduction of the PIT rate, may be more advantageous for them in fiscal terms.

Taxpayers will be able to change their form of income taxation for 2022 when filing their annual tax returns for that year (until the end of April 2023). In those tax returns, taxpayers will report income that was subject to the general flat-rate tax or the flat-rate tax for specific professions in 2022. In the course of 2022, entrepreneurs will be obliged to apply the principles of income taxation hitherto appropriate for the general flat-rate tax or the flat-rate tax for specific professions.

Originally, according to the First Act on Personal Income Tax, the legislator decided to eliminate the deduction of health insurance contributions from the amount of PIT due completely. The Second Act on Personal Income Tax partially restores this preference, but not for all taxpayers and up to a certain limit. According to the new law, the deduction of health insurance contributions from the tax due is possible for entrepreneurs taxed at the general flat-rate tax (at the rate of 19%) and at the flat-rate tax for specific professions. Taxpayers who have chosen to have their income taxed in the form of a lump sum will also benefit from the above preference to a limited extent (the law provides for a deduction of 19% of the health insurance contribution paid from the lump-sum tax). Moreover, the additional limit on tax-deductible health insurance contributions is to be equal to PLN 8,700 (EUR 1,850) per year. However, this amount is to be adjusted annually based on the index specified in the tax law. Entrepreneurs who pay their taxes according to the tax scale (12%, 17%, or 32%, depending on income) will not be entitled to the deduction.

The Second Act on Personal Income Tax provides for the restoration of a preferential calculation of PIT for single parents. Previously, according to the First Act on Personal

[4] Journal of Laws of 15 June 2022, no. 1265 (hereinafter referred to as Second Act on Personal Income Tax).

Income Tax, the aforementioned mechanism was replaced by the so-called allowance of PLN 1,500, but the old mechanism, which, in connection with a significant increase in the tax-free amount as of 1 January 2022 to PLN 30,000 (EUR 6,380), may prove more advantageous for single parents.

According to the First Act on Personal Income Tax, a person earning income from an employment contract (and having other sources of income as an employee) could use the tax-free amount at the stage of calculating the tax advance by one of the remitters of the PIT. This was possible at the request of the taxpayer. The Second Act on Personal Income Tax provides that a taxpayer will be able to select up to three remitters, who may take into account the tax-reducing amount when calculating their own tax advances. However, this does not mean that each remitter selected will apply $1/12^{th}$ of the tax-reducing amount. The aforementioned Act provides that a taxpayer will be able to "split" $1/12^{th}$ of the tax-reducing amount into up to three amounts and to authorise up to three remitters to apply it accordingly.

The Second Act on Personal Income Tax provides for the elimination of the so-called "middle class relief" that has been in force since 1 January 2022, which consisted of a deduction from the income of an amount determined individually based on the amount of revenue. The mechanism was intended to compensate for the negative fiscal consequences for taxpayers that may have resulted from the adoption of the First Act on Personal Income Tax. Generally, the middle class tax relief was available to taxpayers whose total annual revenue was between PLN 68,412 and 133,692 (EUR 14,500–28,500). This mechanism, however, was widely criticised due to its limited subjective scope and the complicated algorithm used to calculate the amount of relief for individual taxpayers. Accordingly, the Second Act on Personal Income Tax eliminated this mechanism. According to the new law, the above change should be neutral for taxpayers, because, in a way, in exchange for the middle class relief they will receive the above-mentioned reduction of the PIT rate (from 17% to 12%).

6. Conclusions

The paper demonstrates that the legal changes introduced in Poland from 2022 in relation to the excise tax and the personal income tax deserve to be called tax reforms. The changes made to the excise tax regulations affect the amount of taxes levied not only on traditional cigarettes, but also on so-called innovative cigarettes. They may also influence the health-related behaviour of Poles in the coming years. The changes made to the PIT regulations affect a very large number of taxpayers (about 18 million).

The paper also indicates the following issues. The amendments to the excise tax regulations were made with disregard for the results of public consultations carried out in the legislative process. The new regulations also do not take into account information resulting from scientific research. This proves that public consultations are treated in Poland only as a formal requirement. In my opinion, it is a mistake to tax traditional cigarettes and electronic cigarettes with excise tax at a similar level. Due to the fact that electronic cigarettes are less harmful to health, they should be taxed at a much lower rate.

The legislature made many mistakes in introducing the amendments to the PIT regulations. They resulted mainly from the excessively fast legislative process. As a consequence, new amendments had to be made to the recently introduced regulations. After these amendments, the PIT regulations are much clearer and easier to apply. This does not mean that the PIT regulations do not require significant additional changes, e.g. in terms of reducing the taxation of entrepreneurs.

The analyses presented in the paper confirm the validity of both research hypotheses indicated at the beginning. First, the current practice of conducting public consultations does not ensure the possibility of exerting a significant influence on the final shape of the law being created. It should be demanded that public participation in decision-making be real and not limited only to formal consultation of bills by specific entities. Second, if the legislator adopts a tax law quickly, it will very likely contain many errors, the consequences of which may be serious.

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Some Aspects of Fiscal and Monetary Tools of the Environmental Sustainability – Through the Case of Hungary[1]

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Abstract: On the one hand, *economic sustainability* depends on an environmentally friendly and energy-saving economy, though it rather means the continuous functioning of businesses and the national economy, which is expressed in the balance of accounting, foreign trade and budget balances.

On the regulatory side, monetary policy, alongside fiscal policy, serves ensuring economic sustainability, as the main objective of central banks is to ensure price stability and maintain financial equilibrium to underpin continued economic activity. However, in our energy crisis-ridden world, there is an increasing emphasis on energy-efficient, environmentally friendly management. The focus of our study is on the environmental sustainability context of Hungarian fiscal and central bank tools, with a particular focus on the legislative and programmatic elements of the green economy development of the Magyar Nemzeti Bank (Hungarian National Bank, hereinafter: MNB).

Keywords: green economy, green investments, financial regulation, Hungary

1. Introduction

Global warming is increasingly posing serious problems for the world economy, including Hungary. Several scientific studies have proved that human activity is the main cause of global warming, which is a direct consequence of the increase in gas emissions, primarily the increasing emissions of carbon dioxide. By the end of 2020, the

[1] This paper is a new research area of the Széll Kálmán Public Finance Lab of the University of Public Service, an initial wing unpacking focusing on a general overview of the subject area. And let us add that it has begun at a difficult time, because, although the theoretical aspects of the green economy have gained momentum in the previous decade, but the economic effects of the coronavirus and the war have somewhat delayed the "green economy".

amount of gas emissions reached 35 billion tons (Ritchie, 2022). From 1940 to the end of 2019, global warming was 0.80°C (Ritchie et al., 2017).

The relevance of the study is that, in addition to the significant environmental damage caused by human activity, the uncertainty of the energy supply has increased recently, which is partly due to the depletion of fossil energy sources, and partly due to the Russian–Ukrainian war and the EU embargo on Russian energy sources. In addition to these, the worldwide demand for hydrocarbons continues to increase, contributing to a significant increase in their price. Act II of 2021 amended certain previous provisions on energy and *waste management that* aim to reduce pollution, for example in relation to waste management and the *use of electric cars.* This law is an amendment to Act I of 1988.

The declining resources and the increasing demand for them are causing the price increase, which has been exacerbated by the economic consequences of the recent Russian–Ukrainian war. Our domestic energy supply is traditionally based on external energy sources, which is in line with the general Western European unilateral external energy dependence, the extent of which, in the case of fossil energy sources, reaches more than 90% of the needs of domestic energy consumption. For further economic development of Western European countries, increasing fossil energy sources are needed (Zivot & Andrews, 2002; Otto & Gugushvili, 2020).[2] This also contributes to a significant increase in their world market price. Access to alternative energy sources, production of renewable energy sources and their expansion require significant financial resources. The importance of environmentally conscious management is reflected in the fact that the MNB has been given a green mandate[3] as its fourth monetary policy objective in 2021, which is also of outstanding importance globally. Based on the Central Bank Act, the Hungarian National Bank supports the maintenance of the stability of the financial intermediation system, increasing its resilience, ensuring its sustainable contribution to economic growth, and now, by helping the green economy gain ground, the government's policy related to economic and environmental sustainability without jeopardising its primary goal.

However, the so-called green mandate is not without precedent for the Magyar Nemzeti Bank. Through its Green Programme, announced in February 2019, the MNB has mobilised instruments to mitigate risks related to climate change and other environmental problems, as well as to reduce risks related to the domestic green economy and, in turn, to stimulate the financing of the green economy. The strategic document *Sustainability and Central Bank Policy – Green Aspects in the Monetary Policy Toolbox of the Hungarian National Bank* adopted by the Monetary Council accordingly provides a unified framework and presents the possible directions with the help of which the central bank can implement sustainability aspects into its monetary policy toolbox (MNB, 2021a). The Green Programme of the MNB, launched in February 2019, and its parliamentary endorsement can facilitate the implementation of a new overall economic development strategy based on carbon neutral investments, both at the macro-micro and

2 [3] We base this finding on the fact that the European Union's efforts to develop a green economy are being realised very slowly, and on the other hand, there is significant civil resistance to the use of nuclear energy.

3 See Act CXXXIX of 2013 on the Magyar Nemzeti Bank effective from 5 April 2019, as well as *Act II of 2021, Amendment to Act I of 1988*.

household level. The development of production technology in this way, involving the increasingly carbon neutral nature of product emissions, can ensure an environmentally friendly structural shift of the whole Hungarian society, promoting the competitiveness of the economy in national and international markets. Accordingly, there is a good link between our competitiveness and carbon neutrality through innovative technological development.

2. Literary background

In line with the appreciation of environmental protection, international and domestic literature has expanded significantly regarding this extremely important problem, as the modern market economy has been growing strongly at the micro-macro level, which is accompanied by a scarcity of energy sources.

In the 20th century, Alfred Pigou (1920) pointed out that if the market is unable to deal with externalities, they will distort the market demand–supply mechanism, which will not be beneficial for the public.

In 1987, the World Commission on Environment and Development made its report entitled Our Common Future, which sets out the principles and requirements that will be used by future generations. These principles have become known as the principles of sustainable development worldwide (UN, 1987). Sustainable development is a development that can meet the needs of the present without threatening future generations' ability to meet their own needs (Meadows et al., 1992; Bank of America, 2021). The three conditions set by Herman Daly (2001) for sustainable development are as follows:

- the rate of use of renewable resources should not exceed their regeneration rate
- the rate of use of non-renewable resources shall not exceed the pace of sustainable renewable substitutes
- the rate of pollutant emissions should not exceed the assimilated capacity of the environment (Daly & Cobb, 1989)

In addition to the above-mentioned Herman Daly, Opschoor addresses the time factor, when he states, as a fourth condition, that the time factor of human intervention must be in balance with the timing of natural processes, as well as the decomposition of waste or renewable raw materials and the regeneration rate of ecosystems (Opschoor, 2000).

Shan and his co-authors (2021) emphasised that green technological innovations (GTIs) and clean energy are the essential factors that can help to achieve the carbon neutrality goal.

At the same time, limits are important for sustainability, including the maintenance of the Earth. In ecology, the Carrying Capacity is a population that an area can support without damaging it. In principle, we may question the Earth's ability of providing favourable living conditions for a significantly increasing population (Szlávik, 2011).[4]

[4] See in detail Fritz et al., 2021; Arvaniti & Habla, 2021.

In our opinion, these findings also indicate a different approach to advanced and less developed countries in the fields of sustainability and ability. Undoubtedly, the waste production of developed market economies is a significant additional natural resource use, both in raw materials and energy carriers, and often regardless of the growing extent of environmental damage and waste. In our view, the market economy system does not mean the wasteful use of natural resources under an increasing environmental load. For the sake of the cycle economy, the recovery of pollutants has also come to the fore, which has also been enshrined in law in Hungary.[5]

The above overview also shows that population growth and rising consumption levels significantly affect the Earth's capacity. More and more developing countries are becoming increasingly overpopulated, as the national economies of given countries are unable to supply and maintain their population. Population problems are linked to the Covid-19 pandemic and the Ukrainian–Russian war, which also presents serious environmental challenges. Hantoko and other authors declared that the Covid-19 pandemic has imposed a global emergency and has also raised issues regarding waste management practices. The amount of food and plastic waste also increased during the pandemic (Hantoko et al., 2021). These factors are increasingly raising awareness and promoting good practice in environmentally conscious economies and company management, including in Hungary.

3. The promotion of an environmentally conscious economy and management in international and domestic conditions

Recently, in the world, because of growing energy production and intensive use of energy sources, it is necessary to reduce the rate of increase in gas emissions, which leads to global warming thereby seriously endangering the wildlife of our planet. Gas emissions have reached critical levels, which has made it increasingly difficult to reverse the process of global warming. These global problems have drawn the attention of governments and international organisations to find ways of limiting climate change through adequate environmentally friendly economic policies in parallel with reducing environmental pollution. The Russian–Ukrainian war has significantly strengthened the energy imports from outside Russia, and the need for a wider use of renewable energy sources. This is even more prominent with regard to the peaceful application of nuclear energy. The Western energy embargo sets the entire economic system of the European Union against Russian fossil energy imports, along with all its consequences.

As a compensation for this, more emphasis should be placed on the use of renewable energy sources and the electricity obtained from it. In this context, for example, in Hungary, Act II of 2021 provides for an integrated electricity business by the developing accounting separation rules and separate accounting records that ensure the transparency of individual activities, non-discrimination, and excludes cross-financing between activities and distorting competition.[6]

[5] Act CLXXXV of 2012 on waste.

[6] Act CLXXXV of 2012 on waste; Act II of 2021 amending certain laws on energy and waste management.

Air pollution is one of the leading causes of serious respiratory illness, chronic obstructive pulmonary disease, ischemic heart disease and others. It is estimated that 4.2 million deaths occur every year because of exposure to ambient (outdoor) air pollution (Grover & Singh, 2020; Jain et al., 2022).

International agreements are rapidly trying to limit the extent of gas emissions associated with the international quota system, which allows for gas emissions trading between countries with excess gas emissions and smaller gas emissions within their national quotas. In this area, the goal is to bring economic growth to new innovative technological procedures through the reduction of gas emissions. A further goal of the quota system is to preserve or reduce gas emissions at the global level, while ensuring further economic growth using less energy and raw materials. This should in any case be accompanied by reducing additional waste contaminants, such as the by-products of production, and additional circular industrial use.

Aspects of an environmentally conscious economy also appear in the Hungarian state financial regulations. The fundamental law emphasises the principle of permanent sustainability, which is also the responsibility of future generations.

The Hungarian Government has set significant environmental and green economic policy goals since 2010; these have achieved great results. Most importantly, the NES (National Energy Strategy) of 2018 set objectives, it examined the technological possibilities of decarbonising the domestic energy sector as the only exception to the NÉS-2. Based on this, the most important statements of the document are that the development of carbon capture and storage (CCS) technology can also contribute to reducing emissions. In the long run, it is not only used for coal-fired but also for natural gas-based power plants. Hungary's position within the European Union for the emissions of greenhouse gas emissions is favourable. By 2019, emissions dropped to 64 metric tons (MT)2 CO_2e from 95 MT CO_2e in 1990, leading to an average annual decrease of 1.4% in this period. At the same time, Hungary experienced an annual 1.7% increase in GDP, demonstrating the potential for achieving significant economic growth without an increase in carbon emissions (NCE, 2015; NÉS, 2018; Békés et al., 2022).

Government green economic programmes have placed great emphasis on decarbonisation and reducing increasing emissions, but this requires maintaining the capacity of the existing Paks Nuclear Power Plant and its expansion with Paks II. The Green Program forecasts that after 2030, further renewable energy development and such expansion can make it realistic to reduce CO2 emissions from power generation by nearly 100%. Carbon neutral energy management affects the environmental development of the country's entire economy, as everything depends on the energy sectors.

In connection with the resolution of the Hungarian economic and financial crisis, public finance reform has placed significant emphasis on encouraging environmental investments. In the monetary toolkit of the MNB, the use of individual monetary policy tools can be replaced by climate-compatible principles, such as coordinating balance sheet assets with green transition and enforcing green aspects when assessing cover. The MNB is organically linked to other Member State and non-EU central banks and thereby to some international initiatives and experiences. Green aspects can be enforced by modifying the rules of asset purchases (e.g. discrimination of pollutants) or, for example, by

incorporating the climate risk into the central bank modelling process. An important aspect may be that the climate objectives are implemented through central bank tools that are permanent. Meanwhile, it may be difficult for EU legislation to set tight limits on the tools with green objectives that the European Central Bank can support. From January 2021, the Swedish Riksbank will only buy corporate bonds that meet international sustainability standards and demands. The Riksbank has justified its decision on financial stability grounds; according to the central bank, climate change carries a significant risk of physical impacts and transition, which all central banks as the national body responsible for financial stability, must address, suggests the Hungarian central bank (MNB, 2021a).

