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PRIRODNOG PRAVA

No. 2/2024
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REVIJA KOPAONIČKE ŠKOLE PRIRODNOG PRAVA

ČASOPIS ZA PRAVNU TEORIJU I PRAKSU

Naučni časopis Kopaoničke škole prirodnog prava *Revija Kopaoničke škole prirodnog prava* izlazi od 2019. godine. Časopis objavljuje naučne članke, teorijska istraživanja i studije iz srpskog i uporednog prava, analize izabраниh sudskih i arbitražnih odluka, komentare zakonskih rešenja, prikaze knjiga i druge naučne priloge istaknutih domaćih i inostranih autora. Tematska sadržina priloga prilagođena je Heksagonu Kopaoničke škole prirodnog prava: *Pravo na život, Pravo na slobodu, Pravo na imovinu, Pravo na intelektualnu tvorevinu, Pravo na pravdu i Pravo na pravnu državu*, a objavljeni radovi raspoređuju se prema odgovarajućim katedrama Kopaoničke škole. Kao glasilo Kopaoničke škole prirodnog prava – Slobodan Perović, časopis prati naučni rad i aktivnosti Škole i o njima obaveštava čitaoce.



KOPAONIČKA ŠKOLA PRIRODNOG PRAVA
– SLOBODAN PEROVIĆ

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REČ UREDNIKA

Ovo izdanje *Revije Kopaoničke škole prirodnog prava* okuplja pet naučnih radova raspoređenih u pet sekcija: Privredna društva (I), Sud u koneksitetu pravde (II), Pravo EU (III) Filozofija prava (IV) i Ekonomija i finansije (V). Sa aspekta sistematike Heksagona prirodnog prava, radovi po svojoj tematskoj sadržini ulaze u oblast katedara *Pravo na imovinu, Pravo na pravdu i Pravo na pravnu državu* Kopaoničke škole prirodnog prava – Slobodan Perović.

U prvoj sekciji, u članku *Primena pravila poslovne procene* autora *prof. dr Vuka Radovića*, analizirana su tri uslova predviđena u srpskom Zakonu o privrednim društvima – racionalna osnova za donošenje poslovne odluke, savesno postupanje i postupanje u skladu sa standardom pažnje dobrog privrednika. Pored njih, u radu su razmotrena još dva uslova koja nisu izričito previđena Zakonom – zasnovanost poslovne odluke na adekvatnim informacijama i nepostojanje ličnog interesa. Autor ističe da se osnovni problem srpskog shvatanja pravila poslovne procene ogleda u nedovoljno preciznoj zakonskoj regulativi i u tom smislu se zalaže za prihvatanje stava prema kome ne treba poistovećivati pojmove dužnosti pažnje i pravila poslove procene.

Druga sekcija posvećena je sudskom postupku (Sud u koneksitetu pravde). *Prof. dr Aleksandra Maganić* autor je rada *Aktivna legitimacija u sporovima o klimatskim promjenama* u kome su analizirana pitanja relevantna za sporove o klimatskim promenama, kao i mere koje se preduzimaju radi sprečavanja, odnosno ublažavanja posledica klimatskih promena. U fokusu rada su klasična pitanja procesnog prava – ko je potencijalni tužilac, a ko tuženi, kom sudu ili nekom drugom telu se obratiti, te šta se tužbenim zahtevom traži. Polazeći od toga da je od krucijalne važnosti upravo ovlašćenje za pokretanje sporova o klimatskim promenama, autorka se primarno bavi aktivnom legitimacijom u pomenutim sporovima.

Za treću sekciju – Pravo EU, autor *dr Andrea Piletta Massaro* napisao je rad *Towards a Renewed Approach to the EU Single Market and its Competitiveness: Last Call for the European Integration*. Autor primećuje da procedure usvojene u fazi osnivanja Unije ne mogu da idu u korak sa proširenom Unijom u globalnom kontekstu koji karakterišu nestabilnost i velike transformacije. U tim okolnostima, Unija je pozvana da reaguje kako bi sačuvala svoje područje slobode i zadržala osobenosti

koje su transformisale jedinstveno tržište u model koji se odlikuje visokim stepenom konkurentnosti i ekonomskog razvoja. U tom kontekstu, u radu su analizirana dva nedavna izveštaja – Enrika Lete i Marija Dragija, a u cilju iznošenja predloga reformi neophodnih da EU održi svoju poziciju u međunarodnom političkom, društvenom i ekonomskom scenariju.

Četvrta sekcija, posvećena filozofiji prava, sadrži rad *On the Legal Nature of Thought and the Essence of the Person: Reflections from the Perspective of Argentine and Comparative Private Law* čiji je autor *prof. dr Alfredo Ferrante*. Polazeći od argentinskog prava i uz osvrt na trendove u stranim pravnim sistemima – sa posebnim osvrtom na francusko pravo, čileansku sudsku praksu i predloženu reformu brazilskog Građanskog zakonika – autor u ovom radu razmatra moguće regulisanje takozvanih „neuro-prava“ u budućnosti. Autor smatra da je, u tom cilju, potrebno identifikovati pravnu prirodu misli u odnosu na suštinu ličnosti. U radu se zastupa ideja o usvajanju pravnog koncepta „ličnosti“ koji se oslanja na Boetijevu i Tomističku koncepciju i ističu se argumenti koji ukazuju na to da bi pozitivizacija „neuro-prava“ bila kontraproduktivna za samu zaštitu ličnosti, kao i za slobodu misli.

Peta sekcija se odnosi na oblast ekonomije i finansija. U radu *China's Logistics and Trade Barriers as a Determinant of Current Disruptions in Global Antimony Supply Chains* autora *dr Veljka Mijuškovića i Ane Todorović Spasenić* ističe se da Kina, lider u globalnom snabdevanju antimonom, diktira tržišne uslove za prodaju/nabavku ove sirovine na svim kontinentima. Aktuelne trgovinske i logističke barijere koje je Kina uvela u ovoj oblasti, dovele su do deficita ove sirovine, što utiče na lance snabdevanja namenske industrije i industrije proizvodnje baterija. Cena antimona je dostigla rekordan istorijski nivo, što otežava uspostavljanje efikasnog i efektivnog menadžmenta lanca snabdevanja u ovim industrijskim sektorima sa aspekta troškovne efikasnosti. Na osnovu analize ovog pitanja, autori zaključuju da dugoročne posledice pomenutih barijera mogu biti nesagledive po BDP mnogih zemalja u svetu.

* * *

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Prof. dr Jelena S. Perović Vujačić
glavni i odgovorni urednik

PRVA SEKCIJA

PRIVREDNA DRUŠTVA

VUK RADOVIĆ

PRIMENA PRAVILA POSLOVNE PROCENE

Pravilo poslovne procene je u srpsko pravo uvedeno pre skoro tri decenije. Iako je odavno prošao razuman rok privikavanja na ovaj anglosaksonski transplant, utisak je da se još uvek nedovoljno jasno shvataju uslovi za njegovu primenu. Zbog toga su detaljno analizirana tri uslova koja su izričito sadržana u našem Zakonu o privrednim društvima, i to racionalna osnova za donošenje poslovne odluke, savesno postupanje i postupanje u skladu sa standardom pažnje dobrog privrednika. Pored njih su analizirana još dva uslova koja nisu izričito pomenuta u našem zakonu: zasnovanost poslovne odluke na adekvatnim informacijama i nepostojanje ličnog interesa. Osnovni problem srpskog shvatanja pravila poslovne procene je nedovoljno precizna zakonska regulativa. Naročito je nejasan odnos između dužnosti pažnje i pravila poslovne procene. Autor se zalaže za prihvatanje stava prema kome ne treba poistovećivati pojmove dužnosti pažnje i pravila poslove procene. Dužnost pažnje treba shvatiti kao pažnju dobrog privrednika, dok pravilo poslovne procene treba razumeti tako da ono pruža zaštitu onim direktorima koji mogu da dokažu da je poslovna odluka bila zasnovana na adekvatnim informacijama i da je postojao racionalni osnov za njeno donošenje.