The Network for Greening the Financial System has developed important principles and recommendations for the MNB, in which the four main general recommendations for central banks and supervisors are essential. The first is to integrate climate risks into financial stability monitoring and supervisory procedures. The second is the incorporation of sustainability aspects into the central bank's own portfolio management. The third is to expand data, improve their quality and strengthen green financial awareness. Further recommendations of the organisation for political decision-makers, which can also be supported by central banks, appear in standardising the publication of climate and environmental risks and developing an international taxonomy (MNB, 2021a; OECD, 2022; Paris Agreement, 2015).

The MNB's monetary policy enables the government budget to strengthen the development of green investments significantly, both in industrial production and in the field of residential consumption, to reduce the environmental burden.

Since 2013, the MNB has led banks within the framework of its Growth Loan Program (GLP), especially targeting small and medium-sized businesses, in making green investments and increasing the use of renewable energy sources. It was also in this period that, with the active participation of the MNB, by the end of 2015 Hungarian households had become completely free from foreign currency loans. Subsequently, it was possible to increase the purchasing power of the population, which later (indirectly) caused the implementation of the residential green investment loan programs. Based on these principles, the MNB launched the Green Home Program (GHP) as part of the Monetary Policy Toolkit in October 2021, as part of the Growth Loan Program (MNB, 2016; Matolcsy, 2015).

Green objectives funded by the Green Bond Portfolio cover a very wide spectrum, including the creation of renewable energy investments, energy efficiency projects and green buildings. Projects, primarily due to supranational issuers, are global in coverage, and bonds are also financing activities in many developing regions (such as Africa and Asia), which will result in even more effective green "paybacks" due to green investments that replace the general pollution of these countries.

On 2 June 2020, the Government Debt Management Centre (GDMC) issued the first (international) green bond in Hungary. Green bonds are those for which the issuer undertakes to make some environmentally positive investment from the collected source. According to the GDMC, the 15-year bond was oversubscribed more than five times and the issue brought in a total of EUR 1.5 billion. The GDMC remains an important player in the market; on 11 September 2020, it issued Samurai bonds, denominated in Japanese

yen. Two of the series of four were green bonds, with a total of 20 billion yen issued for a seven and ten-year term (MNB, 2022).

This program was the first time that these types of bonds had been issued, thus encouraging green investments and their yield-increasing capacity.

Since 2010, the financial system has introduced new funding tools to encourage monetary stability, decrease vulnerabilities and promote green investments under preferential credit conditions. With this new monetary and fiscal economic policy, such instruments have become accessible beyond the corporate sector – primarily to SMEs and households, partly to reduce the government and municipal budget deficit.

4. Fiscal and monetary assets in Hungary

Examples of green investments are forward. According to international estimates in 2014, by 2030, the infrastructures needed for a global climate-friendly economy would require investments of US$ 93 thousand billion. Thus, it is imperative for financial institutions to convey more capital to green developments and investments (NCE, 2015). This estimate also confirms that the most important players in the Hungarian economy, both the government's fiscal policy and the MNB's monetary policy and its assigned monetary tools, should make significant efforts to ensure the development of the environmentally conscious (green) economy in the future.

These efforts are also linked to the 2018 decision of the Hungarian Parliament, which aims to switch Hungary gradually to a low-carbon economy. The implementation of decarbonisation is not planned to have a constitutional competitive limit to the Hungarian economy, and, through the development of innovation and the green economy, the State can contribute to the modernisation of production sectors and the re-industrialisation of Hungary.

The MNB was linked to the direction of the green policy passed by the Hungarian Parliament and converted the three basic pillars of its green program accordingly. The MNB's Green Program (MNB, 2021a) comprises the following:

Pillar 1: Program points for the financial sector:

- analysis of ecological and financial risk
- making financial services greener
- encourage the greening of market players

Pillar 2: Social, International Relations:

- expanding cooperation with domestic partners
- information dissemination, education in green finance
- active participation in international work related to climate risks, green finance

Pillar 3: Further greening of the MNB's operation:

- to further reduce the MNB's own ecological footprint
- to further expand the MNB's own environmental publication

The Monetary Council set the available funds of the Growth Loan Program and Green Home Program at 200 billion HUF when it commenced, and by its decision of 5 April 2022, the program's credit line increased to HUF 300 billion. Accordingly, credit institutions can first provide HUF 120 million from this HUF 300 billion budget to residents applying for home loan contracts. After the use of this amount, the remaining HUF 180 billion will be used. Such programmes by the MNB are closely linked to Government Decree 16/2016 (II),[7] on housing support related to the construction and purchase of new homes. Within the framework of the GLP GHP, the central bank provides a 0% interest, up to a 25-year refinancing loan to credit institutions, to buy and build energy-efficient new residential real estate in Hungary, and to purchase land for new home construction sites. Act CLXII of 2009 on consumer loans (hereinafter: CLL), a Hungarian forint foreign currency, up to 2.5% a year (CLL Credit rate) loan (hereinafter: "home loan"), is further lending to the CLL consumer, and other credit institutions are refinanced for the same purpose (MNB, 2020; MNB, 2022). Government Decree 641/2020 (XII. 22.)[8] in order to introduce a home renovation loan, it also intends to promote the resolution of the public to amend certain government decrees. The social significance of this is outstanding. Norbert Kis (2019) emphasises the importance of accessing a home. Affordable and appropriate housing in a safe environment is a fundamental need and right, which would reduce poverty and social exclusion, but even today, many of the European countries are challenged financially.

Some authors even approach sustainability as a new dimension from economic social aspects, namely that Cognitive Sustainability (CogSust) investigates the links between the research areas of sustainability and cognitive sciences. The former can be interpreted as an environmental discipline issue to a first-order approach; alternatively, as an engineering challenge in a broader range of interpretations but can be interpreted in many more disciplines (Zöldy et al., 2022; Kolozsi et al., 2022).

Kutasi (2022) emphasised the correlation between economy and nature, in that the further interlocking of the ecosystem model and the New Keynesian model is hindered by a crucial difference in their fundamental approaches to the relationship between economy and nature. The ecosystem model of ecological economics regards economy as one of its subsets of the ecosystem, which participates in the flow of resources, energy and waste. In contrast, the mainstream economics model considers the economy to be an overall set, which includes nature as one of the subsets in the circulation of factors and income.

[7] Government Decree 16/2016 (II), which is to support housing related to the construction and purchase of new homes.

[8] Government Decree 641/2020 (XII. 22.) on the amendment of certain government decrees in order to introduce the home renovation loan. Government Decree 17/2016 (II. 10.) on the home purchase subsidy for families for the purchase and extension of used homes. Amendment of Government Decree 518/2020 (XI. 25.) on home renovation support for families raising children.

Due to the above constraints of the domestic corporate loan stock, we currently only have an older but relatively reliable picture of the stock of green loans in terms of *loans related to energy production.* The outstanding bank solar-power loan portfolio can be estimated to be at least HUF 237 billion at the end of 2019. Considering and correcting for the data gap, the fair value of the exposure could be between HUF 250 and 270 billion. This is of the order of 2.5% of the total domestic corporate loan portfolio. The MNB intends to implement the gradual green rating of loans in additional sectors, with incentives in the form of a regulatory discount. Accordingly, the MNB, together with the Association of Hungarian Banks, industry players and industry stakeholders, including business leaders, will regularly review the capital relief for loans (or bonds) financing renewable energy production introduced by the MNB from 2020. International examples are also presented in international literature, which clearly show what serious initiatives have been launched within the framework of green environment-friendly programs (Hirvilammi & Koch, 2020; Otto & Gugushvili, 2020). Tax policy also has a level role to play in strengthening environmental programmes in government policy (Budziszewska & Glod, 2021).

In the future, it will become necessary to expand the provision of green loans further (taxonomy-based) for domestic companies, thereby encouraging the more widespread use of renewable energy sources. Pursuant to its regulations, which will come into force from 2022, the EU requires credit institutions to disclose the proportion of their green loans, in this way also promoting the expansion of the sustainable lending system in the domestic context (MNB, 2020; MNB, 2021a; MNB, 2021b). The MNB extended the capital requirement discount to companies' green bonds, and then in 2021, based on the MNB's previous ideas, to economic sectors that comply with the taxonomy according to EU requirements and related investments, including cases of sustainable agriculture and energy efficiency of non-residential properties (MNB, 2021c).

In *the Green Program, the MNB* specifically strives to ensure that market participants have and can have the appropriate skills and expertise. In this context, the MNB facilitated the availability of domestic and international training courses, in cooperation with the Budapest Institute of Banking (hereinafter: BIB) and other organisations. In addition, four universities have now started green finance courses with the professional support of the MNB.

In 2019, the Monetary Council decided to launch a dedicated green bond portfolio, making the MNB one of the first central banks worldwide to demonstrate its commitment to green objectives in foreign reserve management. The rate of the green bond portfolio within the reserve approximates the rate of the global green bond market, which currently stands at around 1% of the total bond market. The risk-return characteristics of the portfolio do not differ significantly from similar investments. Its slightly longer maturity structure compared to other MNB portfolios supports a long-term view on green finance.

In June 2020, green bonds were issued first in euro and then in Japanese yen in September, with a combined market value of HUF 671 billion at the end of 2020. The Hungarian Government will use the proceeds of the green bond issuance to finance and refinance certain green expenditures of the central budget in line with its sovereign Green Bond Framework Programme. This dedicated amount to finance green investments is

currently negligible, at only 1.9% of the central government's outstanding stock of debt securities of some HUF 36,000 billion at the end of December 2020. Green bond portfolios have global coverage because they provide a green "return" in many developing regions due to green investments replacing more polluting operations.

It is also important to stress that the MNB does not assume the risk of the projects in question, but the credit risk of the highly rated issuers – in many cases 'AAA' (Paulik & Tapaszti, 2022), while positive environmental impacts can still be achieved. The share of investment funds related to environmental or social sustainability in the domestic market is still low, at around 0.5%, accounting for only HUF 27 billion of the total investment fund portfolio of around HUF 5,500 billion (MNB, 2020; MNB, 2021b). In its lending activities, the MNB monitors the competitiveness of businesses, including SMEs, in line with green environmental programmes.

The Hungarian central bank believes that positive macroeconomic and competitiveness effects can be achieved through a green turn and energy-efficient management, which will provide the basis for catching up and then sustainability.[9] In its 144-point competitiveness programme (MNB, 2022), the MNB considers it important to create a more favourable economic situation for companies, which in part strengthens the stability of domestic macroeconomics, including a positive balance of the budget and the balance of payments, or a minimal deficit, as well as better wage and tax incentives, while ensuring corporate profits. This requires taking steps to improve technology and productivity from the company's side as well. Furthermore, we must switch to the intensive growth model. The Hungarian economy is at a disadvantage both in terms of domestic labour productivity, which is the 4th lowest in the European Union, and the proportion of domestic added value within exports from Hungary is ranked the same. According to the MNB's proposal, our goal is for domestic labour productivity to reach the EU average by 2030 and to increase the domestic added value of exports to 70% on the intensive growth path (MNB, 2022). The rise of an environmentally friendly economy plays an important role in the realisation of these goals. It is a fact that the era of cheap labour and energy, as well as low interest rates is over, so an efficient production structure is the way forward. Due to its limited resources, achieving the multiplicative effect and building vertical systems at the same time is of particular importance. With this in mind, the MNB's priority company types are the start-up ecosystem of domestic businesses, those already integrated into global value chains, and companies that supply the internal market.

According to the MNB's opinion, in order to achieve a high domestic added value content, it is *essential for our competitiveness to* have breakthrough points: the shift towards diversified services, the promotion of the entry of SMEs into foreign markets, the encouragement of investments in intangible assets, successful capital investments, the integration of inflowing capital into the domestic production networks, lower intermediate import consumption and supporting the activities of domestically owned exporting companies.

[9] Another key area of the MNB's competitiveness concept is to improve the quality of training and health of the human resources factor, which is no longer the subject of this paper.

For the measures to improve technology and productivity, the MNB proposes to develop the domestic entrepreneurial and start-up ecosystem, including the creation of an iconic building in a prime location as a start-up innovation hub, the creation of a university entrepreneur status, among a series of technology and productivity improvement measures. In addition, the emergence of university incubator houses as venture capital investors, ensuring corporate access to established public research capacities, and the development of the Resource and Competence Map Platform (EKTP) are essential. However, the implementation of a clear professional direction is affected by adverse developments. For reasons of space, we will mention only two. For example, in the meantime, the world is facing new challenges, notably the war between Russia and Ukraine.

The Russian–Ukrainian war has significantly increased the world market prices of fossil energy, primarily in the field of crude oil and natural gas and caused a significant increase in the global food market prices. With this, there is a risk of an energy crisis and food shortage in the world economy. As a result of the Government's quick and decisive action, in European terms, both utility costs and gasoline prices are at a significantly lower level in Hungary compared to the other EU member states. In addition to the energy crisis, the domestic population is increasingly at serious risk by the rise in food prices on the world market, also in connection with the Russian–Ukrainian war, since Russia and Ukraine account for nearly 10% of the world's total food exports. Further elaborating on the topic: Russia and Ukraine exports account for about 12% of total calories traded in the world, and the two countries are among the top five global exporters for many important cereals and oilseeds, including wheat, barley, sunflowers and maize. Ukraine is also an important source of sunflower seed oil, supplying about 50% of the global market (Glauber & Laborde, 2022), in addition to global drought damage. This poses a significant impact also on the Hungarian agriculture and enforces a shift towards high level technology.

The global energy crisis resulted by the war stimulated to use more renewable energy resources, but additionally to renewable energy resources the countries need using more fossil energy resources instead of energy resources coming from Russia. As a result of an international embargo against Russia, due to significantly reduced imports, EU Member States need to find other alternative fossil energy resources, which at the moment is to expand these resources along with renewable energy resources. At the same time, EU Member States sometimes put fossil fuels to renewable energy sources. For example, in Hungary, the case of the Mátra Power Plant, which is based on renewable biomass energy resources, but causes gas emissions. In addition, the domestic coal fire system is expanding, which also causes gas emissions, but may be a solution to the decrease in gas consumption.[10] Of course, the economic strategy does not give up the future development of renewable energy resources. The war negatively affects the development of a green economy. Hopefully this will only be temporary.

[10] The war is already creating constraints in the economy. Battery production is perhaps the most polluting industry in the world. Yet the Hungarian Government should consider taking advantage of the opportunity offered by investors to produce batteries in Debrecen, Dunaújváros and Győrszentiván, because employment and GDP production are important. The economic interest of the moment should not override the primacy of a green economy in the long term.

5. Summary

Protecting the environment, including curbing global warming, has become an important goal, both domestically and internationally. In international and national economic terms, the transition to a carbon neutral economy will entail considerable sacrifices for countries, companies and industries, but it can lead to sustainable economic growth in the long term. However, a failed transition will have a greatly increasing impact on financial, economic, and social systems, potentially making it impossible for a modern, technological society to function. The choice is therefore clear from both financial-economic and social political perspectives (MNB, 2020; MNB, 2021a; MNB, 2021b). The sustainable catch-up of the Hungarian economy is a *sine qua non* for the country's escape from the development trap, and, in the first instance, out of the crisis.

The MNB is committed to taking the necessary steps to ensure that the Hungarian economic and financial system, together with the introduction of innovative measures, can contribute to our country's environmental sustainability and climate neutrality.

The targeted central bank programmes have significantly boosted demand for loans from businesses and focused the attention of credit institutions on businesses and, in turn, the SME sector, to increase their competitiveness in an increasingly competitive international economy.

Among the achievements of the government's fiscal policy, the government has adopted the National Clean Development Strategy and the Climate and Nature Action Plan, which include operational measures in addition to the strategic goal of achieving full climate neutrality by 2050. A competitive economy is based on the creation of an energy-efficient and at the same time environmentally friendly economy, which requires a continuous and green economy-centred coordination of fiscal and monetary tools.

However, it is essential to state that the comprehensive public finance reform starting in 2010 and the environmental and energy-saving management aspects formulated during the successful previous decade were key aspects of the competitiveness of the Hungarian economy. The economic effects of the coronavirus and the Russian–Ukrainian war have significantly squeezed government development funds, and the Magyar Nemzeti Bank has again been faced with the task of stabilising the economy and combating inflation and has been forced to make some adjustments to its toolkit. It is a fact that the financial means for financing clear energy efficiency and environmental protection tasks have become more limited, although we cannot give up on environmental reform despite the crisis, since scarce and expensive energy resources are an elementary requirement for an environmentally conscious and energy-efficient economy. This is a prerequisite for a competitive economy in the long term. In fact, if we draw a deeper conclusion: the energy crisis that is now weighing on us should force us to manage in a more environmentally friendly and energy-efficient way. We must not make the mistake of the 1970s, when, despite expensive energy sources, Hungary's industry and agriculture failed to modernise as expected.

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Hermeneutics of the Law

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Abstract: One of the most ancient forms of thinking about law is what is today known as positivist or normativist. It focuses on the product presented in the name of the law, the textual representation which not only simply includes, but directly embodies the law.[1] In other words, it is a corpus, whether it is a code, a properly issued rule or a set of ad-hoc decisions: this is the law itself. This represents a short-circuited ready form for cognition, which the conscious follower and the professional agent of the law will both use as a tool. In addition, however, presumably ages later, there emerges a completely different version of the idea of law, rooted in a culture that forecasts the hermeneutic way of thinking. If in the former an approach based on epistemology can be discerned, the latter takes a more ontological approach instead. This focuses, beyond the given text, upon its interpretation and on the understanding that may be drawn from the text, and thus ultimately on the content which the law is supposed to message to the law abider and enforcer alike. In other words, it is concerned with the genuine meaning that actually affects and influences its addressees. Moreover, it is clear that, in contrast to text-centricity, the hermeneutic approach is also aimed at what sociological examination relating to the law reveals: finding the *lebendes Recht* [living law], separated from the *positives Recht,* setting some *law in action* next to the *law in books.*[2]

Keywords: hermeneutics, legal hermeneutics, law and language

What is Law? And what is meant by its change? Could it refer to the law adapting to and/or assimilating into the changing circumstances? Or is it a kind of symbiosis of law and its environment? The words chosen to express these ideas, and the use of language as a whole, bear the presumption of a background constituting an "objective reality that

[1] It is to be noticed that the Hungarian term (megtestesít [make it a body]) fits and perfectly accords with the English original meaning: 'to embody something', 'to give a bodily form' or 'incarnate' (https://bit.ly/3NwRG7i). Nevertheless, the Hungarian word is already more of an image-like usage – "<It makes an abstract thing, idea, concept or characteristic> perceptible, possibly also displaying it in a physical form or <An idea or feature> manifests itself in sy, in sg; takes shape, is realised" (https://bit.ly/3Q4zP9x resp. https://bit.ly/3NRtht5) – and no longer suggests that in the case of the term 'being embodied' (https://bit.ly/3GNAOGU), what is the 'body' and what is 'embodied' in this body coincide in logical scope. That is particularly the case in law.

[2] If not the word itself, Eugen Ehrlich's background theory was however already born before his great work (Ehrlich, 1913), namely in his rectorial inauguration address at Czernowitz, (Ehrlich,1907), taking its final form in the programme of Roscoe Pound (1910).

exists independently of our consciousness" and its somewhat reflexive mirror-image in our consciousness,[3] as a kind of precondition.

Yet our expressions employed are *figurative* to begin with, and hence *symbolic,* and because all we do is to speak or write these words, thereby we also represent or reproduce the events of the world in thought, so those expressions thus applied to an object, thought to be present and known, are at the same time *fictional.* After all, our entire thinking is fictional.[4]

The very identity of the law itself, in the diversity of its earlier and present forms, is not only a matter of something having been defined by something else to be named, but also about the general need for, and human purpose of, giving anything supposedly known a *name*.

In our topic, for example, ancient law was cloaked in the acts and facts of power and the violence perpetrated by the mighty, even if it was sometimes pronounced and even described, and it was identified simply by being reduced to (as represented by) this description in order to ensure its easier identification, as well as its extensibility and transportability[5] – and if, on the other hand, another sense of the law happened to clash with it that could only reside in the hearts of its confessors, such as Antigone, whose human empathy conflicted with Creon's order-centeredness (cf. Varga, 2011b). It may have been that the law hovered in obscurity, as its addressees were intimidated by raw power and thus by the enhanced chance of arbitrariness at any time since, according to the myth of its origin (Livius, 1967, pp. 113–195), in Rome before the *Twelve Tables,* it existed in such a vulnerable status of the plebeians with regard to the patricians. However, once the laws had been put in an enacted text, they could be carried further, as it is evident in the transport of steles carved with passages of Hammurabi to the newly conquered areas of Mesopotamia. In our fundamental ignorance of ancient law, however, it is also worth considering that this so-called *codex* may also have been a reminder of the existence of a divine order of worldly power, rather than a rule in the strict sense of the word (Varga, 2011a, pp. 395–423; cf. Driver & Miles, 1952–1955), as it should be borne in mind that the actual settlement (such as the way in which damage caused by a goring ox was to be compensated, to take the most glaring example) was essentially independent of empires, peoples and subjections; it was practically the same in an area almost the size of a continent, which had known many legal regimes, emanating from the vast territory of the former

[3] This was built into a dogma, following the suggestions derived from Marx and Engels by Lenin, 1962.

[4] In our Western culture, two vast classical oeuvres, which also raise issues of law, have professed language and, along with it, our entire human thinking to be fictional from the beginning, and necessarily so. See, on the one hand, the later generalised recognition of Jeremy Bentham (1843b, p. 199) "of nothing […] that has place, or passes in our mind, can we speak, or so much as think, otherwise than in the way of fiction" – and, on the other hand, the fundamental work of Hans Vaihinger (1911), dedicated to this very explanation. As to the doctrine of legal fiction, cf. Varga, 2018, pp. 105–130.

[5] In legal history, this motif has been present from the beginning, for example from the Code of Hammurabi (16th–17th centuries BC), the diorite specimens which symbolised the extension of the empire, until the British codification debates, when the common law material was protected all through from being recorded in a code, yet, during the 19th century, everything which the British wanted to enforce in India had to be brought into a didactic-regular form, in order to be able to export it at all (Varga, 2011, ch. II and VI).

Fertile Crescent (Van Selms, 1950; Yaron, 1966; Finkelstein, 1973; Jackson, 1974; Watson, 1974).

The perpetual and, so to speak, insoluble dilemma of contemporary research into the history of ancient times that is inclined to project today's notions and objectifications into the past reveals the fact that it is not known but may only be assumed what the actual status or function of these legal objectivations was or could have been. Was it a reified *Gesetz-buch;* in other words, a corpus embodying the law, or merely a *memento,* that is, a memory aid – whether for more precise evocation, or for teaching newcomers in the community or prospective law enforcers; or was it merely for descriptive purposes, or, ultimately, simply intended to make a solemn declaration of the unity and identity in the respective community (Varga, 2011a)?

The Ciceros still chanted, rhythmically and poetically, the content of the *Twelve Tables.* Nearly a millennium later, the English acquis, the *Magna Carta,* was posted in every church on Holy Week every year and read aloud at masses while preaching (Varga, 2012a, p. 26 note 8), similarly to Luther's points, which were nailed to the church gates in a similar vein, *pro memoria.* Was it *the* law? Or was it more a way of engraving the law into the people's consciousness or, more literally, their hearts?

Evidently, while the recognition of *hermeneutics* can be traced back to ancient times, it is nevertheless a modern invention as a methodology, deriving from studies on the Bible, and required because God spoke only once, then and there. It was also necessary because, after one and a half millennia of debates, controversy, and frequently the extermination of some or all of the past senses and meanings, happening in bloody fashion, biblical scholars still hoped to extract some kind of extra message from the revelated and sacred texts; perhaps an additional or underlying message from the Lord, where (and if) they could find and also reinterpret layers hitherto considered to be hidden but revealable, by means of various kinds of some new systematism.

Thanks to the hermeneutic way of processing texts, it has become increasingly clear that, despite the fact that there is a text-object in front of us, when deciphering its message it is really nothing more than *two subjects* being present: a *sign* which we believe *speaks to us,* and *ourselves, who address it,* and this game (in which our being, the basic meaning, dignity and nobility of our existence, i.e. our authentic identity in the divine image are at stake) lasts until we become satisfied with its actual result, or at least until the start of our next attempt to decipher some further message.

It was this hermeneutics, which placed the study of the Bible on a new footing by its genesis, which today provides the framework and approach to the interpretability of all textual analysis and communication, from the mundanity of everyday language to the products of literature or law. It is especially applicable to law, and this must be emphasised here, because, in its classical continental form, the law – based on the wording by the legislator – displays the most (pyramidal) structural and (deductive) procedural community with theological thinking built on divine revelation (see Kraft, 1993; Krawietz 1984).

Ever since humans became literate they have torn something out of themselves, to be able to work on and process what was thought or said, at times using our intellect and at others by utilising various further tools. Science seeks in this way the possibilities of truth, i.e. the truthfulness of our propositions, because they are deducible and thus provable from

some more basic and already approved propositions. And in morality, in matters of community, which presuppose unity and unanimity, and most strikingly in law, the possibility of obtaining an answer that has the persuasive force of obviousness.

Did we succeed? Has there ever been any certainty in the law? Or is there legal certainty at all, which was able to reach its fulfilment by deploying newer and newer means; first recording the law in writing, then putting it in conventionalised forms, then affirming it again by oath, and later reissuing it, and, finally, through all sorts of other invented intermediaries, i.e. additional human artifice inserted as a means of assurance?

Have we achieved more by this? The answer may be both yes and no at the same time. After all, progress always also involves regression. Did the qualitative leap succeed because at the same time it led to a transition to a new quality, as so violently taught by dialectical materialism, initiated in Hungary as the true dogma by Soviet troops (Engels, 1940)? Perhaps, in fact, this is only an illusion, a disanthropomorphisation – as a Marxist writer, a son of our country, once suggested – because its object is also inevitably one with us, since behind it lies our anthropomorphism, supposedly born and dying with us at the end of our lives (Sinkó, 1985, p. 626). After all, if anything leaps, quantitatively or qualitatively, we ourselves, the carriers of that leap, leap with it.

On the final analysis, man therefore takes from himself to make himself an autonomous object, because this is how he attempts to make himself more and more expansive and to become a creator of community or even a creator of science. Those of us who can now, by virtue of the social division of labour, deal professionally with this artificially extracted and shaped object, will also create a unique and then canonical way of dealing with this creature – in law, science, and anything else.

As things now stand, the law is objectified. Its processing, or its treatment, is broken down into stages, separated by functions, regulations and tasks. Careers may even be built upon this, and gradually but consistently law and legal order are established as the henceforth extensively growing so-called legal life, producing an own particular and separate world, which now not only claims autonomy, but also seems to function on its own, as if it were the *automatism of an autonomous machine,* sometimes – fortunately – in organic unity with the development of the surrounding world, but sometimes stubbornly engaged in a Michael Kohlhaas-like struggle with it (cf. Varga, 2012a, pp. 119–120; Von Kleist, 2013; Neheimer, 1979). The self-regulating, almost self-reproducing system of the law is thus akin to that of a machine, operating according to a built-in mechanism, until it is broken by revolutionaries who are angry machine-breakers or their society-destroying offspring.[6]

[6] Cf. https://en.wikipedia.org/wiki/Ned_Ludd and https://en.wikipedia.org/wiki/Luddite. One may wonder whether the machine-breakers of the 19th century were not merely the primitive, self-fulfilling imitators in a single furious act of what the punitive campaigns and religious war-like conquests intended to achieve, from the late mediaeval destruction of the Cathar culture to the Maoist destruction of the legal culture of many East Asian countries, when, in Cambodia, for example (as I learned as a participant in the Nagoya conferences to help regenerate its former legal culture in the strictest sense of the word), practically no remnant (either buildings and books or even juristic professionals) could survive? Cf. Brown, 1993. Was not this perhaps the same destructive rage that not infrequently lurks in movements like feminism or black lives matter today? As Immanuel Kant (1797, pp. 318–323) opines, negation of the law amounts to a revolution itself.

Can it be supposed that the very human component behind this law has ceased to exist? Or is he still there, just made invisible by the machine-building hands of masters?

During the return, manifested as so-called progress, just as during the so-called qualitative leap, *our own original being,* which leaps with it from the past to the present and thus partly into the future, *in the relation between man and his artificial creatures, necessarily reproduces its original conditions* – its endowments – as the naturally given framework of real existence, always and under all circumstances. For whatever new means, limitations, mediating paths we may devise, the interposition of further (and in our inertia, again and again, and almost indefinitely, newer and newer) filtering and guiding institutions of law (by various intermediate forums and procedures), will certainly resemble man's original essential self in this one respect. In other words, there is an irreconcilable and contradictory dichotomy between, on the one hand, demanding secure predictability and thus patternedness through the prior standardisation of the multi-stage process built into the process (i.e. the realisation of law as *patterned practice*), and, on the other, the wish to retain its original intention: that ultimately it is man rather than the impersonal automatism of his own institutionality that will finally rule the law.

Therefore, despite the revolutions the law undergoes and its changing objectifications, and the incorporation of various mediating mechanisms as intermediaries, an eternal *hermeneuticum* always reappears in the relationship between the object and its objectifier. Law serves man – and not the other way round: man addresses it again and again, and makes it proprietary, and his own in its humanity and functioning. Hence, man makes the law his own through the means and ways of whichever instrument, procedure, competence or whatever else he happens to have interposed in the course of its objectifications and institution-building.

All this shows that there are two ways of *changing law* from the outset, which cannot be imagined other than by activating the *actuated object* or the *actuating subject,* thus either through a *formal change of the law* or through the informalisms of *daily reinterpretations.*

Is the law therefore a subject in any sense? It is borne by *language,* even if it is rooted in behaviour or in recurrent ways of reacting, as in the case of so-called legal customs. Since the direct personal experience of a custom, whether by the person following it or by an outside observer, can only ever be partial or fragmentary, and the rest of it has to be transmitted or narrated by those who can see through its accessible (though inexhaustibly vast) entirety.

Moreover, language is a deceptive medium. Once we are within it, it is ours. But while the inexpressible range of one's personality and of one's particular state of mind is also condensed in what we say and write in the gesture of a particular moment, talking about this inexpressible fullness of life reduced to a few words,[7] employing only a fraction of the resources of language, this fleeting and truly irretrievable, but once experienced, total sense of life reaches the other (i.e. everyone else who is interlocutor or participant in this personal "ours" in our linguistic community); and this constitutes a form of upper layer,

[7] That which is concrete in human practice, that which contains the elements of infinite complexity inherent in human events, is utterly inaccessible and intangible to science, writes Villey, 1995, p. 364: "la pratique qui joue dans le concret échappe au total à la science."

now itself embodying a kind of abstraction, which we usually record in dictionaries as the abstraction of some *meaning.* Such a definition is, therefore, itself a product of generalisation, a kind of compendium. These meanings do not "exist" in themselves, but are merely described by other words, thus by other meanings and their associations, and thus brought into relation in a vast mental-spiritual space in our intellectuality, which does not exist as reality either, as all that is living language only exists in our practice of language, encoded only in lived communication. Communication, as we know, is itself only part and means of our social existence in action, in which every moment (even if we think by ourselves that it is planned or intended) is in fact a response to something, an interactive product of effects.

Is language objective and neutral? Yes and no. Language can only exist for a reason, that is, as long as the answer includes the statement "yes, it is objective". But our answer may also be "no, it is not objective", because the meanings are carried by man in his social practice, and this, going through major social changes over long distances or over time, as well as in the most personal formation and shaping of all of us, sometimes perhaps from one moment to the next, exhibits changes, i.e. contractions and expansions, shifts and swings of emphasis, that are certainly hardly recognisable in the short term.[8]

In law, anything and everything is composed of nothing but words. Not only what are referred to as rules, but also what we become aware of when perceiving something as a custom, which we describe as behaviour and which we create and name as an institution (i.e. as a procedure inherent in behaviour, but which is essential for us and therefore has a context to be highlighted, as a forum and as a competence of the latter). For just as the facts do not come to court of their own accord, but are established by the authorities through testimonies of varying value,[9] so norms emerge only as they are communicated, mediated by humans.

Language is described by its *reference,* by what it stands for, rather than something conceptualised as an external or internal reality. It may be that which is publicly known to exist or it may be that which now exists because it has been revealed through investigation and named by having been given an independent descriptor; it may be that which can or will exist simply because we want it to exist; or it may be that which has not existed so far but which we have created by naming it as a framework, a focus point of ideas, or in short, as an institution, and by recognising it as such, after defining its conditions.

Through our communication, we thus artificially create *virtual worlds,* which guide and even control our thinking through their own virtual channelling. Since this creates an intricate *web of thoughts,* in which, in its internal interconnectedness and for its conceptual clarification, or for the mapping of possible fields of application, we may have something

[8] Structurally, this dichotomy is reminiscent of the internal contradiction that Lukács describes as the only possibility for language to fulfil its function at all: on the one hand, it must be sufficiently clear in order to make successful communication possible, but on the other hand, its complete clarity is excluded, and only the physical gesture of pointing to something can make up for this. For if it were not suspended in this internal contradiction, it would be incapable of representing the ever-changing contexture of a world that is ever-changing in infinite variety (Lukács, 1984; Lukács, 1986).

[9] It was Jerome Frank's (1949, p. 37) revelatory statement that: "Since the actual facts of a case do not walk into court, but happened out-side the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts."

to do without wanting to concern ourselves with the outside world, with concrete momentary uses in our purposeful human practice, in such a way that we add new abstract constructions to this web of thoughts. Ideally, within the legal profession, for example, the work of a legal scholar or a law commentator is like this.