Ključne reči: dužnost pažnje, direktor, pažnja dobrog privrednika, savesno postupanje, privredno društvo

PRAVILO POSLOVNE PROCENE KAO PRIVILEGIJA DIREKTORA

Direktori svakodnevno donose veliki broj poslovnih odluka. Neke od tih odluka će se naknadno pokazati kao pogrešne, jer su prouzrokovale štetu privrednom

Prof. dr Vuk Radović, LL.M. (University of Pittsburgh), redovni profesor Pravnog fakulteta Univerziteta u Beogradu, e-mail: vuk@ius.bg.ac.rs. Ovaj rad predstavlja nastavak rada: Vuk Radović, „Opšti osvrt na pravilo poslovne procene“, *Poslovni izazovi*, 2024, 9–42. Izložen je na 31. savetovanju sudija privrednih sudova Srbije u septembru 2024. godine i štampan u radnom materijalu ovog savetovanja, Privredni apelacioni sud, *Radni materijal II*, Beograd 2024, 21–48.

društvu. Da li direktor treba da odgovara za naknadu štete koja je posledica svake od donetih poslovnih odluka za koju je glasao? Pozitivan odgovor na ovo pitanje bi bio protivan suštini preduzetništva, gde se kao aksiom prihvata teza da poslovne odluke uvek prate rizici, tj. da su poslovne odluke uvek rizične odluke. Prihvatanjem da su poslovne odluke rizične postaje jasno zbog čega opšta pravila odštetnog prava treba modifikovati kada je reč o odgovornosti direktora. Upravo tome i služi institut pravila poslovne procene.

Pravilo poslovne procene se u teoriji i praksi smatra jednim od najkontroverznijih i najspornijih instituta kompanijskog prava. Njegov cilj je zaštita direktora od građanskopravne odgovornosti koja može uslediti zbog donošenja poslovnih odluka koje su prouzrokovale štetu društvu. Prema tome, reč je o institutu kojim se principi odštetnog prava prilagođavaju potrebama preduzetništva.

Pravilo poslovne procene se nadovezuje na dužnost pažnje. Dužnost pažnje definiše idealan model ponašanja članova uprave, tj. šta se očekuje od članova uprave prilikom donošenja poslovnih odluka. Pravilo poslovne procene predstavlja sudski standard preispitivanja poslovnih odluka direktora.¹ Ideja uvođenja pravila poslovne procene je u tome da se snize standardi preispitivanja poslovnih odluka u odnosu na očekivane standarde koje postavlja dužnost pažnje.² Prema tome, dužnost pažnje je standard ponašanja, a pravilo poslovne procene je standard odgovornosti.³

Sudovi imaju odlučujuću ulogu u kreiranju standarda odgovornosti direktora, tj. određivanju granica pravila poslovne procene.⁴ Primena pravila poslovne procene podrazumeva dva odvojena, ali uzajamno povezana pitanja, jedno materijalnopravne, a drugo procesnopravne prirode. Ispitivanje uslova za primenu pravila poslovne procene predstavlja jedan aspekt ovog problema (materijalnopravni aspekt), dok je pitanje tereta dokaza ispunjenosti ovih uslova drugi aspekt (procesnopravni aspekt).

¹ Franklin A. Gevurtz, „The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?“, *Southern California Law Review*, No. 67, 1994, 295.

² Adina Ponta, Radu N. Catana, „The Business Judgment Rule and its Reception in European Countries“, *The Macrotheme Review*, No. 7, Vol. 4, 2015, 127.

³ Više v. Melvin Aron Eisenberg, „The Divergence of Standards of Conduct and Standards of Review in Corporate Law“, *Fordham Law Review*, No. 62, 1993, 437–468; „Smatra se da upravo sadržina pravila poslovne procene određuje meru odgovornosti a ne sadržina dužnosti pažnje, jer pravilo dužnosti pažnje je slično opštem pravilu o odgovornosti a to je da se odgovara zbog nepažnje.“ Jovana Veličković, *Naknada štete privrednom društvu prouzrokovana radom organa uprave*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2013, 78.

⁴ William T. Allen, Jack B. Jacobs, Leo E. Strine Jr., „Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem“, *Northwestern University Law Review*, No. 2, Vol. 96, 2002, 450.

TRI SLUČAJA KAO POLAZNA OSNOVA ZA DALJU ANALIZU

*Schlensky v. Wrigley*⁵

Vilijam Šlenski (*William Shlensky*) je u svojstvu manjinskog akcionara društva *Chicago National League Ball Club (Inc.)* podneo derivativnu tužbu protiv direktora Filipa Vriglija (*Phillip Wrigley*), koji je u isto vreme vlasnik oko 80% akcija društva. *Chicago National League Ball Club (Inc.)* je društvo iz Delavera koje poseduje profesionalni bejzbol tim Čikago kabs (*Chicago Cubs*). Osnovni razlog za podnošenje tužbe je nepristajanje Vriglija da ugradi reflektore na stadion Vrigli Fild (*Wrigley Field*), kako bi mogle da se održavaju i noćne bejzbol utakmice.

Tužilac je tvrdio da od kada su uvedene noćne bejzbol utakmice 1935. godine, svi profesionalni bejzbol timovi koriste tu opciju, osim Čikago kabsa. Od 1.620 utakmica odigranih 1966. godine 932 utakmice su igrane u noćnom terminu. Prema navodu tužioca, cilj noćnih utakmica je veće prisustvo publike, a time i veći prihodi. Kabsi su u prethodnom periodu pretrpeli značajne operativne gubitke, a tužilac to pripisuje lošoj posećenosti na domaćim utakmicama. Ako se ne ugrade reflektori, Kabsi će nastaviti da posluju sa gubicima, te je odluka da se to ne učini očito protivna interesima društva. Troškovi ugradnje će prema mišljenju tužioca biti nadoknađeni povećanim prihodima. Tužilac dalje tvrdi da Vrigli odbija da ugradi reflektore, jer veruje da je bejzbol dnevni sport i da bi noćne utakmice mogle da imaju negativan uticaj na okolinu. Ostali direktori se nisu suprotstavljali Vrigliju, već su nastavili da primenjuju njegovu poslovnu logiku. Na osnovu navedenog, tužilac zahteva da se direktori učine odgovornim za postupanje protivno dužnosti pažnje, i to zbog lošeg upravljanja i umanjivanja imovine društva.

Osnovno pravno pitanje koje se postavilo u ovom slučaju je sledeće: da li sud može da preinači poslovnu odluku direktora, a da pritom nije dokazana prevara, nezakonitost ili sukob interesa? Sud je u odgovoru na ovo pitanje prvo citirao nekoliko precedenata u kojima je jasno naznačeno da poslovne odluke ne treba dirati samo zbog toga što su u tom trenutku bile dostupne i neke druge, ekonomski isplativije i poslovno mudrije odluke. Štaviše, u ovom slučaju je sud naveo i neke razloge zbog kojih instaliranje reflektora može biti i štetno za društvo, što znači da njihova negativna odluka možda i nije bila protivna interesima društva. Na osnovu ovoga sud ne želi da kaže da je odluka direktora bila ispravna, već da je sadržinsko preispitivanje odluka van njihove nadležnosti i njihovih sposobnosti. Jedino što sud naglašava jeste da je ovo bila odluka o kojoj odlučuju direktori, tj. da spada

⁵ *Schlensky v. Wrigley*, 237 N.E.2d 776 (Ill.App.1968).

u nadležnost organa uprave, kao i da u tužbi nisi priloženi dokazi da su u konkretnom slučaju odluke uključivale prevaru, nezakonitost ili sukob interesa.

*Smith v. Van Gorkom*⁶

Slučaj *Smith v. Van Gorkom* smatra se jednim od najkontroverznijih i najučinjivijih korporativnih slučajeva Vrhovnog suda Delavera. Činjenice ovog slučaja su veoma komplikovane, ali se u osnovi mogu svesti na nekoliko ključnih aspekata. Džerom Van Gorkom (*Jerome Van Gorkom*), predsednik odbora direktora i generalni direktor društva Trans union (*Trans Union*), odlučuje da kontaktira Džej Prickera (*Jay Pritzker*), investitora zainteresovanog za preuzimanje kompanije. Van Gorkom vodi pregovore sa Prickerom bez konsultovanja ostalih članova odbora direktora i dogovara se da Pricker kupi akcije društva po ceni od 55 dolara po akciji. Ova cena je bila za oko 40% viša od trenutne tržišne cene akcija, a predložio ju je Van Gorkom, pri čemu nisu prezentovani dokazi na osnovu kojih je formulisao ovaj predlog. U sporazumu je stajalo da Trans union ima pravo da u narednih 90 dana prihvati i neku drugu ponudu, ali i da neće aktivno tražiti druge ponudioce, niti im na bilo koji način pomagati.