In the law, as a result of and in the manner of these processes, the primacy of written forms, their hierarchisation and their reworking in a doctrinally systemic manner took place gradually, and was followed by the development of procedural methods, forms and, above all, reasons (or more precisely: possible justifications[10]) by means of which any narrowing or widening, reinterpretation, or preemptive or fictional extension of the law (Varga, 2018; cf. Del Mar, 2013, pp. 442–465) can be conceived and, in the event of its consistent mass dissemination, followed, simply by the way in which the subject addresses the term by reacting to it.

Words, words, and more words... Man desires order and conventionally working environment around himself, in a world in which he experiences nothing but constant movement and change in his objects and in projections projected by humans, in this purely human, artificial virtuality, which affects not only individual real objects or their ad hoc positioning, not only a term or the institutional nature of sets of terms, but also their broadest possible contexts – since *man constantly rethinks himself,* as well as the context this man exists in, so to speak, his outside world.

Man is a reactive being, reacting in one way or another to the impulses that reach him incessantly. The more modern a person is, i.e. a man living with literacy, books and knowledge-culture, the more he builds a vision of the future for himself, in addition to concentrating on the needs of the present, and this vision is usually one in which he attempts to make use of the experiences of the past.[11] He therefore draws an arc in time, builds bridges and strives for consistency, but never forgets that his task is to shape the present in the present, for the present, in the desired manner.

As the law begins to take on a form that moves away from the immediacy of daily existence and the pleasure of the dominant person or institution at the top of the social hierarchy, the need for consistency and to avoid contradiction becomes increasingly prominent in its emerging independent nature, both as self-justification and, above all, in its efforts for uniformity in making law enforcement efficient. This necessarily appears in its attachment to the past and in its further invigoration of the past: it weaves in and/or cuts off the threads of its former entirety in such a way that the elements it identifies itself with at the moment provides a crystal clear and at the same time more transparent image of it.

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[10] In the European continent the theoretical reconstruction that sees the norm as a decision pattern, i.e. as a procedural basis and as a reference for justifying the decision taken in the process of law enforcement that ends with the imposition of a sanction, rather than a reason, has spread with Kelsen. In his posthumous ontology, Lukács called it a system of fulfilment *(Verfüllungssystem).* In this perspective anything in the legal process becomes a successful realisation of law when – and only provided that – it is recognised as the legal consequence of a patterned pattern (i.e. as a decision based on as deducible from the law) rather than when something good happens or occurs in society as a result of it (cf. Varga, 2013, pp. 219–234; Varga, 2012b).

[11] In today's terminology, this is *legal tradition* as an alternative to *legal culture,* when the past has a justifying significance in making our decisions today (cf. Varga, 2021, pp. 191–219).

All this, however, takes place in the present, for the present. And the man of a particular present, if he happens to work with the law, understands the *text of the past* in the relational *context of the present.* This includes both what was written centuries ago, and what was written only yesterday.

Legal imagination (White, 1973) – an active person in charge today can only think of what he can imagine as valid (correct, controllable, or more precisely: controllable in this way) in the spectrum of the particular time he lives in, while also thinking of the future. These, in other words, are the limits of the legal imagination,[12] within which there is nothing that he cannot conceive from his experience to date. This was, for example, the specific case for a criminal law codifier in the Hungary of a century and a half ago, who, unlike in the German model of dogmatic systemic completeness, would have considered it a disgrace to determine the status of an act if the state itself not only has committed something that it had itself ordered to be punished as a crime, but also prevented its mandatory punishment until the statute of limitation of that crime had run out (for the background see Varga, 1995; for the practice of the Hungarian Constitutional Court see Nagy, 2019). Thus, every word and every context is heard, understood and interpreted in the context of the day.

The eternal lesson of hermeneutics, then, is that *every interpretation is a reinterpretation,* just as every situation in communication is new, however much it may seem like a routine continuation of an act or procedure also carried out yesterday or of one just completed. Whether we are wading in the Danube or in Lake Balaton, the water is always different in it, just as we are different. For every existence is a continuous flow-like process, and every moment and phase of it is an interaction.

It is obvious that as soon as we speak of hermeneutics, we find ourselves in a counter-conceptualisation, since in so doing we practically question or simply negate the self-sufficient role that the set of signs in question, the text itself may play in the human undertaking of conveying meaning. As we are talking about hermeneutics, we are already examining the limiting and channelling effects of a wider environment. The common core of all this is language, which serves the purpose of capturing and transferring meaning. Examining the process in all its complexity, we must therefore conclude that, as the unravelling of meaning takes place within a web of conventions and traditions, it is the newer and newer interpretations of the conventionality of these traditions themselves that give rise to the fluidity that can be perceived in a hermeneutic inquiry. It is a never-ending game of constant movement while maintaining one's self-identity, and ultimately nothing more than a unity of renewal and preservation, as their simultaneous dissolution in each other takes place at every moment of the search. This implies that in the description of the process itself, the direction of the explanation and the argumentation constitutes the centre of gravity – because in analysing its continuity, I am analysing its determination, and if I want to show the discontinuity of the process over lengthy time periods, I am emphasising the accumulation of random surplus effects.

[12] For Carl Schmitt, the idea of conceivability appears as the basis for any kind of regulation (cf. Varga, 2013, pp. 219–234).

Words simply channel the other words we associate with them. If we call upon them, they speak; but what they say, that is, what we ourselves mean by them, is up to us. Ultimately, therefore, language is nothing more than ourselves: in our mass, as a community of language-users, it serves our own understanding by using it for ourselves, yet, if we can, because we have the power to impose it, then for others as well, even for a whole society, as something to be followed by all of us. Just as monks disbanded in a dictatorship may feel the emotional charge of their past attachment to each other and to their common cause, so in my quality as an overzealous police chief I may need nothing but a rule reinterpreted and raised thereby to the level of the law in force on the framework conditions for founding and operating associations, which, if the counter-cause is so important to me, I may order to be applied to threaten them with illegality as a deterrent, to be sanctioned as preparation for a sin. And perhaps in the future there may arise some confusion on my deeds, in another era, with a different order of values and culture, when I may perhaps condemn this in retrospect but as a continuation of the same language game, now perhaps detached from my past culture of the law once made to nihilise any civil arrangement through the arbitrariness of communism. For it is in *culture and not law,* by prudent self-restraint and not law, that a society as a language-user community can attempt *to achieve a certain continuity* of values, or even standardisation, and thus to establish them as fixed for its own life. In England, efforts were once made to encourage the use of *plain language* – to ensure that subjects, predicates and adverbial extensions should be unambiguous, that is, that the proliferation of metaphorical or symbolic terms would not destroy the credibility and clarity of language and linguistic communication. It is no coincidence, but precisely a continuation of such a tradition, that later the unsuccessful great legal reformer of the 19th century, Jeremy Bentham, would speak out against the use of fictions, by naming them a kind of common enemy (Ogden, 1932; Takashima, 2019; for the forecoded failure of the Plain Legal Language Movement see Assy, 2011; Ződi, 2019).

We can, and must, try to mitigate all such possibilities inherent in the nature of language. We cannot, however, change the most important fact (and one mostly unnoticed by those working on its improvement), that language is a creation of man, and thus man remains the master of his language under whatever conditions. He creates it around himself, and even if he cuts the umbilical cord attached to his person he does not, indeed cannot, detach it from the man himself. Because in the man-made so-called second nature we may establish complex systems of relationships, in the context of which we can create man-made virtual contexts of objects by linking things with other things, so that afterwards these – as institutions and the like – can now seemingly move by themselves and even reproduce themselves (which is known as *reificatio*), and these sets of things may even act as an immutable threatening force against individuals, groups or even the majority of a whole society, independently of their personal stand and wish (which is already *alienatio*). This is not, however, related to language or language use, but to the ontological reality of social practice, which also lives in any form of representation through nothing other than language.

This is because *the language* itself is not reality – it does not "exist" – but is located as a *medium of mediation* in the process of its use, with a continuity of the past, so also with

interruptions and of constant change that can only be detected in retrospect, even if it may not be captured at the level of moments.

Starting from culture, that is, from the way we perceive the world and ourselves in it, everything we created as *second nature is conventional.* In toto, it is a function of what we mean by it and in it, even in its smallest element. In social practice, from the outset what is conventional can only be something that is expressed linguistically. Language is thus truly a mediating medium operating in our social existence. To the extent that we build increasingly complex self-contained webs of actions and relationships for our increasingly profiled social activities, to use them in their own terrain, this common so-called vernacular develops into more or less self-contained languages, which may even go as far as partially separating from the common language itself, through specific uses of their nomenclature. This is well known: in law, the colloquial description and designation of a behaviour can only be considered if the so-called subject-language expression of the given behaviour has been transcribed into the meta-language of the law; and the law itself can decide when, under what conditions and to what extent colloquial language can be used in or introduced into a legal procedure in other contexts. In this way, not only are different spheres of action linguistically distinct, but the logic, the process and not least the justification of action within them also becomes self-contained, i.e. they become a function of the sphere in question, for example of the law's own set of criteria. Thus, newer, increasingly more professional and specific conventionalities are built on the overall societal conventionality that maintains the language and the respective community at all.

We gaze in wonder at the theoretical achievements of particle physics and theoretical physics, things we can never see. While the history of physics concerns this, it is also about the fact that, although these discoveries, their so-called laws, are now the well-known reality of our present, in our everyday lives it is sufficient to rely on the worldview that theorised our direct human experience half a millennium earlier, by applying Newton's physics and the tradition of the causality of processes it involves. In the same way, we still hold to the notion of language as a reproduction of reality, the notion of *adequatio rei et intellectus,* that is, that in our language words stand for objects, and thus we can linguistically replicate, represent and thus substitute the external world from its smallest constituent to its infinite correlations, and even make it the object of operations carried out on a purely intellectual plane. Yet it was only a century ago that the first description in jurisprudence was made of the fact that its *systemic terms,* although borrowed mostly from common words, mean nothing beyond the designation of the taxonomic position of an artificial system of thought, i.e. a mere *locus;* their only role is to designate, economically, a single sign for a number of criteria set up by a mass of specific rules (Ross, 1957; Brożek, 2015). What they say, therefore, does not "exist", but they nevertheless serve as signposts in the *reference* debates of the legal game, as incentives or as channelers of juridical action in a certain direction (and not in another): we just use them as concepts, as a means of ensuring its localisation within the conceptual web of the law. All legal terms par excellence are like this, from 'contract' to 'possession' to 'self-defence'. This is because – to return to the previous analogy – we have known since the end of the 19th century at the latest that our world is more and different from what we can experience even indirectly with our senses, and that, in the same way our *language is* not a description of reality, but

the creation of a meta-net of thoughts, which we can then project onto reality with varying degrees of success. And this is because the experience of our intellectuality is also an action, which is subject to conditioning – from interests asserted to any other mental conditioning present in the relevant moment – that affects it.

With our ancient topos, which still survive in us as divine creatures, we have, like *ancilla theologiae,* not only viewed the order of nature, but also human behaviour in our legal thinking, so to speak, following a theological pattern, namely, translating the sequence of "God ® law ® nature" to the formula of the trinity of "legislator ® rule ® compliance/non-compliance" (Krawietz, 1984). It was only from predominantly American anthropological research, starting in the 20th century, that we learned that the whole social process does not take place in such a causal chain, but *stochastically,* interleaved with randomness, even if statistically measurable and perhaps also predictable and pre-plannable as well. That is to say, translated into practical language: in everyday life, we tend to act with ordinary attention and care, and even if we sometimes consider risks and dangers, we are still predominantly prisoners of the potentials and the very chance of the moment as we seek to assert our interests; and only *incidentally,* among other things, mostly when we reconsider or are forced to justify our just-as-it-happened choices, does the law or legal *criterionality* arise, if at all (see Edgerton, 1985; Reynolds, 1994).

In this dichotomy – to put the original conceptual distinction (Pound, 1910) in the sense and context of the present explanation – on the one hand, there is always a given text in law, which in our legalistic worldview we call *the* law *(law in books),* and on the other hand, there is the understanding of it as a fact, by which in the given culture of understanding it is enforced as hic et nunc concrete law applied to the case (*law in action* understood as a counterpart of the former). Moreover, there may be a wide variety of such interpretations with variability inherent in each of them. This also means that, due to this variable nature, it can no longer be theorised, but at most can be described in other words in a description of the practice of understanding (as dogmatics of or commentary on the law). Nevertheless, as with any text, it can be said that on top of what we create by textual objectification as part of the humans' second reality, we also add another layer, an exercise in understanding.[13]

It is also worth recalling that an English classic of establishing a historical vision of law recognised the possibility of this a century and a half ago. "I apply the term 'legal fiction' to any expression," wrote Maine (1861, pp. 25–26), "which conceals or attempts to conceal the fact that the law has been modified by the fact that, although its words remain unchanged, its operation has been modified [...]. Because the law as a whole has thus changed; and the fiction is that it remains what it was."[14] Of course, this did not yet herald the introduction of the idea of *hermeneuticum* into the studies on law or the

[13] This shows the significance of the doctrinal study of law *(Rechtsdogmatik).* It was also the core of the so-called invisible constitution that the first President of the Hungarian Constitutional Court invoked as the legal basis for many of the rulings the Court made (cf. Varga, 2020).

[14] Cf. Goëtzmann, 2013. It is worth noting that by Maine's time, Jeremy Bentham's oeuvre was already complete, and he was passionately fighting against, among other things, "the pestilential air of fiction". According to Bentham, 1843a, p. 1153: "Fiction, tautology, technicality, circuity, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near" (cf. Stolzenber, 1999).

practical use of its teaching, since as a natural consequence of his desire for plain language Maine trusted in the plain meaning that follows from it – that is, in the desired fact that in language words and expressions have a kind of natural meaning, which the inherent arbitrariness of the way we form our language can of course distort and further shape as well, but still, as the command of common sense, we must adhere to its given nature and, if possible, adjust to it.

To sum up, an awareness of the role of hermeneutics in law and thus the recognition of the possibility of informal change of law, which can be reconstructed as a continuous process by those who look at change of law not from within, as a formal object of legal analysis, but from a broader social-scientific perspective, for example, from the point of view of the very chance of the legal recognition of the demands formulated in social and political mass movements, can now offer the prospect of influencing and possibly affecting a triple sphere of legal actors and activities, since, in addition to *legislation* on the one hand and the *law enforcement* on the other, an entire sphere of *putting the law into practice* via mass or individual popular implementation is also included as a third sphere (Gustafsson & Vinthagen, 2013, p. 40). And it is perhaps no accident that it is precisely here, in this trinity, that the *hermeneuticum* and the *sociologicum* meet as two components of the direction identified within any ontological approach to law.

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Characteristics of the European Platform Regulation

Platform Law and User Protection

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Abstract: This paper presents the European regulation of platforms. In its first part, it reconstructs the process by which the concept of 'platform' in information technology and marketing have evolved and become a legal concept. This emerged from the mid-2010s, first in amendments of sectoral rules and later in *sui generis* platform rules. The second part of the paper argues that these rules can be interpreted as an emerging separate area of law, the 'European platform law'. One of the most important ultimate justifying principles and purposes of this legal corpus is the protection of users. This is achieved through a number of tools, some of which are legal transplants from other legal areas (such as consumer protection), while others are *sui generis* legal rules created specifically for platforms, such as the protection of user accounts or the explainability and transparency of algorithms.

Keywords: internet platforms, concept of platform, platform as legal concept, user protection on platforms, Digital Services Act (DSA), Digital Markets Act (DMA), platform-work, platform law, comprehensibility of user contracts, transparency and explainability of algorithms, complaint mechanism on platforms

1. Introduction

Most of the online platforms were created around the turn of the millennium, but it was only in the early 2010s that they really became important actors in our lives. They have never operated in an unregulated, 'lawless' space, but it is only in the last four or five years that they have been given a tailor-made set of legal rules. This paper recalls the process by which the platform emerged as a concept and evolved – first as a technical, then as a social science, and finally as a legal concept. It also briefly presents the evolution of the rules on platforms, and outlines the European rules, some of which are already in force and some in draft form at the time of writing this paper, that have been developed specifically for platforms.

As the entire body of platform legislation is so extensive that a description of it would go far beyond the scope of a single paper, the paper focuses its argument along two lines.

The first is that a new area of law is emerging in Europe, 'platform law', which is the result of the historical development described above, and which is developing certain internal recurring patterns and legal instruments regulating platforms operating in different areas through very similar means. The second consideration is that one of the main principles underlying these legal institutions is to protect platform users who are vulnerable in a new way. For this reason, platform law can be called "user protection law", along the lines of "consumer protection". The second part of the paper describes the main features and legal institutions of this set of user protection legislation.