Nakon što je nekoliko rukovodilaca izrazilo svoje neslaganje sa dogovorenim cenom, Van Gorkom saziva sednicu odbora direktora. Članove odbora su činili pet spoljnih direktora i pet direktora zaposlenih u društvu. Pre sazivanja sednice, oni nisu imali nikakve prethodne informacije o ponudi. Štaviše, samo dva člana odbora su znala šta je na dnevnom redu sednice. Sednica je tako brzo sazvana da Van Gorkom nije imao ni vremena da fotokopira nacrt sporazuma o preuzimanju društva Trans union, a kamoli da utvrdi stvarnu vrednost akcija. Bez ikakvih dokumenata ispred sebe koje bi analizirali, članovi odbora direktora su 20 minuta slušali predlog Van Gorkoma, da bi nakon toga dva sata raspravljali o predlogu, koji je na kraju prihvaćen. Prema tome, odbor je glasao o sporazumu o preuzimanju, a da nisu imali priliku da se upoznaju sa njegovim tekstom. Pored usmenog izlaganja Van Gorkoma, jedini oslonac članovima uprave bila je procena koju je bez dublje analize izvršio finansijski direktor Donald Romans (*Donald Romans*), prema kome se prihvatljivom smatra cena između 50 i 60 dolara. Ubrzo nakon inicijalne saglasnosti, održana je druga sednica, na kojoj je odbor direktora prihvatio izmene sporazuma, koje je predložio kupac. U toku postupka je dokazano da nijedan član odbora nije pročitao ni drugi sporazum, a u nekim aspektima se on razlikovao od predloga koji je prvobitno predstavio Van Gorkom. Na kraju je skupština društva usvojila predlog.

⁶ *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

Akcionar Smit je tužio direktore smatrajući da su oni glasanjem za sporazum o preuzimanju postupili protivno dužnosti pažnje. Tuženi direktori su isticali da je njihova odluka da prodaju društvu zaštićena pravilom poslovne procene. Prvostepeni sud Delavera je oslobodio direktore odgovornosti, primenivši pravilo poslovne procene. Vrhovni sud Delavera je nakon opsežne analize preinačio prvostepenu odluku i zaključio da su direktori prekršili dužnost pažnje kada su na sednici dali saglasnost na sporazum o kupovini društva. Prema stanovištu suda zaštita koju pruža pravilo poslovne procene se u ovom slučaju ne može primeniti, jer se direktori nisu upoznali sa svim materijalnim informacijama koje su im bile razumno dostupne (engl. *all material information reasonably available to them*).⁷ Sud je za evaluaciju ispunjenosti dužnosti informisanja prihvatio standard krajnje nepažnje. Ovaj slučaj je očigledno veliki značaj pridao postupku donošenja poslovnih odluka. Direktori koji mogu da dokažu da su se adekvatno informisali biće zaštićeni pravilom poslovne procene.

Direktori su u postupku iznosili veći broj argumenata u prilog svoje neodgovornosti. Prvi argument je bio vezan za značajnu premiju koja je plaćena akcionarima (55 dolara umesto 38 dolara koliko je iznosila tržišna vrednost akcija). Ovaj argument sud nije prihvatio, jer vrednost društva nije utvrđena. Oslanjajući samo na tržišnu vrednost akcija nije prihvatljivo, jer ta vrednost ne mora da odražava i vrednost društva, a pogotovu imajući u vidu da su direktori znali da je tržišna vrednost akcija potcenjena. Prickerov brzi prihvati ponuđene cene govori u prilog tezi da je cena za njega bila povoljna, što dalje pobuđuje sumnje o njenoj adekvatnosti.

Drugi argument se odnosio na činjenicu da su ovu odluku konačno usvojili akcionari, i to značajnom većinom (oko 70% glasova za odluku). Sud ni ovaj argument nije uvažio, jer su akcionari glasali za odluku koja nije bila potkrepljena adekvatnim informacijama. Teret prikupljanja informacija je na direktorima.

Direktori su tvrdili da ih je advokat društva upozorio da ako ne prihvate ovaj sporazum to može prouzrokovati njihovu odgovornost zbog postupanja protivno dužnosti pažnje. Upozorenje advokata nije opravdanje za neadekvatno informisanje prilikom donošenja jedne ovako značajne odluke.

Nijedna odluka Vrhovnog suda Delavera nije doživela takvu lavinu kritika kao slučaj Van Gorkom. Rečima profesora Meninga, donošenjem odluke u slučaju

⁷ „Da sumiramo: mi smatramo da su direktori Trans uniona prekršili svoje fiducijarne dužnosti prema akcionarima: 1) tako što se nisu informisali o svim informacijama koje su im bile razumno dostupne i relevantne za odluku da preporučuje spajanje sa Prickerom i 2) tako što nisu otkrili sve materijalne informacije koje bi razumni akcionar smatrao značajnim prilikom donošenja odluke da li da prihvati Prickerovu ponudu.“

Van Gorkom eksplodirala je bomba.⁸ U izdvojenom mišljenju troje od sedam sudija ova presuda je nazvana „komedijom grešaka“. Prema profesoru Danijelu Fišelu ovo je „sigurno jedna od najgorih odluka u istoriji korporativnog prava“.⁹ Šta je to u ovoj odluci toliko isprovociralo naučnu i stručnu javnost? Ima li nečeg lošeg u tome da se od direktora zahteva da se adekvatno informišu pre nego što pristupe donošenju poslovnih odluka? Odgovor na postavljeno pitanje je sam po sebi jasan. No, time što smo rekli da je informisanje potrebno i nužno, nije dat odgovor na pitanje da li je sud u ovom slučaju otišao i korak dalje, tako da od direktora traži prekomerno informisanje. Kritike ovog slučaja su se uglavnom odnosile na previsoke standarde koji se postavljaju pred direktore, a u vezi sa prethodnim informisanjem.

*Francis v. United Jersey Bank*¹⁰

Društvo *P&B* je poslovalo kao posrednik (broker) između osiguravajućih i reosiguravajućih društava, tako što je naplaćivalo premiju osiguranja od osiguravajućih društava i prenosilo je reosiguravajućim društvima, a takođe i naplaćivalo sumu osiguranja od reosiguravajućih društava u korist društava za osiguranje. Zarada se ostvarivala po svakoj transakciji između ovih subjekata. U svakom trenutku društvo je posedovalo veliku količinu novca koja je pripadala njegovim klijentima. Najbolja praksa je da broker odvojeno drži sredstva osiguravajućih društava od sredstava reosiguravajućih društava, a da je račun samog društva potpuno odvojen. Generalni direktor društva *P&B* Čarls Pričard (*Charles Pritchard*) nije poslovaao na taj način, ali je obezbedio da se sredstva koja uplate treća lica ne mogu koristiti za lične potrebe. Nakon što je gospodin Pričard napustio društvo, njegova dva sina su preuzela kontrolu. U narednom periodu oni su sa računa koji su pripadali osiguravajućim i reosiguravajućim društvima uzimali lične zajmove, koje nikada nisu vratili i nikada nisu platili kamatu. Praksa uzimanja zajmova se nastavila sve dok društvo nije palo pod stečaj. Za sve ovo vreme, supruga Čarlsa Pričarda, Lilijan Pričard, je bila većinski akcionar društva sa 42% akcija i jedna od tri člana odbora direktora, pored svoja dva sina. Za vreme svog mandata Lilijen Pričard nikada nije učestvovala u poslovanju društva, nije posećivala prostorije društva, niti je ikada čitala finansijske izveštaje. Nakon što joj je preminuo muž, ona je postala još nemarnija, počela je da pije, psihičko stanje joj se pogoršalo, te je suštinski postala

⁸ Bayless Manning, „Reflections and Practical Tips on Life in the Boardroom After Van Gorkom“, *Business Lawyer*, No. 41, 1985, 1.

⁹ Daniel R. Fischel, „The Business Judgment Rule and the Trans Union Case“, *Business Lawyer*, No. 4, Vol. 40, 1985, 1455.

¹⁰ *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981).

nepodobna za obavljanje funkcije direktora. Stečajni upravnik je tužio gospođu Pričard zbog nemarnog odnosa prema društvu i postupanja protivno dužnosti pažnje koja se od direktora očekuje.

Sud je u analizi pošao od standarda razumno razboritog lica. Direktori moraju da izvršavaju svoje obaveze sa stepenom pažnje koji bi uložio uobičajeno razborit čovek pod sličnim okolnostima na sličnoj poziciji. Kao osnovno je prihvaćeno pravilo da direktori treba da budu upoznati makar sa osnovama poslovanja društva u kome su angažovani. Oni ne mogu da se brane argumentom da nemaju dovoljno znanja i poslovnog iskustva da obavljaju dužnosti direktora, jer u tom slučaju oni treba ili da nauče, ili da pitaju drugo lice ili da ne preuzimaju te poslove. Direktori imaju kontinuiranu obavezu da se informišu o aktivnostima društva, jer u suprotnom ne bi mogli da učestvuju u upravljanju društvom. Oni nisu dužni da detaljno nadgledaju svakodnevne aktivnosti u društvu, već samo da vrše generalni nadzor nad poslovanjem društva. Od direktora se ne očekuje da vrše reviziju finansijskih izveštaja i poslovnih knjiga, ali oni treba da budu upoznati sa finansijskim stanjem u kome se društvo nalazi, tako što će redovno analizirati finansijske izveštaje. Direktor nije ukras društva, već esencijalna komponenta korporativnog upravljanja. On ne može da se brani motom „ja sam neuki direktor“, jer ta lica nisu zamišljena da budu figure u akcionarskom društvu bez ikakve odgovornosti.