2. The emergence and evolution of the concept of platform in EU law

2.1. Platform as a technical and information technology concept (1992–2006)

The importance of the *terminus technicus* with which we choose to describe the world has been expressed in many different ways (Riordan, 2016, p. 3). We are also aware that most of these choices are spontaneous, unconscious acts of a linguistic community. However, there are also situations, such as the language renewal movement in Hungary, or the linguistic ingenuity of poets and writers who have had a particularly strong impact on the language, where the rooting of a word in language can be linked to specific events or people. Today's meaning of 'platform' can be explicitly linked to a specific series of events (Gillespie, 2010), the acquisition of YouTube by Google – at least according to Tarleton Gillespie's convincing argument. We can add that the platform has become a legal concept over the course of a few years, and this can also be linked to certain specific events.

But before recalling the events of 2006, a few words about the origins of the term 'platform' are worth saying. According to the Oxford English Dictionary, the word 'platform' appeared in English in the 16th century (perhaps as a result of French influence – platte forme). It means "a raised surface on which people or things can stand, a separate structure intended for a specific activity or act". In addition, the word 'platform' also had a figurative meaning from the very beginning: "A plan, a concept, an idea, something that serves as a model or template."[1]

This double meaning (platform, plateau and political programme, system of ideas, grouping within a party) persisted until the 1990s. Steven Wheelwright and Kim Clark's book on revolutionising product development was published in 1992, turning the tide in English usage (Wheelwright & Clark, 1992). This book was the first to talk about the fact that one of the keys to product development is that there must be core products and 'derivative' products (Wheelwright & Clark, 1992, pp. 41–42). He gave the example of Sony's Walkman range, which was actually built on three core products but had hundreds

[1] Oxford English Dictionary, heading 'platform'.

of sub-variants. The core products on which the derivative products are built are what the book called their 'platform'. It is quite likely that the book also inspired the automotive industry, which then began to call the chassis and engine designs used for several models of cars "platforms". Another development of the "industrial age" is that platform often also meant a technical standard of some kind.

In the late 1990s, the word also started to be used by the software industry, but here it was enriched with a new meaning. In the software industry, it is now common for the platform (which, as I mentioned, is also a quasi or even a real standard) to be developed by other manufacturers, so that the platform becomes open to external manufacturers. This meaning, that a platform owner not only uses the platform for its own purposes, but also opens it up to external manufacturers, then took on a new layer of meaning with the advent of game consoles, when *users* also appeared on the platform. The actual power of the platform is also enhanced by user activity; in other words, direct and indirect network effects (Zhu & Iansiti, 2007). The phenomenon of network effects, in particular in the software industry, has been well known since the seminal work of Hal Varian and Carl Shapiro (1998), but the two-sided markets around platforms, the two markets that reinforce each other, is only a development of the mid-2000s.

Gillespie identifies a specific turning point in the evolution of the platform's meaning: the moment when Google acquired YouTube in 2006. According to Gillespie, these large corporations seek to create an environment that is favourable to themselves not only through political influence, lobbying and subtle shaping of the regulatory environment, but also through 'discursive work', and part of this conscious framing was the consistent way in which Google began to refer to YouTube as a 'platform' when it gradually replaced the terms 'website', 'service', 'forum' and 'community' in its post-acquisition marketing communications. This mental conditioning using this term is not at all coincidental and uses all the connotations associated with the platform. Since the platform, as we have seen, has a physical space, an 'architectural' meaning if you like; that is, it is a raised, prominent surface, YouTube has begun to reinforce this meaning in its advertising campaign ("Broadcast yourself").

So, by around the early 2010s, the word platform had developed the following meanings: a product or standard on which other products are built, on which other products can be developed, a software solution that underpins other software, and a software or game on which people or groups of people can engage in some joint activity.

2.2. Platform as a social science and marketing concept (2006–2018)

At that time, platform was still a concept of marketing and IT, and the law did not use this term but, for the web services we now call platforms, 'hosting services'. For example, the GDPR,[2] drafted roughly between 2009 and 2015, does not mention the word

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR).

'platform' even once, even though one of the main issues in response to which it was drafted was the spread of 'social networking and online activities'.[3] The same applies to the Copyright Directive, which uses the term 'online content-sharing service provider'.[4]

The turning points for the platform to become a legal concept are, clearly, 2015 and 2016. It was in these two years that the term 'platform' started to become common, especially in the context of the digital economy. It started to be used first in the materials for the preparation of decisions and expert inputs, then it appeared in the European Digital Single Market Strategy in 2015,[5] and then in 2016 in another Commission Communication, focusing exclusively on industrial platforms.[6] Also in 2016, a Commission Communication on a European agenda for the collaborative economy[7] was published. All three documents were almost exclusively concerned with economic aspects, and the word 'platform', while being used as a general umbrella term, started to lose its clearly positive connotation. "The market power of some online platforms potentially raises concerns"[8] states the Digital Single Market Strategy. "Online platforms have dramatically changed the digital economy over the last two decades and bring many benefits in today's digital society"[9] – starts the other communication on platforms.

The old meaning of platform was still alive for a while. For example, in 2016, the paper entitled *Digitalisation of European Industry*[10] still referred to platforms as "multilateral market gateways that create value by enabling interaction between multiple groups of economic actors",[11] in other words, under platform, it essentially meant a *loose association of companies,* not too large in number and mainly organised around common projects or standards, which had already been fashionable in certain industries.[12] So this clearly still carried the product development[13] (and partly related to this, standards[14]) and of course

[3] GDPR, recital (18).

[4] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe COM/2015/0192 final.

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM/2016/0288 final.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy COM/2016/0356 final.

[8] A Digital Single Market Strategy for Europe. 9.

[9] Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, Ibid, (fn. 12) 2.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Digitising European Industry Reaping the full benefits of a Digital Single Market COM(2016)180, SWD(2016) 110 final.

[11] Ibid. 11.

[12] Ibid. Examples of existing industry platforms include AUTOSAR in the automotive sector (www.autosar.org).

[13] Platform building means, inter alia, "the development of reference architectures". Ibid.

[14] "...platform on Cooperative Intelligent Transport Systems." Ibid. 12.

the software industry[15] meaning as mentioned above, but other *policy papers* and expert materials could also be cited.[16]

However, in 2016, the use of platform in the sense of a "general online infrastructure or coordination mechanism", including services run by large tech companies for different purposes, also emerged. Dutch media scholar José Van Dijck played a major role in this shift in meaning and approach, by publishing a book on the platform society (De Waal et al., 2016) with two colleagues in 2016, and in the same year the Oxford Internet Institute organised a conference on the topic, at which Van Dijck was one of the keynote speakers.

Van Dijck was also influential in that the word "platform" then became clearly negative, because in his book, which was later published in English (Van Dijck et al., 2018), he already feared for our public values due to the platforms. The underlying idea of his book is that platforms have penetrated so deeply into certain spheres that they threaten to override the community, professional and ethical values and logics that had previously been established in these spheres (especially in the public and press spheres, education and health). Van Dijck has defined three conceptual elements of the platform: data-driven, algorithmic governance and monetisation. "Online platforms are not simply technology products – they are based on hardware infrastructure, driven by data (often user-generated data), automated and organised by algorithms, formalised by ownership, and monetised through business models" (Van Dijck, 2021).

Some well-known events contributed to the reinforcement of negative connotations. Firstly, the 2016 terrorist attacks in Brussels, in which the platforms played a role mainly by spreading hate speech. In the wake of this, heads of state and government issued a statement condemning the attacks, after which the EU drew up a code of conduct to which all the major social platforms subscribed.[17] This has made the issue of hate speech and terrorist content on these platforms, particularly social media and video-sharing platforms, very much part of the public discourse. In the same year, Donald Trump was elected President and the Brexit referendum took place. In both cases, the role played by platforms, especially the largely illegal microtargeting campaign based on personal profiles by the data marketing company Cambridge Analytica (Wong, 2018), is still unclear. From then on, attention was not simply focused on social media platforms, but in many ways was disproportionately focused on them, and the term 'platform' became almost a catchword.

From this time onwards, in addition to companies (the GAFAM universe[18]), medium and small web services were also included in the meaning of a platform, provided they connected a larger number of users and applied "algorithmic management", regardless of

[15] "Building on existing open service platforms such as FIWARE." Ibid. FIWARE or FI-WARE is the open technology platform that the European Union intends to build the future Internet on (www.fiware.org).

[16] Some material for illustration: Competition Policy for the Digital Era (https://bit.ly/3yJrt09); Protecting Workers in the Online Platform Economy (https://bit.ly/3MC8KZX); A multi-dimensional approach to disinformation Report of the independent High level Group on fake news and online disinformation (https://bit.ly/3rXwzC3); The EU Code of Conduct on Hate Speech (https://bit.ly/3s0mLqW); An important milestone in the systematisation of legal solutions was the publication in December 2019 by the European Legal Institute of a document setting out model rules for the regulation of platforms (https://bit.ly/3TrFZBK), which I rely on also in this article.

[17] The EU Code of conduct on countering illegal hate speech (https://bit.ly/3s0mLqW).

[18] An acronym formed from the initials of the names of companies such as Google, Amazon, Facebook, Apple, Microsoft.

the economic sector and type of activity. They have thus become platforms for music and video sharing, for facilitating work, or for sharing objects and real estate, as well as for online services coordinating manufacturing, logistics, health services or administration.

2.3. Platform becoming a legal concept in EU sectoral rules (2018–2019)

Although platform as a legal concept did not exist until the late 2010s, this does not mean that platforms were not regulated by law. Platforms fell under the categories of "intermediary service provider", including "hosting service provider", as defined in the e-commerce Directive.[19] Intermediary service provider is not formally defined in the Directive, but is understood as an information society (online) service that does not directly serve the purposes of providing services or content, but only passively transmitting or storing them (Riordan, 2016, p. 3). The E-commerce directive was drafted at a time when platforms apart from search engines did not exist and "hosting providers" meant providers who passively hosted websites. According to this, hosting service "consists of the storage of information provided by a recipient of the service" [Article 14 (1)].

The platforms were thus classified by analogy, but it soon became clear that the platform was in many places outside the scope of the regulation. Firstly, its activity is not passive but active, and more akin to editing than to simple storage. It performs this by using algorithms (sorting, classifying, personalising, etc. content). Secondly, it collects an unprecedented amount of data on users, much more than an intermediary. Thirdly, it monetises its services in some way based on user data or user activity (i.e. it does not simply charge a flat fee for services like an intermediary service provider, and even platforms with flat-fee structures, for example *video-on-demand* or music sharing providers also operate personalised referral systems). Fourthly, most platforms, in today's wording "very large platforms", create very strong network effects in their own territory (or able to operate by building on it), so they are partly in a monopolistic position and partly have a very strong social impact as a result. (In contrast to intermediary service providers, which do not have such network effects based monopoly positions and social impacts.) Of course, not all platforms have all four elements, but the first three are generally true for all platforms.

It is also typical of this period that legislators tried to deal with new problems raised by platforms within the framework of the norms that already governed certain sectors or spheres of life, usually by supplementing or amending them. Two standards are mentioned here as illustration: the AVMSD[20] and the amendment to the Copyright Directive.[21] Both

[19] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[20] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[21] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

directives explicitly referred to certain new technologies, including platforms, as the main reason for their emergence.

The AVMSD already mentions video-sharing platform services as one of the objects of its regulation, "service is devoted to providing programmes, user-generated videos" by means of electronic communications, "for which the video-sharing platform provider does not have editorial responsibility [...] the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing" [Article 1(1)(b) AVMSD]. With this definition, at least in one area the platform becomes a legal concept, which already has three conceptual elements: user content, the absence of (editorial) responsibility and algorithmic management, content management. However, the basic premise of the Directive is that video-sharing platforms must be treated as media service providers.

The other sectoral standard that is heavily influenced by platforms is the 2019/790 Copyright Directive, as the main reason for its creation was also the emergence of platforms. Recital 3 of the Directive talks about new technologies, "new business models" and "new actors" as reasons for its adoption. Its central concept is the "content-sharing service provider", which has three elements: 1. its main purpose is to host and provide access to copyright-protected content uploaded by users, namely 2. for profit, but 3. the Directive imposes certain additional obligations only on platforms of a larger size (with revenues of more than €10 million). The Directive basically specifies two obligations for platforms. On the one hand, it obliges video-sharing platforms to obtain licence for the works they transmit, and on the other hand, it effectively restates the notice-and-takedown obligation introduced by the E-commerce Directive,[22] otherwise platforms "shall be liable for unauthorised acts of communication to the public [...] of copyright-protected works and other subject matter".[23]

2.4. The emergence of sui generis platform law (from 2019 until present)

2.4.1. The P2B Regulation

In the process of platform regulation an important milestone is the P2B (platform-to-business) Regulation, which was adopted in 2019 and now specifically targets platforms (and a specialised version of platforms, intermediaries of goods and services).[24] The aim of the Regulation is to reduce the vulnerability of (small) businesses that depend on platforms and to create a level playing field for them in their dealings with platforms. The Regulation also includes two regulatory instruments that have subsequently been included in several other standards, such as the draft Platform Work Directive described in section 2.4.4. The first are rules requiring *transparency* of algorithms and the second

[22] "Acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter" [Copyright Directive, Article 17(4)(c)].

[23] Copyright Directive, Article 17(4).

[24] Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

are rules requiring the operation of a *complaints mechanism.* The former is represented by the part of the Regulation dealing with 'ranking' (Article 5), which requires platforms to "set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters" [Article 5(1)]. This parameter description should be suitable to enable the user to understand the importance of the various details related to the products and the design of the online store. The Regulation explicitly states that platforms do not have to disclose their algorithms themselves, but they do have to disclose the broad outline of how the ranking software works and *what* changes to which parameters will cause *what kind of a* change in the ranking. The complaint-handling mechanism is set out in Article 11 of the Regulation: "Providers of online intermediation services shall provide for an internal system for handling the complaints of business users."

2.4.2. The draft Digital Services Act[25]

At the end of 2020, the Commission published its draft regulation on digital services to replace the E-Commerce Directive. Most of the provisions (three of the five sections in Chapter III) are actually about platforms or very large platforms. The text already includes a general legal concept of platform and places it in an ever narrowing field of four concepts. A platform is an information society service that falls within the category of "intermediary services" (which have in common the limited liability for content). Within this category, a platform is a *hosting service,* which is characterised by the storage of user-generated content ["storage of information provided by, and at the request of, a recipient of the service"; draft DSA, Article 2(f)]. Within this, a platform is a hosting service that not only stores but also "disseminates to the public" information [Article 2(h)]. Within the category of platforms, the DSA creates a new category with additional obligations, i.e. the "very large platform", which refers to platforms with more than 45 million users [Article 25(1)]. Although this concept of platform is at first sight very different from the one used in social sciences, which mainly operates with the conceptual elements of datafication, algorithmic control, particularly close contact with users and large size (large network effects), after a closer examination, this difference does not seem so big. In the following, I will try to illustrate, through the platform concepts of each norm, that the legal definition relies heavily on elements of the social science concept.

First of all, it is worth noting that the DSA does not consider algorithmic management (control) as a conceptual element of platform (nor does the P2B Regulation), but it does define the concepts of recommender systems and content moderation, and at several points it attributes a key role to the rules on these – through which it seeks to influence the 'behaviour' of platforms. In case of a recommender system, the conceptual element is explicitly defined as a fully or partially automated system to "suggest or prioritise

[25] Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [COM(2020) 825 final] (hereinafter: The draft DSA).

information [...] determining the relative order or prominence of information displayed". According to the definition, algorithmic control is not an element of content moderation, as it is an *activity* of the intermediary service provider that is "aimed at detecting, identifying and addressing" compliant or illegal content. Both concepts become relevant for the very large platforms, which, among other additional obligations, must make their recommender systems *transparent*. The have to set out parameters in "a clear, accessible and easily comprehensible manner" [Article 29 (1)], and how the user can influence this, and they have to make this option of influencing "easily accessible" [Article 29 (2)].

Content moderation, although not necessarily an algorithmic activity in principle, appears at several points in the draft as an "automated tool" used in decision-making [Articles 14(6), 15(2)(c)], and all platforms are required to report on this in their regular transparency reports [Article 23(1)(c)]. According to the DSA, the concept of platform does not therefore include the concept of a large number of members and algorithmic control, but by defining a very large platform using the concept of a large number of users and by giving a key role to two algorithmic tools on giant platforms, it does indirectly include these two elements in the concept of platform.

2.4.3. The Digital Markets Act[26]

An important milestone in the evolution of the concept of platform is the draft Digital Markets Act, which is treated as a package with the DSA Regulation, creating two new categories of platforms, one on a functional basis ('core platform services') and the other on a size basis, further narrowing the category of 'very large platforms' to the largest ones, the 'gatekeepers', and imposing additional obligations on them. The basic platform services envisaged in the draft are:

- online intermediary services
- online search engines
- online social networking services
- video-sharing platform services
- number-independent interpersonal electronic communication services
- operating system
- cloud services
- advertising services, including advertising networks, advertising exchanges and any other advertising intermediation service, where these advertising services are related to one or more of the other core platform services mentioned in the above sections

In addition to the known number of users (45 million), the size restriction also includes a revenue and capitalisation criterion (€6.5 billion in revenue or €65 billion in capitalisation).

[26] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [COM(2020) 842 final].

2.4.4. Draft Platform Work Directive[27]

The draft Platform Work Directive, published in December 2021, is an important step towards expanding the concept of platform. The draft contains two important sets of rules. The first is the provision of a rebuttable presumption that platform workers shall be considered workers until this presumption is rebutted by the platform on the basis of criteria developed in the case law of the EU Court of Justice. This is less interesting for our topic. The second set of rules sets out the rules for "algorithmic management". One of the interesting things about the draft platform working rules is that, although they do not mention any of the above concepts (data-driven, algorithmic management, user data collection and network effects)[28] in the definition of the labour platform, a substantial part of the norm is still constraining the work organised algorithmically.

3. The European platform law as a "law of user protection"

We have thus seen how the concept of platform has evolved, how it has become part of sectoral norms, and then how a *sui generis* platform law has emerged, and what platform concept, or rather concepts, it operates with. In this section I will attempt to summarise the characteristics of European 'platform law'. Although the legislation and draft legislation seek to regulate platforms operating in very different spheres of life, with very different business models and sizes, and the problems and risks they seek to address are very different, some of their rules are very similar and usually very similar to the already known rules of some traditional area of law. One could say that these are legal transplants. However, transposition is never mechanical: the logic of the platform, or the particular sector or situation in which it operates, always modifies or bends the legal instrument. This is one of the main reasons why I dare to call this emerging new area of law 'platform law'.

3.1. User protection as justification and purpose of platform law

If we look at the ultimate purpose and justification of this platform law, we should recognise the bulk of platform law as rules protecting users against illegal content on the

[27] Proposal for a Directive of the European Parliament and the Council on improving working conditions in platform work [COM (2021)762 final].

[28] It is provided remotely by electronic means, via a website or mobile device, at the initiative of the recipient of the service, and its main component is that it involves the work of individuals [draft Platform Work Directive, Article 2(1)(1)(a)–(c)].

one hand, and *excessive power* of platforms[29] on the other, alongside some other equally important but perhaps subordinate purposes, such as preserving a healthy structure of publicity or maintaining competition in certain economic sectors. These user protection rules can basically be divided into two categories: individual and collective user protection rules. These two sets of rules have different legal sources of inspiration. While the rules on individual user protection are very similar to some of the provisions of consumer protection and data protection, collective user protection is more reminiscent of investor protection rules. These two sets of rules are briefly, without claiming to be exhaustive, described below.

But before I get to that, it is important to discuss briefly why user protection has become such an important element of platform law, protecting individuals and small businesses from the excess power of the platform. How does this excess power manifest itself? As several authors (Van Dijck et al., 2019; Cohen, 2019) have noted, a new version of social power (authority) and everyday power (micro-power) has emerged here, based on the collection, continuous analysis and combination of personal data (datafication and surveillance) and its monetisation. An important element of it is that it takes place through behavioural advertising[30] and its more sophisticated version, microtargeting, which can influence behaviour in unprecedented ways.

This is not just, or even primarily, a question of privacy, competition, copyright or freedom of expression, because the issues addressed separately by the traditional branches of law are deeply interconnected and ultimately form a 'platform power'. This power rivals the power of states and governments in terms of influence and strength, even if, unlike a traditional nation state, the platform cannot mobilise police, close borders or launch wars. It rivals it because it can drive people's behaviour *en masse* in one direction without physical coercion or the prospect of it. Moreover, on platforms, this kind of vulnerability tends to appear in the longer term, as opposed to, for example, short-term abuses of monopolies, such as unilateral price increases.

The platform power does not distinguish between consumer, citizen, voter, entrepreneur, etc.; all these roles are equally targeted by the platform.[31] Platforms have the unprecedented ability to penetrate the privacy of individuals, to learn about their behaviour, to collect data about them and their transactions, and to manipulate users. In this power field, individual freedom and (decision-making) autonomy can be seriously compromised (Dumbrava, 2021). To make matters worse, monitoring and data collection are largely carried out by algorithms, i.e. *impersonal mechanisms,* and what is more,

[29] The term 'user protection' is all the more appropriate because it appears in the very same context in several European documents. The logic of the model rules on the regulation of online platforms published by the European Law Institute in 2019 is also built around this. The largest part of the proposed legislation is a list of the obligations of the platform operators, with Article 8 entitled "Obligation to protect users". Report of the European Law Institute. Model Rules on Online Platforms (https://bit.ly/3TsXJg6). The Declaration on Digital Rights and Principles for the Digital Decade [COM(2022) 28 final], published in January 2022, also aims to provide "strengthened protection of users' rights in the digital environment" (Preamble, para. 2). The concept was further inspired by Jack Balkin's fiduciary model, although this would only impose additional obligations on platforms in relation to *privacy* (Balkin, 2016; Balkin, 2020).

[30] Article 29 Working Party Opinion 2/2010 on online behavioural advertising, 00909/10/EN WP 171.

[31] Ibid. 6.

a number of decisions are also taken by them. On top of that, in certain spheres (social public sphere, certain market segments), platforms have become so powerful, so inescapable that it is very difficult or impossible to get along without them. I describe five legal instruments below that seek to limit this excessive power.

3.2. Protection of users against illegal content

Undoubtedly, the most important justification and purpose of the new platform law, which is also constantly emphasised in the communication related to DSA,[32] is the protection of users, especially minors, from illegal content. The underlying logic is very similar to the corresponding institutions of media law, and in the case of the AVMSD, the rules for electronic media must also be applied to video sharing platforms in this context. However, what greatly differentiates the obligations of platforms regarding illegal content from the media is the lack of prior screening and general monitoring obligations. It is well known that the E-Commerce Directive only codified the notification-removal procedure in relation to illegal content, the essence of which is that the hosting provider only deals with illegal content if it becomes aware of it, but has no general monitoring obligation.[33]

However, the situation is far from being that simple, for two reasons. One is that, since monitoring is not prohibited, it is simply not mandatory, platforms have been monitoring content from the earliest times. The other is that a series of exceptions to the general lack of obligations have been established in part by some legislation, such as the supplement to the Copyright Directive,[34] and in part by judicial practice too. While the Copyright Directive does not impose a general monitoring obligation, it does make platforms generally responsible for unauthorised communication of copyrighted works and other protected achievements to the public unless they can prove that everything has been done to obtain permission and to prevent future uploads (Article 14).[35]

However, the *sui generis* solution of the platform law for protecting the users from illegal content is a preventive *(ex ante)* system, consisting of three lines of defence. The first element is the detailed regulation of user-friendly, easily accessible interfaces for reporting illegal content (Article 14). The second is the system of trusted flaggers (Article 19). Finally, the third set of rules prescribes protection against abuse (Article 20).

[32] The DSA and DMA have two main goals: "…to create a safer digital space" (https://bit.ly/3g7MXxg).

[33] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) ("No general obligation to monitor").

[34] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[35] "If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless…" [Article 17(4)].

3.3. Regulation of contracts with users

This new platform law, as I have mentioned, seeks to limit this platform power by rules taken from other branches of law. The first instrument is the mandatory provision of certain content elements in contracts (or general terms and conditions) with users. This instrument is very similar to the well-established consumer protection toolbox. The draft DSA already requires intermediary service providers (i.e. a broader category than the platform) to provide information in the contract "on any restrictions that they impose in relation to the use of their service" [Article 12(1)], such as content moderation, "including algorithmic decision-making and human review". Platforms have even more serious obligations, for example to describe in the contract, clearly and in detail, their policy applied towards users who post notoriously illegal content and unreasonably report others. Very large platforms must also include in their contractual terms and conditions "the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they may have made available" [Article 29(1)], so the transparency of algorithms must be ensured already in the contracts.

The P2B Regulation also contains minimum requirements for contracts between the platform and the user. The first set of rules regulates some of the characteristics of the contracts between the platform and the contractor. One of these rules requires contracts to be drafted in a clear and comprehensible manner. This provision is included in nearly the same form in Article 5 of Directive 93/13/EEC. Point (c) requires, as a compulsory element of the contract, the indication of the reasons for the decision to suspend, terminate or in any other way restrict user accounts. (The rules for the protection of user accounts are discussed separately.) In the same article, there is also a provision on how to notify the user of changes to contracts and what grace period is required for them to take effect.

3.4. Decisions concerning the user account

A further set of user protection rules is used to control the decisions of the platform that most seriously affect users (in particular, termination, suspension or restriction of the user account). While the rules on user contracts are still written in consumer protection style, the rules on user account protection are already clearly *sui generis* platform law rules. Since most platforms have become a basic infrastructure for users (whether in a business or private sense), restricting or terminating accounts is essentially a truncation or even elimination of a person's "digital identity".

The norms seek to curb the unrestricted right of platforms to restrict or close user accounts in a number of ways. For example, the draft DSA provides for the operation of an "effective and easily accessible internal complaints-handling system" to be used in such cases (draft DSA, Article 17). The P2B, in addition to imposing certain formal requirements for these decisions ("communication on a durable medium", 30 days' notice in the event of termination), also imposes an obligation to state reasons for these decisions

(in addition to the internal complaints mechanism provided for in the DSA).[36] The Platform Work Directive provides for a written form and human review in the event of (algorithmic) decisions to restrict, suspend or terminate a platform worker's profile (account) (Article 8).

3.5. Transparency of algorithms and explainability

As a third means of user protection, all three documents contain provisions to make the operation of algorithms that affect users in their daily use more transparent. In relation to very large platforms, the DSA requires that the "main parameters" used in recommender systems and "any options for the recipients of the service to modify or influence those main parameters that they may have made available" be stated in the contract [draft DSA, Article 29(1)]. The other two draft instruments are much more detailed in terms of algorithm transparency rules, as the stakes are much higher in both areas than in a social media platform. The P2B Regulation, which mainly protects (small) businesses operating on large marketplace platforms, dedicates a specific article to provisions on transparency of "ranking". According to it, "intermediary service providers" must set out in the contract "the main parameters determining the ranking and the reasons for the relative importance of those main parameters as opposed to other parameters" [P2B, Article 5(1)].

In addition, search engine providers must also disclose "the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters". Moreover, in the Platform Work Directive, a whole chapter is devoted to algorithmic management issues (Chapter III, Articles 6–10). This not only contains rules on transparency and explainability, but also certain substantive rules on what algorithms for work platforms are forbidden, which is otherwise exceptional in platform law. For example, they must not place undue pressure on workers or otherwise endanger their physical or mental health. In addition, as I mentioned above, written justification and the possibility to appeal to a human must be provided with regard to certain algorithmic decisions.

It is no coincidence that the most elaborate algorithm transparency rules are in the draft work platform directive. Here the relevant article is entitled *Transparency on and Use of Automated Monitoring and Decision-Making Systems.*[37] The essence of this provision is that workers must be informed of both the systems that monitor and those that decide on the essential parameters of work (e.g. work assignment), and that this information must not only cover what systems are in place but also their basic operational characteristics, such as what parameters are used and their relative weighting in relation to each other, and under what conditions a worker can be suspended, banned or restricted. This information must be provided on the first day and any subsequent changes needs to be notified.

[36] P2B, Article 4.
[37] Draft Platform Work Directive, Article 6.

Further provisions deal with *human supervision* of automated systems. Platforms must regularly monitor and evaluate the consequences of decisions taken by automated monitoring and individual decision-making systems, continuously assess the impact on working conditions and the health of workers, and put in place preventive and protective measures to prevent the risks generated by these systems. The operation of systems exerting psychological or mental pressure is prohibited. The proposal also contains provisions for human review of substantive decisions, reminiscent of the right to explanation as defined in Article 22 of the GDPR (which is otherwise disputed in the literature) (Wachter et al., 2017; Malgieri & Comand, 2017). Accordingly, platforms must provide access to a contact person with whom the employee can discuss the individual machine-made decision, its factual basis and the arguments supporting this decision. Decisions that would result in the suspension, restriction or termination of the employee's profile or that affect his or her remuneration or contract must also be confirmed in writing by the platform. If employees are not satisfied with the decision, they must be given the opportunity to have the decision reviewed.

A provision also requires that, when algorithmic monitoring or decision-making systems are introduced or substantially changed, employees or their representatives must be provided with information and a consultation opportunity on them.[38] Finally, the last provision of this chapter of the draft provides that most of the rules on algorithmic management also apply to platform workers working in a relationship other than employment. Here, the legislator may have perceived that, in this case, the provisions of this Directive could overlap (and sometimes even conflict) with the P2B Regulation. Obviously, this is particularly true for businesses that are present and provide services on the large intermediary platforms as sole traders or small businesses providing a personal contribution. (This is not an option for businesses offering goods.) Namely, the P2B Regulation, as I indicated above, also regulates certain aspects of algorithmic management, in particular the problem of ranking goods and services, contains a set of provisions for the suspension, limitation and termination of an account, and codifies a complaints mechanism. The proposal makes business users primarily subject to the provisions of the P2B Directive, and explicitly excludes the option in Article 8 (right of access to a human) from the options available to business users.

3.6. Dispute and complaint-handling mechanisms

The fourth typical tool for user protection is the introduction of various dispute resolution, complaint-handling and "contestation" mechanisms. As we have seen, this tool is often intertwined with the first two, because it provides a "remedy" against key decisions or decisions taken by algorithms, but in no way in each and every case. The documents analysed seem to consider complaint mechanisms as a general user protection tool. They

[38] It is worth noting here that the algorithmic management chapter also includes the basic data protection rules according to which platforms may only process personal data that are intrinsically linked to the contractual relationship and are indispensable for its performance. Draft Platform Work Directive, Article 6(5).

exist in two versions: internal and external mechanisms. In external mechanisms, complaint-handling or dispute resolution does not take place within the platform, but independently of it (e.g. P2B, Article 12), but the institution of whistleblowers may also be considered such (draft DSA, Article 19). The mechanisms provided for in Article 17 of the DSA, Article 11 of the P2B and Article 7 of the draft Work Platform Directive, but also the successor to the old notice and take-down mechanism, the notification and action mechanism (draft DSA, Article 14), can be considered internal mechanisms. The AVMSD provides that, in order to protect minors, prevent hate speech and avoid criminal content, service providers are subject to an obligation of "establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned" the infringing or harmful content on its platform [Article 28a(3)(d) AVMSD].

3.7. Collective user protection: rules on transparency on platforms

Finally, I will briefly deal with another area of user protection, namely the set of rules that impose compliance and especially transparency rules, especially for larger platforms. Some of these relate to the obligation for platforms to make public their individual user protection efforts and the data relating to them on an ongoing basis. In Article 13 of the draft DSA, intermediary service providers are already subject to such transparency reporting obligations, and then platforms are subject to even more (Article 23), and very large platforms are subject to additional obligations in addition to those (Articles 30, 33).

The transparency reporting obligation for intermediary service providers mainly covers the disclosure of information on content management (draft DSA, Article 13). Accordingly, they must report annually on content removed on the basis of external or internal initiatives, according to the type of unlawfulness. Online platforms are already obliged to report regularly on, among other things, suspensions, cases referred to dispute resolution bodies, the functioning of content moderation algorithms, and the number of active users. And the very large online platforms have such a wide set of reporting obligations that it is not possible to describe them fully here, so I will just mention by way of illustration that in addition to the obligations on the platforms, they are obliged to maintain a repository of online advertising, to give the Commission access to essentially all their data, to carry out risk assessments and mitigation measures and publish a report of them, to tolerate independent audits and publish the results of such audits, etc.

4. Evaluation and summary

The first and perhaps most important feature is that most of the institutions of platform law are formal-procedural-guarantee in nature, which means that, with very few exceptions, the norms cited do not contain any substantive criteria, which are left to the platforms to develop. Platform law is not a "substantive" law, if you like, but rather

"procedural law", although not in the traditional sense. The DSA does not, for example, talk about what additional requirements a social media platform must enforce, for example, regarding offensive speech or pornographic content, in addition to the minimum requirements set out in the legislation. In essence, it grants the platform freedom in this, as well as the choice of sanctions in the event of a violation of these requirements. All it asks is that these requirements are transparent and, if someone is sanctioned, there must be a fair procedure whereby the decision is explained, the sanctioned person can explain their position and request a review of the decision. *Mutatis mutandis,* the P2B Regulation does not impose any substantive requirements on the criteria according to which goods must be ranked in the hit list, it only requires that the ranking criteria are transparent and included in the contract. By the same token, the P2B Regulation does not contain a list of specific "unfair commercial practices", as in the case of the Consumer Directives 93/13,[39] 2005/29[40] or 2011/83,[41] but only the above-mentioned provisions on transparency of ranking and guarantees for account closure.