Sud nije uvažio argumente da je gospođa Pričard u tom periodu bila u depresiji zbog smrti muža, kao i da je počela prekomerno da konzumira alkohol. Manjak simpatija prema gospođi Pričard je u skladu sa „objektivnom prirodom testa razumno pažljivog čoveka iz prava naknade štete. Pijanstvo, depresija i neznanje nisu izgovori za nekoga ko vozi kola, a za pretpostaviti je da ne treba da budu izgovori ni za nekoga ko obavlja poslove korporativnog rukovodioca ili direktora. Uostalom, niko nije terao gospođu Pričard da se prihvati tog posla.“

U ovom slučaju sud je apostrofirao nekoliko kriterijuma koji mogu imati uticaja na donošenje odluke o odgovornosti direktora. Jedan od tih kriterijuma je priroda delatnosti društva. Ono što je u slučaju *Francis v. United Jersey Bank* bilo za sud posebno osetljivo je činjenica da je društvo *PeB* čuvalo velike sume novca za treća lica. Otvoreno je pitanje da li bi sud gospođu Pričard učinio odgovornom da se društvo bavilo nekom drugom delatnošću. Takođe, sud je ukazao i na to da se prilikom odlučivanja o odgovornosti mora voditi računa i o tome kakvu ulogu direktor ima u društvu. Tako se više očekuje od direktora koji je zaposlen u društvu, a mnogo manje od nezavisnog direktora. Konačno, od značaja može biti i činjenica da li je društvo javno ili nejavno, jer se od direktora javnih društava očekuje viši stepen pažnje, odnosno veća aktivnost prilikom vršenja nadzora nad društvom.

USLOVI ZA PRIMENU PRAVILA POSLOVNE PROCENE

Da bi se primenilo pravilo poslovne procene, potrebno je da se ispune uslovi propisani zakonom (srpski model) ili ustanovljeni sudskom praksom (američki model). U daljem tekstu će biti više reči o tri uslova koji su izričito sadržani u našem Zakonu o privrednim društvima (racionalna osnova za donošenje poslovne odluke, savesno postupanje i postupanje u skladu sa standardom pažnje dobrog privrednika). Pored njih biće analizirana još dva uslova, koja nisu izričito pomenuta u našem zakonu (zasnovanost poslovne odluke na adekvatnim informacijama i nepostojanje ličnog interesa). Svi uslovi će biti sagledani korišćenjem uporedno-pravne prakse i teorije.

Da bi se krenulo u analizu uslova za primenu pravila poslovne procene potrebno je da se ispune dva prethodna uslova (preduslova): prvo, da je doneta poslovna odluka i drugo, da su poslovnu odluku donela ona lica na koja se pravilo poslovne procene može primeniti, tj. koja su subjekti dužnosti pažnje. Prema tome, preduslov za analizu uslova za primenu pravila poslovne procene je da se utvrdi da je subjekt dužnosti pažnje doneo poslovnu odluku.¹¹

Poslovna odluka zasnovana na adekvatnim informacijama

Od direktora se očekuje da svoje poslovne odluke zasniva na odgovarajućim (primerenim) informacijama, a takva odluka se naziva informisana odluka (engl. *informed decision*). Odluka koja nije zasnovana na odgovarajućim informacijama ne može biti zaštićena pravilom poslovne procene. Uslov adekvatne informisanosti se smatra jednim od najznačajnijih uslova za primenu pravila poslovne procene. Širenje ili sužavanje obuhvata ovog uslova direktno utiče na domen primene pravila poslovne poslovne procene. Tri su osnovne karakteristike ovog uslova.

Prvo, on se odnosi na radnje preduzete u postupku donošenja poslovne odluke. Zapravo, ovde se ustanovljava odgovornost članova uprave za (ne)preduzete radnje u postupku donošenja poslovne odluke.¹² Uslov zasnovanosti na adekvatnim informacijama ni na koji način ne podrazumeva ispitivanje ispravnosti poslovne odluke. Ispunjenost ovog uslova se utvrđuje na dva načina. Prvo se analizira na koji način je odluka pripremana, tj. na osnovu kojih prethodno prikupljenih informacija je odluka doneta. Prema tome, ovde se gleda činjenična građa koja je predstavljala osnov poslovne odluke. U slučaju *Smith v. Van Gorkom*

¹¹ Više v. V. Radović (2024), op. cit., 28–37.

¹² Holger Fleischer y: *Kommentar zum Aktiengesetz – Band 1, 3.* (eds. Gerald Spindler, Eberhard Stilz,) Auflage, Verlag C. H. Beck, München, 2015, 1373.

jedini oslonac za donošenje krupne strateške poslovne odluke bila je površna procena finansijskog direktora, a dodatni problem je bila i činjenica da se neki direktori nisu ni složili sa predloženom cenom, smatrajući je preniskom. Drugi način ispitivanja da li je odluka bila zasnovana na adekvatnim informacijama se odnosi na sam postupak donošenja poslovne odluke. Ovde se ne misli na to da li su postovane zakonske norme (na primer, o načinu sazivanja sednice, kvorumu i sl.), jer nepoštovanje zakonskih normi podrazumeva primenu drugih sankcija. Potrebno je sagledati kako je izgledao postupak donošenja poslovne odluke, kako bi se utvrdilo da li je odluka bila zasnovana na adekvatnim informacijama. I ovde se kao primer može uzeti slučaj *Smith v. Van Gorkom*, gde su članovi upravnog odbora dva puta doneli odluku, a da pritom nisu imali ni tekst sporazuma ispred sebe. Pri takvim činjenicama, teško je dokazati ispunjenost ovog uslova za primenu pravila poslovne procene.

Drugo, ovaj uslov se uvek primenjuje, jer se za svaku poslovnu odluku može postaviti pitanje na osnovu čega je doneta i kako je doneta. U praktičnom smislu je najjednostavnije odluku napasti iz proceduralnih razloga. Drugi uslovi za primenu pravila poslovne procene će dolaziti do izražaja po pravilu u nekim specifičnim situacijama. Retki će biti slučajevi da je direktor u određenom pravnom poslu imao lični interes ili da je postupao u lošoj veri. Odgovornost direktora se najčešće utvrđuje zbog nezasnovanosti poslovne odluke na adekvatnim informacijama.

Treće, uslov informisanosti se može shvatiti na različite načine, te u nekom smislu predstavlja kaučuk standard. Zakonska definicija može u većoj ili manjoj meri da odredi njegove granice. No, bez obzira na sadržinu zakonskog rešenja, ovaj uslov uvek sa sobom nosi određen stepen neodređenosti, što nesporno utiče na pravnu sigurnost.

Zakonodavstva koja uređuju pravilo poslovne procene po pravilu sadrže ovaj uslov. Standard je u tom pogledu postavio Američki pravni institut (*American Law Institute*) koji je u svojim Principima korporativnog upravljanja formulisao pravilo poslovne procene.¹³ Prema tom rešenju, direktor ili rukovodilac ispunjava dužnost pažnje ako je „informisan u odnosu na predmet poslovne odluke u meri u kojoj direktor ili rukovodilac razumno veruje da je adekvatno imajući u vidu sve okolnosti“. Iako ovo rešenje nije važeće američko pravo, ono je izvršilo uticaj na brojna druga zakonodavstva i model zakone. Tako je gotovo identičan tekst prihvatio i Evropski model kompanijskog zakona iz 2017. godine,¹⁴ kao i

¹³ ALI, *Principles of Corporate Governance: Analysis and Recommendations*, American Law Institute Publishers, rev ed, 2002, paragraf 4.01(c)

¹⁴ *European Model Companies Act – EMCA*, Sec. 10.01(3).

australijski Zakon o akcionarskim društvima.¹⁵ Uslov da poslovna odluka mora biti zasnovana na primerenim informacijama je sadržan i u nemačkom, austrijskom i hrvatskom pravu.¹⁶

Osnovni problem za praksu je da utvrdi pravu meru potrebnih informacija za donošenje jedne poslovne odluke. U svakom slučaju, ovaj standard ne zahteva od direktora da pribave sve raspoložive informacije,¹⁷ niti najbolje moguće informacije.¹⁸ Koja količina i kvalitet informacija se smatraju odgovarajućim, odnosno primerenim, zavisi od brojnih okolnosti.¹⁹ U tom pogledu će se posebno isticati sledeći faktori:²⁰ vreme potrebno za dobijanje informacija, priroda i značaj poslovne odluke koja se donosi, obuhvat (složenost) poslovne odluke, vremenski okvir u kome se odluka mora doneti,²¹ faktičke i pravne mogućnosti pribavljanja informacija, kao i odnos očekivane koristi od prikupljenih informacija i troškova njihovog pribavljanja. Osnovno je pravilo da što je poslovna odluka značajnija za egzistenciju i uspeh društva, to i informaciona osnova za njeno donošenje mora da bude veća.²² Takođe, u slučaju da je odluka skopčana sa brojnim rizicima (rizična odluka), poput strategijskih ili investicionih odluka, neophodno je sprovesti brojne pripremljene radnje u cilju prikupljanja što veće količine informacija.²³ Ako uprava nema vremena za pribavljanje svih potrebnih informacija, mora da se uzdrži od donošenja odluke.²⁴

¹⁵ *Corporations Act*, Sec. 180(2)(c).