This probably will be a disappointment to many. Those who were expecting the EU to take a clear stance on issues such as freedom of expression, or to list a taxonomy of unfair trading practices on platforms, will consider these rules insufficient.[42] At the same time, it must be seen that they will enter into force almost simultaneously, without anyone really knowing how effective they will be, how they could be applied and whether they would really protect users from the excessive power of platforms. We do not know whether this procedural-formal regulation will be sufficient, nor do we know to what extent the current situation will be improved by the need for large platforms to disclose a range of information and data. We do not know whether the fact that some parameters will now have to be included in contracts with users (and whether users will read the contracts at all) would really improve the transparency of algorithms, etc. In any case, platform law is already with us and will play an increasingly important role in all our lives in the years to come, and it is possible that procedural provisions will be followed by substantive ones.

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[41] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

[42] Although, for example, this is partly what the Parliament wanted in the context of the P2B Regulation. See Report (7.12.2018) on the proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. Amendments 2, 11, 21.

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Self-Regulating Platforms?

The Analysis of the Enforcement of End-user Rights in the Light of the Transposition of Article 17 of the CDSM Directive[1]

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Abstract: The deadline for the transposition of Directive (EU) 2019/790 (the CDSM Directive) into national law expired on 7 June 2021. Some EU Member States have failed to perform the transposition, and so they also failed to introduce the new obligations under Article 17 prescribing brand new requirements that online content-sharing service providers (OCSSPs) shall comply with. As a part of these rules, OCSSPs shall amend their end-user licence agreements (EULAs) to include terms on the enforcement of the mandatory limitations and exceptions (quotation, criticism, review, as well as use for the purpose of caricature, parody and pastiche) under Article 17(7) and the establishment of an effective complaints and redress mechanism regarding the removal of the user-generated content in line with Article 17(9). In the second phase of our ongoing EU-funded research project, we examined the extent to which specific OCSSPs have amended their EULAs to meet these EU obligations. Our empirical data show that, besides only little progress, new sources of conflict have emerged.

Keywords: CDSM Directive, copyright reform, online content-sharing service provider, end-user licence agreements, platform liability, complaints and redress mechanism

1. Introduction

The advent of the web 2.0 brought along the age of platforms. Today, information flows are dominated by websites that specialise in making available for the most part *user-generated* or *user-uploaded* content. The potential copyright liability of streaming service providers, social media platforms, online marketplaces, websites offering open source

[1] This article was completed within the frames of the H2020 reCreating Europe project. On the project itself see www.recreating.eu/

software or open-access content and online encyclopaedias has become one of the most prominent issues in legal literature and practice (Brieske & Peukert, 2022; Quintais, 2019a; Quintais, 2019b).[2]

Following the development of the Digital Single Market concept and the increasingly outdated nature of EU copyright law, reforming the EU copyright law has become necessary. Among other things, the CDSM Directive also sought to regulate the behaviour of OCSSPs.[3] The new rules have created new challenges. Article 17 of the directive deserves special attention, not only from a dogmatic point of view (see Grad-Gyenge, 2020) but it must also be subjected to empirical tests. The aim of the present study is to examine the steps taken by some OCSSPs to ensure that their EULAs comply with the provisions of Article 17 and the extent to which they provide transparent information on their content moderation practices.

Against this background, the study is structured as follows. Section 2 briefly outlines the latest developments in the copyright regulatory environment for OCSSPs, including the case law of the Court of Justice of the European Union (CJEU) and Article 17 of the CDSM Directive. Section 3 briefly summarises the results of our empirical research conducted in 2021 on end-user licence agreements for platforms. This research has sought to map the practices of platforms in relation to end-user rights before the transposition deadline of the CDSM Directive. These are followed by the most important new findings of our research. Section 4 summarises the results of a limited, 'second round' empirical study conducted in terms of the practice of one Hungarian and eight international OCSSPs. We specifically looked at the extent to which these service providers have brought their EULAs into line with the requirements for the benefit of end-users under Article 17 of the CDSM Directive. In the concluding section, we make some observations that may help in the future monitoring of OCSSPs for compliance with copyright standards.

2. The age of platforms[4]

The Court of Justice of the European Union (CJEU) has a long history of jurisprudence on the intellectual property liability of intermediary service providers (platforms); however, only some of these decisions concern the world of copyrights directly. For the first time it was in the Ziggo case that the CJEU had to answer the question[5] of whether The Pirate Bay, the *peer-to-peer* file-sharing service provider that had been sued across Europe, was directly liable for copyright infringements by individuals using their site. According

[2] For the proposal of the Directive (EU) 2019/790 and the explanatory memorandum see https://bit.ly/3yModBf. For Impact Assessment 1–3 see https://bit.ly/3yKmQD0; https://bit.ly/3Vy0cYs; https://bit.ly/3T55qcz

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[4] This concise summary draws heavily on our previous research, some of which was conducted with other colleagues (Mezei & Lábody, 2022; Mezei & Harkai, 2022; Harkai, 2021a).

[5] Judgment of 14 June 2017 in Case no. C-610/15 Stichting Brein v. Ziggo BV, XS4ALL Internet BV, para 38 (see Ferge, 2017).

to the CJEU, The Pirate Bay itself was a direct infringer by actively supporting end-users' illegal behaviour. With its decision, the CJEU has effectively extended the direct liability regime of Article 3 of the InfoSoc Directive[6] to activities, which had historically been considered indirect conduct (Mezei, 2012, pp. 112–131). The CJEU brought both fresh air and "strange vibrations" to EU copyright law with the idea of direct liability for intermediary service providers (Leistner, 2020, p. 132; Hofmann & Specht-Riemenschneider, 2021).[7]

The CJEU passed its decision in the joint cases of YouTube/Cyando[8] regarding the copyright liability of "bona fide" intermediary service providers under the InfoSoc Directive (that is, the pre-CDSM legal regime) just a few days after the deadline for transposition of the CDSM Directive (Jütte, 2021). Here, the CJEU has established that YouTube (operated by Google/Alphabet) and Uploaded (operated by Cyando) are not directly liable for infringements committed by users of the platforms as long as they do not actively engage in such conduct; that they are entitled to the protection of the hosting service providers' limitation of liability if they do not actively assist end-users; and that they can only be subject to measures after they have been notified by rights holders of specific illegal content available through their systems (Angelopoulos, 2021).

This practice of the CJEU has given rise to a bifurcated solution in which the knowledge of the service provider and its actual involvement in the use of the content formed the basis of the legal qualification. It is into this environment that the complex balancing regime of the CDSM Directive has entered. Article 17, on the one hand, aims to ensure a high level of copyright protection by declaring the most important platforms of the web 2.0 era as copyright-relevant users; on the other hand, it tries to reduce the burden on these service providers within certain reasonable limits and to exempt them from potential copyright liability. Thirdly it establishes 'user rights' for the end-users of OCSSPs' services. Let us briefly consider these three dimensions.

Firstly, under the CDSM Directive, OCSSPs[9] qualify as users of (classically non-commercial, *user-generated*) content uploaded to their websites by end-users who do not generate significant revenues.[10] The underlying justification (rather than a legal basis) for this classification was the *value gap* (or *transfer of value*) theory, as developed by music copyright owners – i.e. the difference between the revenues generated by OCSSPs and the amount of royalties paid to music rights holders, which is not exactly favourable to the copyright owners (Frosio, 2020). It follows from the new regulation that the lawful operation of service providers is subject to prior authorisation of uses. However, this legalisation is almost impossible in everyday life due to the mass nature of the content uploaded to sites such as YouTube or Facebook.

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[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[7] So much so, that the judgment – before further creative interpretations by the CJEU – made a legal literature proposal like the harmonisation of indirect copyright liability in the EU (see Leistner & Ohly, 2019).

[8] Judgment of 22 June 2021 in joined cases C-682/18 and C-683/18 Frank Peterson v. Google LLC and Others and Elsevier, Inc. v. Cyando AG. For a detailed treatment of the YouTube/Cyando cases, see Harkai, 2021b.

[9] Article 2(6) CDSM Directive. For the Hungarian definition of online content-sharing service providers, see Act LXXVI of 1999 on Copyrights (hereinafter Copyright Act), Article 57/A.

[10] Article 17(1) CDSM Directive; Article 57/B of the Copyright Act.

Secondly, exactly for that reason, the CDSM Directive provides an alternative way for service providers to be exempted from copyright liability if they apply content moderation to sort out illegal contents from their system. More precisely, OCSSPs shall ensure the unavailability of specific works and other subject matter uploaded to their websites *and* identified by copyright owners, and prevent the content from being made available again after filtering the contested content; *or* disable access to or remove the contested content from their websites expeditiously following subsequent notifications made by copyright owners regarding individual infringing uses.[11]

Thirdly, there was (and still is) a real risk that end-users will be the collateral losers of the tension between copyright owners and platforms, because platforms will 'filter first and ask questions later' to avoid these new liabilities. Furthermore, automated (algorithmic) and generally excessive filtering practices can cause serious harm to freedom of expression, access to information and even to freedom of education and learning. The CDSM Directive has therefore also declared a number of guaranteed end-user rights, and hence quotation, criticism, review, and the use of works for the purposes of caricature, parody or pastiche have become mandatorily free (Stieper, 2020). Moreover, it has been established as a result-oriented obligation that the new cooperation between rights holders and platforms should not result in prior or ex-ante filtering of content freely uploaded, independently of the request for permission.[12] Platforms are also required to have effective complaint and redress mechanisms,[13] and must inform their clients, *expressis verbis,* of their rights in the end-user licence agreements (see Quintais et al. 2022).[14]

3. Empirical research on the end-user licence agreements of platforms and end-user flexibility (Mezei & Harkai, 2022)

In 2021, we conducted an empirical research whereby we examined 17 content-sharing and other service providers[15] in terms of the degree of flexibility they offer end-users in their EULAs for the use of content, and the internal rules and mechanisms they have in place to ensure a balance between different stakeholders (in particular in the area of dispute resolution).[16] This study had three important findings.

First of all, it has been clearly demonstrated that end-users have spectacularly fewer rights for service-type accesses compared to the use of physical copies. Some of the

[11] Article 17(4) CDSM Directive; Article 57/E (2) of the Copyright Act.

[12] Article 17(7) first sentence CDSM Directive; Article 57/E (4) of the Copyright Act.

[13] Article 17(9) first sentence CDSM Directive; Article 57/G of the Copyright Act.

[14] Article 17(9) last sentence CDSM Directive; Article 57/H of the Copyright Act.

[15] The comprehensive list of the analysed service providers is as follows: streaming websites with hosting service for end-user uploads (Soundcloud, Bandcamp, YouTube, Twitch, DailyMotion, Pornhub); streaming websites without hosting service for end-user uploads (Spotify, Netflix, Disney+); online marketplaces (Steam, Electronic Arts Origin, Amazon, Apple Media Service, Google Play); and social media (Twitter, Instagram, Facebook).

[16] It should be emphasised that the majority of the services under review are provided by U.S. companies, but are global in their nature (cf. Nieborg & Poell, 2018, p. 4285). As these services are also directed to the territory of the Member States of the European Union, they are bound by both EU and national law. For a similar – albeit much narrower – analysis from the American legal literature, see in particular Mixon, 2021.

end-user flexibilities are excluded by the legislator itself or by judicial practice (for example, by rejecting digital exhaustion). We called this "regulatory lock-in" effect. This is further reinforced by the platforms, through their internal rules, imposing severe (often technological) restrictions on access; by remaining silent on limitations and exceptions akin to freedom of expression (moving this issue from the regulatory to the dispute resolution realm); and in many cases even keeping dispute resolution mechanisms, especially for end-user complaints, in the dark. An equally serious problem is that EULAs use spectacularly vague terminology. The words "sale" or "purchase" dominate, despite the fact that the prevailing practice is that the end-users cannot acquire ownership of a file, especially a *stream.* Ultimately, we have found that the "as is" nature of EULAs, namely that they cannot be modified by end-users (i.e. that they qualify as general terms and conditions) and their misleading language create an asymmetric situation in which end-user rights and expectations are not adequately enforced. On the other hand, platforms entrench their own legal position, often by obtaining unnecessarily broad rights from uploaders.

Secondly, it seems that social media sites offer the greatest flexibility to end-users, despite the fact that the basic model of these services is free and does not grant any ownership rights to its customers. Interestingly, subscription-based *streaming* providers are the least flexible, despite payment of subscription fees. Overall, we found that the potential presence of *user-generated* content increases the flexibility of the platform in direct proportion – we called this the "UGC effect".

Thirdly, end-user expectations and the corresponding services are perhaps most affected by the huge competition that pervades the platform economy. The "streaming war" pervades both horizontal (service-type, e.g. Facebook vs. Twitter) and vertical (portfolio-based, e.g. Apple vs. Google) competition. This – in addition to the own business models of the actors – necessitated that platforms learn from each other, and sometimes overbid competitors' offers. Interestingly, many end-user flexibilities owe their existence to this competition, especially in the areas of secondary access (access sharing, linking, offline use, etc.) and ancillary services (e.g. subtitling). We called this phenomenon the "business flexibility effect".

4. New findings

In addition to the new liability regime for OCSSPs, Article 17 of the CDSM Directive also contains rules on user flexibilities. Article 17(7) provides that OCSSPs must not impede the availability of lawful end-user content, and users can invoke a number of exceptions when receiving and transmitting information using the platforms. Article 17(8) makes it clear that OCSSPs are not subject to a general monitoring obligation; that is, they are not required to monitor the lawfulness of end-user content in general terms or whether such content falls within the scope of the permitted exceptions. Article 17(9) obliges OCSSPs to put in place effective and expeditious complaint and redress mechanisms and to inform users in end-user licence agreements of the possibilities provided by exceptions and limitations under EU law (Schwemer & Schovsbo, 2020). The European Commission, in its Guidance on the implementation of Article 17, made the

liability regime conditional on the proper functioning of safeguards that also take into account the legitimate interests of end-users.[17] Likewise, the CJEU's confirmed in its judgment in Case C-401/19 that the introduced regime offers a balanced mechanism to respect the interests of all stakeholders at hand.[18]

The platforms examined in the first phase of the research were narrowed down in the second phase. This was justified by the fact that the new liability regime of Article 17 is limited in Article 2(6) and recital 62 to OCSSPs, whose main activity is the hosting and provision of access to the public of a substantial amount of copyrighted-protected works or other protected subject matter uploaded by end-users, as well as the organisation and promotion of protected content in order to generate a profit. Below, we examine the terms and conditions of use of eight international and one Hungarian OCSSPs to see how they have met the requirements of the CDSM Directive. In addition, we will examine what mechanisms do they offer to address end-users complaints related to the moderation of uploaded contents.

4.1. Video sharing platforms

YouTube's EULA was last modified on 5 January 2022.[19] According to the agreement, uploaded content may only contain another person's copyrighted work or other subject matter if that party has given their consent or if the user is otherwise entitled to do so (including through exceptions or limitations in copyright law or related rights under European Union law).[20] YouTube may use automated systems to analyse the lawfulness of uploaded content and to identify infringements and abuse. In case of uploading unlawful content, operators may remove all or a specified part of the content, and the end-user concerned will be notified of this decision. In terms of end-user guarantees, which are the focus of the study, the main text of the terms of use does not provide much further guidance, but the information sought can be found in YouTube Help.

The "Copyright Claim Basics" page informs the end-user of the substance and process of the notice and take down procedure. YouTube provides three ways to resolve a copyright claim. 1. The end-user may wait until the copyright claim expires (90 days). In case of a first claim, the end-user will need to complete the Copyright School. 2. The end-user can try to get in touch with the copyright owner and ask them to retract their claim of copyright infringement. In this respect, the terms of use, very succinctly, state that "each creator shall indicate on their channel how to contact them".[21] A further point of reference for

[17] Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, Brussels, 4.6.2021, COM(2021) 288 final, 18–25.

[18] Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, Judgment of the Court of Justice of the European Union, 26 April 2022, ECLI:EU:C:2022:297. We did not pay closer attention to this judgment in the present paper, since it was published after the ending of our second phase empirical research. In general, however, the findings of the CJEU do not alter the validity of our findings, indeed, they completely support the importance of the proper use implementation of end-user flexibilities under Article 17.

[19] For more information see www.youtube.com/static?gl=GB&template=terms

[20] "Your content and activities – uploading content", Ibid.