¹⁶ Nemački Zakon o akcijama (*Aktiengesetz – AktG*), § 93(1); austrijski Zakon o akcijama (*Aktiengesetz – AktG*), § 84(1a); hrvatski Zakon o trgovačkim društvima, čl. 252(1).

¹⁷ Martin Winner, „The Duty of Care and Business Judgment Rule in Austrian Company Law“, *Acta Universitatis Carolinae – Iuridica*, No. 3, 2022, 17.

¹⁸ H. Fleischer, op. cit., 1373–1374.

¹⁹ Zbog toga se u teoriji često i ističe da članovi uprave prilikom selektovanja i utvrđivanja značaja informacija imaju veliki manevarski prostor. Gerd Krieger, Viola Sailer u: Karsten Schmidt, Marcus Lutter (Hrsg.), *Aktiengesetz Kommentar, I. Band*, Verlag Dr. Otto Schmidt KG, Köln, 2008, 1063.

²⁰ H. Fleischer, op. cit., 1373; M. Winner, op. cit., 18.

²¹ Nisu uporedive situacije kada direktor ima nekoliko sati ili nekoliko dana za donošenje odluke i kada ima na raspolaganju više nedelja ili meseci. U prvom slučaju je vreme očigledno ograničavajući faktor, te se ne može očekivati od direktora da u kratkom roku pribavi sve potrebne informacije za donošenje poslovne odluke. Prema tome, potreba za brzim donošenjem neke poslovne odluke snižava standarde informisanosti. Sanja Graić Stepanović, „Pravilo (adekvatne) poslovne procene“, *Pravo i privreda*, No. 5–8, 2008, 305.

²² H. Fleischer, op. cit., 1374.

²³ M. Winner, op. cit., 18.

²⁴ *Ibidem*.

Slučaj *Smith v. Van Gorkom* predstavlja drugi pristup ovom problemu. U odluci je sud zaključio da direktori moraju da se informišu o svim materijalnim činjenicama koje su im razumno dostupne. Na ovaj način je postavljen izuzetno zahtevan standard, koji podrazumeva obavezu prekomernog trošenja novca za pripremu poslovnih odluka. Postojala je opravdana bojazan da će direktori učestalo angažovati eksperte pre donošenja bilo koje iole značajnije poslovne odluke, ali i da će opasti interesovanje za direktorske pozicije, a naročito pozicije neizvršnih direktora. Pravnici su svojim klijentima (kompanijama) slali upozorenja na povećan rizik od odgovornosti direktora ukoliko ne mogu da dokažu da su pre donošenja odluke sprovedli opsežne analize.²⁵ U isto vreme su polise osiguranja koje pokrivaju povrede dužnosti pažnje direktora postale skuplje i teže dostupne.²⁶ Kako bi predupremio ove moguće posledice, Delaver je izmenio svoj zakon, tako što je omogućio da se u osnivački akt akcionarskog društva unese odredba kojom se isključuje ili ograničava odgovornost direktora za povredu dužnosti pažnje.²⁷ Odmah nakon usvajanja ove zakonske izmene, hiljade akcionarskih društava iz Delavera je promenilo svoje osnivačke akte iskoristivši opciju koju je ponudio zakon, a ubrzo nakon toga su i druge američke države izmenile svoja zakonodavstva u istom pravcu.²⁸ Cilj zakonske opcije je bio u tome da se omogućiti akcionarima da ekskulpiraju direktore od odgovornosti za naknadu štete koju su pričinili društvu povredom dužnosti pažnje.²⁹ Zakonima su propisane situacije kada se direktorima ne može isključiti ili ograničiti odgovornost za naknadu štete odredbom u osnivačkom aktu. Tako se ovaj izuzetak ne primenjuje na povrede dužnosti lojalnosti, radnje koje nisu preduzete u dobroj veri, svesno kršenje normi pozitivnog prava, isplate dividendi preko dozvoljenih limita, i sl.³⁰

Posebno pitanje se odnosi na to iz čijeg ugla treba posmatrati primerenost informacija potrebnih za donošenje poslovne odluke. U tom pogledu je moguća primena dva standarda: subjektivnog i objektivnog. Prema subjektivnom standardu, primerenost informacija se sagledava iz ugla donosioca poslovne odluke. Tako se zahteva da direktor koji donosi poslovnu odluku razumno veruje da su prikupljene

²⁵ Robert W. Hamilton, *The Law of Corporations in a Nutshell*, St. Paul, Minn, 2000, 459.

²⁶ Franklin A. Gevurtz, *Corporation law*, West Group, St. Paul, Minn, 2000, 316. Više v. Roberta Romano, „What Went Wrong with Directors’ and Officers’ Liability Insurance“, *Delaware Journal of Corporate Law*, No 1, Vol. 14, 1989, 1–33.

²⁷ *Delaware General Corporation Law*, Sec. 102(b)(7).

²⁸ R. W. Hamilton, op. cit., 459.

²⁹ F. A. Gevurtz, op. cit., 318.

³⁰ *Ibidem*, 317.

informacije primerene i dovoljne imajući u vidu sve okolnosti konkretnog slučaja („... subjektivna orijentacija koja reflektuje razumno verovanje donosioca odluke“).³¹ Na ovaj način se direktorima daje dovoljno manevarskog prostora prilikom utvrđivanja supstancijalne osnove za donošenje poslovne odluke.³²

U uporednom pravu ima pokušaja da se standard preispitivanja objektivizira. Kao primer se može navesti slučaj *Brehm v. Eisner*,³³ u kome se Vrhovni sud Delavera bavio pitanjem razumne dostupnosti informacija članova odbora direktora društva Dizni, kada su odobrivali menadžerski ugovor sa direktorom Majklom Ovicom (*Michael Ovitz*). Sud je zaključio da je „odbor direktora odgovoran da uzme u obzir samo materijalne činjenice koje su razumno dostupne, ne one koje su beznačajne ili koje su van domašaja odbora“. Na ovaj način je prihvaćen objektivni test razumnosti, što je sud i sam konstatovao.³⁴ U Nemačkoj literaturi prevladuje mišljenje da objektivni standard za ispitivanje primerenosti informacija nije opravdan.³⁵

Srpsko pozitivno pravo ne uslovljava primenu pravila poslovne procene adekvatnom pripremom poslovne odluke, jer ovaj uslov nije direktno sadržan u članu koji uređuje dužnost pažnje. No, čini se da uslov informisanosti posredno proizlazi iz dva druga uslova koji jesu deo dužne pažnje: savesnog izvršavanja poslova i postupanja sa pažnjom dobrog privrednika. Problem nastupa onda kada treba konkretno odrediti koliko je to informacija potrebno prikupiti da bi se jedna poslovna odluka smatrala informisanom, a time i bila zaštićena pravilom poslovne procene. Savesno postupanje članova uprave i zastupnika bi ukazivalo na primenu subjektivnog standarda, dok bi pažnja dobrog privrednika sugerisala primenu objektivnog standarda. U svakom slučaju se može konstatovati da je Srbija implicitno prihvatila subjektivno-objektivni pristup. Međutim, na ovaj način ne samo što nisu otklonjene praktične dileme, već primena dva standarda može dovesti do još većih nedoumica i pravne neizvesnosti. Subjektivni standard treba razumeti tako da se primerenost informacija potrebnih za donošenje poslovne odluke utvrđuje u odnosu na donosioca, tj. na ono što je to lice razumno verovalo da je potrebno za donošenje neke odluke. „Visina“ ovog standarda će očigledno zavisiti

³¹ Joseph IV Hinsey, „Business Judgment and the American Law Institute’s Corporate Governance Project: the Rule, the Doctrine and the Reality“, *George Washington Law Review*, No. 4–5, Vol. 52, 1984, 613–614.

³² H. Fleischer, op. cit., 1374.

³³ *Brehm v. Eisner*, 746 A.2d 244 (2000).

³⁴ I Austrija prihvata objektivni test. M. Winner, op. cit., 18.

³⁵ H. Fleischer, op. cit., 1374.

od znanja, stručnosti i iskustva konkretnog donosioca odluke. Suprotno tome, objektivni standard, koji bi proizlazio iz pažnje dobrog privrednika, bi primerenost informacija koje je potrebno prikupiti sagledavao iz ugla prosečnog (razumno pažljivog) privrednika. Na ovaj način bi standard prosečnog privrednika bio donja granica primene ovog uslova, dok bi subjektivni standard mogao „letvicu da digne na neku veći visinu“.

Imajući u vidu uporedno pravo i praksu, ali i potrebu zaštite direktora, prilikom sagledavanja primerenosti informacija koje su neophodne za donošenje jedne poslovne odluke treba primeniti subjektivni standard. Međutim, kada je reč o ispitivanju postupka donošenja poslovne odluke, utisak je da treba da dominira objektivni standard.³⁶

Potreba za adekvatnim informisanjem može u određenim slučajevima podrazumevati angažovanje stručnjaka. No, to nikako ne može postati pravilo u korporativnoj praksi,³⁷ jer bi enormno opteretilo postupak donošenja poslovnih odluka, kako u finansijskom smislu (visoki troškovi), tako i u vremenskom smislu (vreme potrebno za dobijanje ekspertize). Angažovanje stručnjaka je obavezno onda kada donosilac poslovne odluke nema potrebna znanja i iskustvo. U tom pogledu, direktor će se prevashodno osloniti na stručnjake koji rade unutar društva (interne stručnjake), a tek ako njih nema, potražiće stručnjake van društva (eksterne stručnjake). Uključivanje eksternih stručnjaka u postupak donošenja poslovne odluke predstavlja indiciju ispoljavanja visokog stepena pažnje, ali i mogućnost da se lakše dokumentuju koraci preduzeti u postupku donošenja poslovne odluke.³⁸ Postoji opravdana bojazan da bi članovi uprave na ovaj način fokus ispitivanja preusmerili sa sadržine poslovne odluke na postupak njenog donošenja, kao i da će mišljenje spoljnog eksperta na izvestan način dovesti do makar delimičnog prenošenja odgovornosti za (ne)ispravnost poslovne odluke sa članova uprave na treća lica.³⁹

U srpskom pravu je zakonom izričito rečeno da se smatra da lica koja imaju dužnost pažnje mogu svoje postupanje da zasnivaju i na „informacijama i mišljenjima lica stručnih za odgovarajuću oblast, za koje razumno veruju da su u tom

³⁶ U australijskoj praksi se polazi od subjektivnog testa, jer je sadržan u zakonu, ali se on kombinuje sa objektivnim zahtevima postupka prikupljanja informacija. V. Michael Legg, Dean Jordan, „The Australian Business Judgment Rule after ASIC v RICH: Balancing Director Authority and Accountability“, *Adelaide Law Review*, No. 34, 2014, 421–422.

³⁷ M. Winner, op. cit., 18.

³⁸ *Ibidem*.

³⁹ *Ibidem*.

slučaju savesno postupala“.⁴⁰ Iz zakonske norme nedvosmisleno proizlazi da obveznicima dužnosti pažnje nije zabranjeno da angažuju stručna lica u cilju dobijanja profesionalnih saveta. Da bi oni to mogli da urade neophodno je da im interni akti i finansijsko stanje društva to omogućavaju.⁴¹ Zakonom nije propisano da u određenim situacijama postoji obaveza zasnivanja poslovne odluke na mišljenju stručnog lica. No, imajući u vidu obaveznu primenu principa savesnosti i pažnje dobrog privrednika ova obaveza postoji onda kada donosilac poslovne odluke ne poseduje odgovarajuća znanja i iskustvo, a koji su nužni za sagledavanje svih aspekata jedne poslovne odluke.⁴² Jasno je da ne bi bilo moguće dokazivati ispunjenost uslova adekvatne informisanosti u slučaju da član uprave ne poznaje ili površno poznaje oblast kojoj poslovna odluka pripada.

Racionalna osnova za donošenje odluke

Prema Zakonu o privrednim društvima, subjekti dužnosti pažnje su dužni da svoje poslove izvršavaju „u razumnom uverenju da deluju u najboljem interesu društva“.⁴³ Gotovo istovetan uslov je sadržan i u Principima korporativnog upravljanja Američkog pravnog instituta, Model zakonu za akcionarska društva, Evropskom modelu kompanijskog zakona i australijskom Zakonu o akcionarskim društvima,⁴⁴ a u nešto modifikovanom obliku i u nemačkom, austrijskom i hrvatskom pravu.

Strogo jezički posmatrano, ovaj uslov se može razložiti na nekoliko elemenata. Prvi element se odnosi na rad u interesu društva. Obaveza donošenja poslovnih odluka u interesu društva svrstava Srbiju u red država koje nesporno prihvataju tzv. *stakeholderski* (multiinteresni) pristup. Kada donose poslovne odluke, članovi uprave ne treba da vode računa samo o interesima akcionara, odnosno članova, već treba da uzimaju u obzir i interese svih drugih nosilaca rizika poslovanja društva

⁴⁰ ZOPD, čl. 63(4).

⁴¹ „Društvo može da izdvoji posebna sredstva kako bi se omogućilo odboru direktora, odnosno nadzornom odboru, da koristi profesionalne savete nezavisnih stručnjaka, u skladu sa prethodno ustanovljenim pravilima od strane odbora direktora, odnosno nadzornog odbora, kad god je to potrebno za uspešno izvršavanje obaveza. Tim pravilima bi se mogao urediti način korišćenja sredstava, maksimalna naknada, ograničenje vrste profesionalnih saveta, i dr.“ Kodeks korporativnog upravljanja, *Službeni glasnik RS*, br. 99/21, Princip 8, Preporuka 7.

⁴² Tijana R. Kovačević, „Pravilo poslovne procene“, *Strani pravni život*, br. 2, Beograd, 2020, 151.

⁴³ ZOPD, čl. 63(1).

⁴⁴ ALI, *Principles of Corporate Governance: Analysis and Recommendations*, paragraf 4.01(c) (3); *MBCA*, § 8.30.(a), 8.31(a)(2)(ii)(A); *EMCA*, Sec. 10.01(3)(c); *Corporations Act*, Sec. 180(2)(d).

(tzv. stejkholdera).⁴⁵ U teoriji je kod nas već godinama prisutna teza da je interes društva osoben, *sui generis* interes, različit od interesa njegovih nosilaca rizika poslovanja.⁴⁶ Multiinteresni pristup danas dominira, a osnovna njegova prednost je u tome što omogućava donošenje odluka koje su dugoročno posmatrano u interesu društva, kao i implementaciju ESG standarda u sferi korporativnog prava. Promovisanje isključivo interesa akcionara predstavlja prepreku za donošenje ovakvih i sličnih poslovnih odluka. Kao reper za utvrđivanje interesa društva treba uzeti očuvanje njegove egzistencije, održivo profitabilno poslovanje i uvećanje održive vrednosti preduzeća.⁴⁷

Iz ugla dužnosti pažnje, rad u interesu društva je u praktičnom smislu sporan. Naime, sam pojam „interes društva“ je neuhvatljiv. Za brojne poslovne odluke bi se mogao braniti stav da su u interesu društva, iako su možda protivne interesima nekih nosilaca rizika poslovanja (na primer, akcionara i zaposlenih). Na taj način je kreirana pravna nesigurnost, što nije u interesu ni onih koji donose poslovne odluke (direktori), ni onih koji autoritativno odlučuju o tome da li je odluka u interesu društva (sudije).

Postupanje u skladu sa dužnošću pažnje ne kaže da donete poslovne odluke moraju biti u interesu društva. Bitno je samo da kod direktora postoji uverenje da je odluka najbolja za društvo, iako se naknadno pokaže suprotno.⁴⁸ Uverenje da je odluka u interesu društva mora postojati u trenutku donošenja poslovne odluke. „Naknadna pamet“, koju direktor stiže protekom vremena saznanjem novih činjenica i okolnosti, je bez uticaja. Izuzetak bi bio ako direktor može novom poslovnom odlukom da umanjí ili otkloni loše posledice ranije odluke, u kom slučaju bi se moglo govoriti o odgovornosti za nedonošenje te nove poslovne odluke.

Činjenica da kod direktora mora postojati uverenje da je odluka u interesu društva nedvosmisleno ukazuje na subjektivan karakter ovog standarda. Međutim, zakonodavac se odlučio da ovaj čisto subjektivni standard objektivizira, tako što je propisao da uverenje mora biti razumno. Na taj način su postavljene objektivne granice subjektivnom standardu.⁴⁹

⁴⁵ Za ekstenzivnu analizu cilja privrednog društva v. Vuk Radović, „Cilj privrednog društva sa osvrtom na aktuelnu pandemiju“, *Revija Kopaoničke škole prirodnog prava*, tom 2, 2021, 25–58.