[21] Retraction of a claim of copyright infringement (https://bit.ly/3MCdPS3).

end-users seeking redress may be the requirement for contact details in removal requests.[22] 3. End-users have the option to file a counter-notification if they believe that the video has been removed by mistake, for example because it qualifies as "fair use".[23] YouTube will forward the counter-notification to the claimant, who will have 10 working days to respond. If the claimant (the initiator of the notice and take down procedure) still wishes to prevent the content from being restored, they must provide evidence to that effect.[24]

It is particularly interesting to see what exactly YouTube means by the term "fair use", which clearly refers to the *fair use* test, and which is the term used in the original English text. However, this is a scheme unknown in European, continental copyright law. In any case, YouTube explains the four steps (factors) of the *fair use* test in detail and even gives examples of how it can be applied in practice.[25]

YouTube uses Content ID claims in addition to the notice and take down procedure and the end-user counter notification that may be provided in response. This is an automatic claim that is triggered when an uploaded video matches another video or part of another video. Blocking or maintaining the availability of the video with the addition of advertisements is essentially at the discretion of the copyright owner.[26] The end-user who uploaded a content subjected by a Content ID claim can leave the videos on the site, but they can also choose to remove it, in whole or in part, for that segment; and it may even happen that the advertising revenue will eventually have to be shared between the copyright owner and the end-user.[27] If the end-user disagrees with the Content ID claim, they may contest it, of which the copyright owner will be notified and will have 30 days to respond. The copyright owner can withdraw the claim, after which the system will automatically restore the content. If the claim is maintained by the copyright owner, the end-user may appeal against it. As a third option, the copyright owner can request the removal of the content or simply ignore the claim. If the end-user lodges an appeal, the copyright owner has an additional 30 days to respond, which is essentially the same procedure as the pre-appeal procedure.[28]

From a copyright perspective, in particular with regard to the provisions of the CDSM Directive, YouTube has transposed the Directive's provisions into its contractual practice, at most only in principle, which it seems to regard as governed by the *fair use* test rather than by the European system of limitations and exceptions. At least no specific reference to this was found when studying the terms of use of the service. In any case, the rules outlined above are not only not expeditious and flexible for end-users, but they also ignore continental copyright doctrine and envisage a typical American legal institution. In addition, YouTube continues to exclude primary liability for any infringing content uploaded by users that is clearly incompatible with the CDSM Directive regime.[29]

[22] Contact information in copyright takedown requests (https://bit.ly/3VJGVDx).
[23] Copyright Claim Basics. Resolution of copyright claim (https://bit.ly/3ga6EV9).
[24] Submission of a copyright counter notification (https://support.google.com/youtube/answer/2807684).
[25] Fair use on YouTube (https://support.google.com/youtube/answer/9783148?hl=hu).
[26] What is a Content ID claim? (https://support.google.com/youtube/answer/6013276).
[27] Monetizing eligible cover videos (https://support.google.com/youtube/answer/3301938).
[28] Disputing a Content ID claim (https://support.google.com/youtube/answer/2797454#appeal).
[29] Limitation of liability (www.youtube.com/static?gl=GB&template=terms).

YouTube was the first among OCSSPs to publish a transparency report on copyright infringements. The company's first report was published on 6 December 2021, covering the six months before the deadline for transposition of the CDSM Directive (January–June 2021).[30] YouTube uses three types of copyright protection mechanisms (Webform, Copyright Match and Content ID), of which Content ID is by far the most important. During the reporting period, 722.6 million notifications passed through this system – all initiated by 53.7% of the 9,115 potential customers (4,893 copyright owners).[31] There were around 3.7 million objections made by content uploaders against the 722 million "complaints". Once the objection has been lodged, the copyright owner may withdraw the complaint, maintain it, or take no further action and allow the complaint to lapse after 30 days. According to YouTube data, 2.2 million complaints against uploaded content have been dismissed and 1.47 million complaints have been upheld. In the latter case, the end-user can file an "appeal", against which the copyright owner must take the dispute to the "official" removal procedure, which is governed by the U.S. Digital Millennium Copyright Act (DMCA). This official procedure was initiated in 38,864 cases. There were only 4,471 cases when uploaders filed counter claims against these removals.[32] YouTube data are raw numbers – it is very difficult to read the reality from them. On the one hand, it does not answer the question of whether the contested uploads were in fact infringing or whether they were merely assumed to be infringing by the copyright owners. It is also not clear whether the low number of end-user objections, appeals and counter claims means "admission of infringement" or whether the average *YouTuber* has little knowledge of how to defend their own rights and may be frightened by the potential costs of the procedure (see Keller, 2021).

DailyMotion's service is very similar to YouTube's profile, and the fact that it is a platform based in France, an EU country, is a particular reason to examine its terms of use. Last modification date of the terms of use is 19 January 2022.[33] With regard to the lawfulness of the content uploaded, the operators exclude any direct liability and any obligation to monitor the content uploaded in general, including pre-filtering. The end-user uploading the content is solely responsible for the content.[34] If content has been deleted under a notice and take down procedure,[35] the end-user concerned may send a counter-notification to the copyright owner via the platform.[36] The terms of use available online do not contain any more detailed provisions than these, taking into account the provisions of the CDSM Directive, which is somewhat surprising given that the company providing the service is established in Europe.

In the terms of use of Twitch, which were last amended on 1 January 2021, the operators of Twitch, the market leader in the online streaming of video games, place all primary

[30] YouTube Copyright Transparency Report H1 2021 (https://transparencyreport.google.com/report-downloads).
[31] Ibid. 5.
[32] For all data see Ibid. 10–11.
[33] Section 9: Miscellaneous, Point 9.5 (https://legal.dailymotion.com/en/terms-of-use). This is also clear from the fact that French law is applicable to any disputes that citizens of the European Economic Area, the United Kingdom and Switzerland may have with operators.
[34] Section 5: Our Liability as a Hosting Service Provider, Ibid.
[35] Copyright – (I) Copyright Notification (https://legal.dailymotion.com/en/copyright).
[36] Copyright – (II) Copyright Counter Notification, Ibid.

liability on the end-user who uploads the infringing content.[37] The platform uses security measures to protect the uploaded content from unlawful acts of reproduction and distribution (communication to the public). In addition, operators do not assume any liability for infringements that might occur despite these measures.[38] As far as copyright infringements are concerned, the terms of use follow the DMCA rules, which allow copyright owners to mark infringing content for removal through a notice and take down procedure.[39] Interestingly, Twitch maintains a repertoire of licensed music that end-users can choose from to enhance their uploaded videos, but with the caveat that the music cannot be used for any other purpose and that operators can make any element of the repertoire unavailable at any time if the licence agreement for any of the sound recordings is terminated or expires.[40]

For music and sound recordings, Twitch has additional, separate music guidelines (Music Guidelines). End-users cannot only choose from Twitch's music offerings, but can also upload content that includes otherwise licensed music.[41] The terms of use acknowledge that there may be otherwise unlicensed music and sound recordings that are subject to the *fair use* test, including transformative uses or works in the public domain.[42] Similarly to other service providers, Twitch also provides the option of restoring content removed under the notice and take down procedure, also by filing a counter-notification, if the end-user "believes that his or her actions comply with free use under US law".[43]

Users of Videa – a company based in Hungary – are obliged to warrant[44] that they have the necessary copyright permissions to use the uploaded content and are responsible for any copyright infringement.[45] The operators of the platform exclude any liability for any damage caused as a result of the content of the uploaded videos.[46] The operators can remove all or part of the infringing content that violates the terms of use, but they are not obliged to know the actual content of the uploaded videos. If the copyright owners wish to contest the legality of a piece of content, they may do so within the framework of a notice and take down procedure, in the course of which the service provider's liability is adjusted by the terms of use to Articles 10 and 13 of the E-commerce Act.[47] Otherwise, Videa's end-user licence agreement does not contain any guarantees protecting end-users.

Pornhub, one of the world's largest adult content providers,[48] provides very detailed terms of use for the end-users visiting its platform. This fact was already evident in the

[37] User Content Representations and Warranties (www.twitch.tv/p/en/legal/terms-of-service/#8-user-content).
[38] Content is Uploaded at Your Own Risk, Ibid.
[39] Respecting Copyright, Ibid.
[40] Specific Terms for Soundtrack by Twitch, Ibid.
[41] Sharing Music on Twitch (www.twitch.tv/p/en/legal/community-guidelines/music).
[42] Uses Permitted by Law, Ibid.
[43] How to make a counter-notification (www.twitch.tv/p/hu-hu/legal/dmca-guidelines).
[44] Imprint (https://videa.hu/impresszum). The last update of the terms of use was performed on 31 May 2021.
[45] Copyrights (https://videa.reblog.hu/cimke/%C3%81SZF).
[46] Responsibility, Ibid.
[47] Act CVIII of 2001 on certain issues of electronic commerce services and information society services. Removal of videos (https://videa.reblog.hu/cimke/%C3%81SZF).
[48] This paper is dedicated solely to the copyright aspects of lawful adult contents, and will therefore completely omit the analysis of the socially reprehensible aspects of porn industry, e.g. child pornography or abuse of actors.

previous phase of the research. The terms of use have not been changed since then, with the last modification date being 5 May 2021. The end-user is entirely responsible for the legality of the content uploaded; the operator is not liable for it and uploads are not checked by the operator in general, but at most only randomly.[49] The operator reserves the right to remove content even without notice. The notice and take down procedure is ensured by Pornhub to copyright owners.[50] End-users may contest the legality of the removal in a counter-notification sent by the operator to the copyright owner.[51] Pornhub has implemented an automated audio-visual content recognition system *(digital video fingerprints)* to help identify infringing content before it is made accessible.[52]

4.2. Social media platforms

Facebook, the flagship of the Meta family of products, warns users in its terms of use that it employs advanced technical systems and supporting human resources around the world to prevent abuse and harmful behaviour, and may remove infringing content or make certain features inaccessible or disable the user account.[53] It uses automated systems to detect and remove abusive and dangerous activities.[54] Operators may remove or disable content that violates community standards, is unlawful (including intellectual property infringements), misleading, discriminatory or fraudulent, where this avoids or mitigates legal or regulatory impacts that negatively affect Facebook. The user will be informed of the fact of removal, but may request a repeated check of the content, but the latter option is not available if the user has seriously or repeatedly violated the terms of use, or if doing so would expose Facebook, or anyone else, to liability, or, inter alia, if it is prohibited for legal reasons.[55]

Facebook has specific guidelines for content that includes music, stating that the uploader is responsible for the legality of the content posted, and emphasising that Facebook is not responsible for any conduct that could give rise to secondary liability; in other words, Facebook does not invite users to engage in infringing behaviour.[56] The Music Guidelines also state that any use for commercial purposes beyond the scope of private (personal) use is prohibited, in particular if the user has not obtained the appropriate licences. In addition, Facebook cannot be used to "create a music listening experience"[57] and infringing content can be removed or blocked.

Facebook's Transparency Center publishes the number of content items removed from the platform, broken down by year. By June 2021, operators had received 147,000 copyright infringement notifications – 84.44% of the content concerned had been

[49] Limited, Conditional License to Use Our Intellectual Property (www.pornhub.com/information/terms).
[50] DMCA Reporting Claims of Copyright Infringement (www.pornhub.com/information/dmca).
[51] Counter-Notification Procedures, Ibid.
[52] Video Fingerprints, Ibid.
[53] Action against harmful behaviour, protecting and supporting the community (www.facebook.com/legal/terms).
[54] Using and developing advanced technologies to provide secure and functional services, Ibid.
[55] What can be shared and done in Meta products? Ibid.
[56] Music Guidelines (www.facebook.com/legal/music_guidelines).
[57] Ibid.

removed, which amounted to 519,000 pieces of content. Since the next platform analysed, Instagram, is also part of the Meta product family, the Transparency Center reports the above data for Instagram at the same time, so we quote them here. In June 2021, Instagram operators received 59,500 copyright infringement notifications, covering a total of 289,000 pieces of content – 88.41% of which were removed.[58] Facebook and Instagram operators filter content not only on a notification basis, but also proactively. In June 2021, 604,000 pieces of content were deleted or blocked on Facebook as a result of proactive filtering, 53.76% of which was copyright-infringing content. A total of 349,000 pieces of content were removed from Instagram as a result of the pre-filtering, 53.76% of which were related to copyright infringement.[59]

Although the last modification of the terms of use reviewed here was on 20 December 2020, well before the transposition of the CDSM Directive in the Member States, there are still provisions to protect the interests of end-users against unjustified removals. For that purpose, operators use intellectual property operations teams (IP Operations Teams), which are tasked with removing only content that is truly infringing. End-users have the possibility to contest the claim with the copyright owner who reported the content. An interesting fact is that if the legality of the content is contested under the DMCA rules, the user can send a counter-notification.[60]

The terms of use for Instagram, the other Meta product under review, were last updated on 4 January 2022. The posting of unlawful content is also prohibited here, which would result in the removal or blocking of content or information if it is "reasonably necessary" or if it would result in a legal sanction or regulatory impact negatively affecting the operators. The end-user will be informed of the removal.[61] However, Instagram's terms of use are silent on procedural safeguards (if any) for the benefit of end-users.

Twitter's terms of use differ depending on[62] whether the user lives inside the European Union, EFTA countries, the United Kingdom, or outside of these, including the United States.[63] As a general rule, here as well, end-users are responsible for the lawfulness of the content. Any liability of the platform is excluded by the terms of use.[64] The operators also do not undertake to monitor or otherwise control the lawfulness of the content posted. However, they reserve the right to remove content that violates legal regulations or community principles.[65] If the content is removed, the user who uploaded it will receive a copyright complaint, which they can contest in a counter-notice and ask the operators to restore the content. In addition, based on the information provided in

[58] Notice and Takedown (https://transparency.fb.com/data/intellectual-property/notice-and-takedown/facebook).
[59] Proactive Enforcement (https://transparency.fb.com/data/intellectual-property/proactive-enforcement/facebook).
[60] Supporting People whose Content is Reported (https://transparency.fb.com/data/intellectual-property/protecting-intellectual-property-rights).
[61] Content Removal and Disabling or Terminating Your Account (https://help.instagram.com/581066165581870).
[62] The terms of use were last amended on 19 August 2021, which is after the deadline for transposition of the CDSM Directive.
[63] Twitter Terms of Service – If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States; Twitter Terms of Service – If you live in the European Union, EFTA States, or the United Kingdom.
[64] Limitations of Liability (https://twitter.com/en/tos#intlTerms).
[65] Content on the Services, Ibid.

the DMCA notice, the end-user may contact the rights holder directly to request withdrawal of the notice. By issuing a counter-notice, the end-user also acknowledges the jurisdiction of the federal court of the United States in the event of a potential dispute. Operators shall forward the counter-notice that complies with the formal requirements to the rights holder. Twitter's EULA also stipulates that Twitter will not provide any further legal advice.[66]

Twitter also uses the *automated copyright claiming* system for live broadcasts to help copyright owners identify unauthorised content. The uploader has the right to challenge the removal or blocking of the filtered videos, in which case Twitter may reinstate the broadcast as a replay. The legal basis for contesting the claim may be the existence of a licence or when the user believes that their use of the material is a *fair use*.[67] If the broadcast is reinstated but the rights holder still disputes it, it has the option to send a notice through the traditional channels and request the removal of the content, which can also be disputed by the end-user in the way described above.[68]

5. Conclusions

At the time of finalising this manuscript, the deadline for transposition of the CDSM Directive had expired just over six months ago, yet implementation had not yet taken place in all Member States. This has created legal uncertainty for service providers, making it difficult to expect full compliance with the requirements of the CDSM Directive. Even so, a number of observations can be made about the analysed EULAs of the OCSSPs under review.

On the one hand, the analysis shows that the terms of use continue to focus basically on two aspects: the exclusion of primary liability of operators and an effective notice and takedown mechanism that protect the interests of rights holders. YouTube, DailyMotion, Twitch, Facebook and Twitter allow end-users to contest the blocking of content. YouTube, Twitch and Twitter also point out that if the use of the content is a *fair use,* it can be made accessible again on the platform. Only YouTube's contractual provisions contain some reference to limitations and exceptions in line with the EU copyright system and in deviation of the *fair use* test. In other words, the majority of the platforms examined contain guarantees that allow users to dispute the lawfulness of removal under U.S. copyright law, but neither the guarantees in Article 17 of the CDSM Directive are mentioned *expressis verbis,* nor is there any specific reference to general prior content filtering in the contractual terms.

This can be instructive for two reasons. On the one hand, OCSSPs seem to stick to the well-established limitation of liability clauses, shifting the responsibility to the end-user, thus weakening the viability of the new liability regime envisaged by the CDSM Directive. On the other hand, some platforms, such as YouTube, have automated systems

[66] Copyright Policy (https://help.twitter.com/en/rules-and-policies/copyright-policy).
[67] Fair Use Policy (https://help.twitter.com/en/rules-and-policies/fair-use-policy).
[68] Automated Copyright Claims for Live Video (https://help.twitter.com/en/rules-and-policies/automated-claims-policy).

that actively filter uploaded content, which they can remove at their own discretion without notifying the rights holders. In other words, the balance between the actors concerned by the operation of the platforms – operators, rights holders and end-users – continues to tip towards the first two stakeholders, while it is not clear how the platforms would protect freedom of expression, freedom of creative expression and freedom of access to information, which have been among the main watchwords for criticism of the provisions of Article 17.

The *status quo,* it seems, will remain despite the much-trumpeted new liability rules, although there is no doubt that transposition of the CDSM Directive is still ongoing in some Member States. Moreover, the fact that platforms with a North American background operate their contractual practices under the U.S. *copyright regime* rather than EU copyright law seems to help maintain the previous situation. This may raise further serious private international law issues for future researchers in this field.

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