⁴⁶ Mirko S. Vasiljević, *Korporativno upravljanje – Izabrane teme*, Udruženje pravnika u privredi Srbije, Beograd 2013, 59.

⁴⁷ G. Krieger, V. Sailer, op. cit., 1063.

⁴⁸ T. R. Kovačević, op. cit., 152.

⁴⁹ M. Winner, op. cit., 18. Upor. Miloš Spirić, „Pravilo poslovne procene“, *Pravo i privreda*, br. 4–6, Beograd, 2010, 199.

Dodatni problem predstavlja okolnost da zakon ne kaže da odluka mora biti doneta u razumnom uverenju da je „u interesu društva“, već „u najboljem interesu društva“. Kvalifikativ najboljeg interesa ne poznaju nemačko, austrijsko i hrvatsko pravo, već smatraju dovoljnim da se odluka donosi u interesu društva. Deo naše teorije upravo i zagovara ovakvo rešenje, jer se čini nelogičnom da se direktor učini odgovornim za radnju koja je u interesu društva i koja donosi dobit, ali nije najbolja moguća odluka, koja je mogla da donese veću dobit.⁵⁰ Drugi deo teorije ističe više argumenata protiv ovakvog stava, a kao najsnažniji među njima je da bi se na ovaj način dala prevelika sloboda direktorima u odlučivanju.⁵¹

Insistiranje na „najboljem interesu društva“ široko otvara vrata za utvrđivanje odgovornosti direktora. Međutim, u isto vreme, ne sme se smetnuti s uma ni činjenica da direktor u to treba razumno da veruje. Prema tome, ako je direktor razumno verovao da je jedna poslovna odluka u najboljem interesu društva, a on je doneo drugu, postoji osnov za odgovornost. U praktičnom smislu će ovakvi dokazi biti teže dostupni.

Prikazana analiza ovog uslova za primenu pravila poslovne procene daje slabe smernice praksi kako da ga pravilno shvati. Utisak je da jezičkim tumačenjem konstrukcije „razumno uverenje da se deluje u najboljem interesu društva“ ne dobijamo nikakve korisne putokaze. U suštinskoj analizi ovog uslova treba poći od odnosa sa prethodnim uslovom – uslovom informisanosti poslovne odluke. Uslov informisanosti se fokusira na pripremnu fazu donošenja jedne poslovne odluke, kao i sam postupak njenog donošenja. Kada je ispunjen uslov informisanosti, tj. kada su ispoštovani proceduralni uslovi, prelazi se u drugu fazu, u kojoj se poslovna odluka sadržinski ispituje. Na ovaj način se priznaje da poštovanje procedure ne može da bude opravdanje za bilo kakvu poslovnu odluku.⁵² Drugim rečima, mora da postoji i neka sadržinska (materijalna) kontrola poslovne odluke. Upravo uslov „razumnog uverenja da se deluje u najboljem interesu društva“ omogućava sudiji da vrši sadržinsku kontrolu odluka direktora.

Korporativna praksa razvijenih država (naročito, praksa sudova Delavera) smatra da sudije ne treba da se upuštaju u sadržinsko preispitivanje poslovnih odluka. Uostalom, u tome je i suština uvođenja pravila poslovne procene. Ako bi sudije mogle da analiziraju sadržinu poslovnih odluka, pravilo poslovne procene ne bi imalo nikakav praktičan značaj. Međutim, princip nepreispitivanja nije bez

⁵⁰ Jelena D. Lepetić, „Kompanijskoppravni režim sukoba interesa“, doktorska disertacija, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, 108–109.

⁵¹ Za detaljnu argumenaciju v. T. R. Kovačević, op. cit., 152–153.

⁵² M. Winner, op. cit., 19.

izuzetaka. Upravo prikazani uslov treba shvatiti kao zakonsko određivanje granica sadržinskom preispitivanju poslovnih odluka.

Kako bi se što više suzio manevarski prostor za sadržinsku analizu poslovnih odluka, potrebno je uslov „razumnog uverenja da se deluje u najboljem interesu društva“ suziti na najmanju moguću meru. Zbog toga se čini opravdanim da se analiza ovog uslova svede na pitanje da li je poslovna odluka imala racionalan osnov.⁵³ Tako se, primera radi, odluka da se prihvati niža od dve ponude, ne može smatrati racionalnom, te ne bi bila zaštićena pravilom poslovne procene.⁵⁴ Kao drugi primer se može navesti slučaj iz američke sudske prakse, gde su direktori doneli odluku da se sav novac društva uloži u fabriku za koju su znali da ne može da obavlja poslove profitabilno. Sud je učinio direktore odgovornim, jer nisu mogli da daju nikakvo zadovoljavajuće objašnjenje za izvršeno ulaganje.⁵⁵ Racionalno uverenje treba razumeti na sličan način kao građanskopravni pojam grube (krajnje) nepažnje, u smislu da se traži da se direktor nije ponašao onako kako se ponaša iole pažljiv čovek. Kako je gruba nepažnja objektivni standard, čini se da uslov nepostojanja racionalnog osnova treba što je moguće više objektivizirati. Na taj način jedan u osnovi subjektivni standard dobija značajnu objektivnu notu.

U praksi se kao posebno značajno postavlja pitanje u kojoj meri visokorizične poslovne odluke mogu biti zaštićene pravilom poslovne procene.⁵⁶ U odgovoru na ovo pitanje uvek treba imati na umu da poslovne odluke uvek sa sobom nose određen stepen rizika.⁵⁷ Postoje oblasti u kojima je rizik posebno izražen i uobičajen, u kom slučaju je jasno da bi takve odluke bile pod zaštitom pravila poslovne procene. Naročiti problem predstavljaju one odluke koje mogu da ugroze egzistenciju čitavog privrednog društva. Ni takve odluke, same po sebi, ne treba smatrati da su protivne dužnosti pažnje, osim ukoliko je verovatnoća pozitivnog ishoda po društva bila izrazito niska.⁵⁸ Viši stepen rizičnosti poslovnih odluka je naročito karakterističan za društva koja se nalaze na ivici stečaja, kada se može polemisati sa idejom da li u takvoj situaciji direktori imaju obavezu da preuzimaju veći rizik, što implicira niži stepen njihove odgovornosti.

⁵³ Douglas M. Branson, „The Rule That Isn't a Rule – The Business Judgment Rule“, *Valparaiso University Law Review*, No. 36, 2002, 641.

⁵⁴ D. M. Branson, op. cit., 641.

⁵⁵ Nav. prema: Melvin A. Eisenberg, „The Duty of Care of Corporate Directors and Officers“, *University of Pittsburgh Law Review*, No. 4, Vol. 51, 1990, 965–966.

⁵⁶ Više v. M. Winner, op. cit., 20.

⁵⁷ Rizik i neizvesnost su dve osnovne karakteristike poslovnih odluka. V. V. Radović (2024), op. cit., 33.

⁵⁸ M. Winner, op. cit., 20.

Savesno postupanje (postupanje u dobroj veri)

Savesno postupanje je propisano kao konstitutivni element dužnosti pažnje i uslov za primenu pravila poslovne procene. U našem pravu ovaj uslov se izričito pominje, te ima status zakonskog uslova. U američkoj sudskoj praksi on je poznat pod nazivom „dobra vera“ (engl. *good faith*).

Reći da direktor prilikom donošenja poslovnih odluka treba da postupa savesno, te da onaj direktor koji je postupao nesavesno ne zaslužuje da bude zaštićen pravilom poslovne procene, ne zahteva neko posebno objašnjenje, jer se ono i podrazumeva. Otuda se kao opravdano postavlja pitanje uloge koju ovaj uslov igra kod pravila poslovne procene, tj. kod dužnosti pažnje. Autori na ovo pitanje daju različite odgovore. Prema jednim, dužnost postupanja u dobroj veri je dužnost koja postoji uporedo sa dužnošću pažnje i lojalnosti, te se može posmatrati kao zasebna (treća) dužnost.⁵⁹ Prema drugima, dobra vera kao uslov za primenu pravila poslovne procene nema samostalan domen primene, već služi pravilnom shvatanju drugih uslova, a naročito postojanju razumnog uverenja da se deluje u najboljem interesu društva.⁶⁰ Treća grupa autora, savesnost posmatraju kao poseban, odvojen i samostalan uslov za primenu pravila poslovne procene.

Ne ulazeći u analizu da li dužnost savesnog postupanja može da bude i odvojena dužnost, činjenica je da je savesnost utkana u obe dužnosti koje poznaje naše pravo: dužnost pažnje i dužnost lojalnosti.⁶¹ Načelo savesnosti se izvodi iz moralnih vrednosti i nesporno predstavlja subjektivan standard. Ako se sagleda u kontekstu dužnosti pažnje, jasno je da je savesno postupanje sadržano i u uslovu da direktor mora razumno da veruje da je poslovna odluka u najboljem interesu društva. Teško je zamisliti situaciju da je direktor postupao u razumnom uverenju da je odluka u interesu društva, a da je u isto vreme postupao i u lošoj veri. Kako lice koje postupa u lošoj veri može da veruje da je odluka u najboljem interesu društva?

Uslov dobre vere može imati više domena primene. Profesor Branson ga posmatra kao „kišobran uslov“, koji predstavlja surogat tzv. testa mirisa.⁶² Naime,

⁵⁹ Ovo je stav sudova Delavera. V. Andrew S. Gold, „A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty“, *Maryland Law Review*, No. 2, Vol. 66, 2007, 406.

⁶⁰ Mirko Vasiljević, „Građansko pravo i *business judgment rule*“, *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije* (ur. Vuk Radović), Pravni fakultet Univerziteta u Beogradu, Beograd, 2011, 28.

⁶¹ J. D. Lepetić, op. cit., 105; Borko Mihajlović, „Dužnost lojalnosti prema privrednom društvu“, doktorska disertacija, Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2018, 45.

⁶² D. M. Branson, op. cit., 642.

moguće je da su ispunjeni svi uslovi za primenu pravila poslovne procene, ali da se čini da nešto nije u redu („ne miriše dobro“). Upravo ono što nedostaje je dobra vera. Uslov dobre vere ne može biti ispunjen ako je postupak donošenja poslovne odluke bio „kontaminiran“ nedozvoljenim motivima. Kako je to jedan američki sudija rekao, „svaka ljudska emocija može prouzrokovati da direktor stavi svoje interese, preference ili želje ispred dobrobiti društva“, što znači da zaštita koju pruža pravilo poslovne procene neće biti dostupna direktorima koji postupaju iz mržnje, osvete, ljubomore, ponosa, srama, zavisti i sl.⁶³ Takođe, svesno kršenje pozitivnih propisa treba tretirati kao postupanje u lošoj veri. Konačno, direktor koji svesno prikrije određene značajne informacije od ostalih članova odbora direktora ne postupa u dobroj veri.⁶⁴

Uslov savesnosti u srpskom pravu nema veći praktičan značaj, jer postoje drugi uslovi koji garantuju savesnost donosioca poslovne odluke. Ovaj uslov veliki značaj ima u nekim drugim pravnim sistemima, poput američkog, gde je pravilo poslovne procene nekodifikovano i zasnovano na bogatoj, ali često neujednačenoj sudskoj praksi. Zbog toga se dobroj veri pridaje odlučujući značaj, jer tumačenje ovog pojma širi ili sužava domen primene pravila poslovne procene. Na jednoj strani se nalaze prodirektorska shvatanja, koja dobru veru razumeju kao čisto subjektivan standard, što implicira manja ovlašćenja sudije. Prema njima, direktor koji ima čisto srce i praznu glavu najverovatnije ne bi bio odgovoran za postupanje protivno dužnosti pažnje.⁶⁵ Na drugoj strani su stavovi koji u analizu dobre vere uključuju i objektivne elemente, što omogućava veće ili manje kvalitativno preispitivanje poslovnih odluka. Rečima sudije Kvilena iz Delavera, „sudovi bez dileme već godinama ispituju poslovne odluke direktora u određenoj meri iz ugla kvaliteta odlučivanja. Biznismenima se to ne dopada, ali sudovi to čine i najverovatnije će nastaviti da to rade, jer su direktori poverenici“.⁶⁶

Pažnja dobrog privrednika

Postupanje u skladu sa standardom pažnje dobrog privrednika je četvrti konstitutivni element pravila poslovne procene u srpskom pravu. Aktuelni zakon

⁶³ M. A. Eisenberg, op. cit., 968–969.

⁶⁴ D. M. Branson, op. cit., 643.

⁶⁵ A. S. Gold, op. cit., 400–401.

⁶⁶ William T. Quillen, „Trans Union, Business Judgment, and Neutral Principles“, *Delaware Journal of Corporate Law*, No. 2, Vol. 10, 1985, 492.

je prvi naš kompanijski propis koji definiše ovu pažnju, i to kao „stepen pažnje sa kojom bi postupalo razumno pažljivo lice koje bi posedovalo znanja, veštine i iskustvo koje bi se osnovano moglo očekivati za obavljanje te dužnosti u društvu“.⁶⁷ Standard je objektivna, a njegova primena se vrši u dva koraka. U prvom koraku sudija utvrđuje koja to znanja, veštine i iskustvo se mogu osnovano očekivati za obavljanje dužnosti direktora koji je poslovnu odluku doneo, tj. zamišlja se direktor sa odgovarajućim kvalifikacijama. U drugom koraku se utvrđuje kakav stepen pažnje bi jedan takav direktor ispoljio ako bi postupao kao razumno pažljivo lice. Prema tome, odgovara se na pitanje da li bi konkretnu poslovnu odluku koju je doneo određeni direktor mogao da donese razumno pažljiv direktor sa odgovarajućim kvalifikacijama. Poređenje sa razumno pažljivim direktorom odgovarajućih kvalifikacija treba tretirati kao minimalan standard.

Pored prikazane, zakon sadrži još jednu normu, prema kojoj ako direktor „poseduje određena specifična znanja, veštine ili iskustvo, prilikom ocene stepena pažnje uzeće se u obzir i ta znanja, veštine i iskustvo“.⁶⁸ I ovde se vrši istovetna analiza, ali se u pojam apstraktnog direktora sa kojim se vrši poređenje ugrađuju i specifična znanja i iskustvo konkretnog direktora. Prema tome, ako je direktor ekspert u određenoj oblasti, njegova poslovna odluka se ne poredi sa uobičajenim direktorom, već sa direktorom koji poseduje i ta posebna znanja i iskustvo. Tako se od direktora sa većim kvalifikacijama očekuje i veći stepen pažnje.⁶⁹

Imajući u vidu sve uslove koji su propisani našim zakonom za primenu pravila poslovne procene, uvođenje pažnje dobrog privrednika je bilo nepotrebno. Uslov razumnog uverenja da se deluje u najboljem interesu društva je bio dovoljan, jer on u sebi već sadrži objektivne kriterijume. Zbog toga standard pažnje dobrog privrednika treba koristiti za utvrđivanje racionalne osnove za donošenje poslovne odluke.

Uslov pažnje dobrog privrednika u srpskom pravu ima jedan veliki nedostatak. Već je rečeno da se konkretno postupanje direktora poredi sa postupanjem lica koje poseduje znanja, veštine i iskustvo koji se osnovano mogu očekivati za obavljanje te dužnosti. Problem je u sledećem: koja se to znanja, veštine i iskustvo osnovano mogu očekivati za obavljanje dužnosti direktora? Zakonima se takvi uslovi ne predviđaju za bilo koju direktorsku poziciju, što je u skladu sa ustavom

⁶⁷ ZOPD, čl. 63(2).

⁶⁸ ZOPD, čl. 63(3).

⁶⁹ „... direktor mora imati određena znanja i iskustvo, što je minimalni standard, a ako poseduje bolje kvalitete nego što se to može razumno očekivati od lica na toj poziciji, biće odgovoran prema strožem kriterijumu.“ J. D. Lepetić, op. cit., 106.

proklamovanom slobodom preduzetništva. Svako lice, bez obzira na svoje kvalifikacije i iskustvo, može da bude imenovano za direktora. Štaviše, nisu retki slučajevi da na papiru potpuno nekvalifikovana lica ostvare velike preduzetničke uspehe. Ovakva norma očigledno diskriminiše one direktore koji nemaju odgovarajuće formalne kvalifikacije. Uostalom, puno toga zavisi od procene sudije koja su to znanja, veštine i iskustvo potrebni za obavljanje određene direktorske funkcije. Ako sudija proceni da su bila potrebna znanja iz oblasti ekonomije i finansija, svako lice koje nije završilo odgovarajuće ekonomske škole biće u nezavidnoj poziciji, jer se od tog lica očekuje da ta znanja poseduje. U suprotnom postoji realna šansa da to lice odgovara zbog nepostupanja u skladu sa dužnošću pažnje, tj. neće biti zaštićeno pravilom poslovne procene. Može se čak i reći da uslov pažnje dobrog privrednika podriva celu ideju pravila poslovne procene. Umesto da štiti direktore i ohrabruje preduzetništvo, naša norma može u praksi da ima potpuno suprotan efekat.

Pro futuro bi pažnju dobrog privrednika trebalo izdvojiti u zaseban (prvi) stav i koristiti je kao standard ponašanja članova uprave. Nakon toga bi u drugom stavu trebalo definisati uslove koji treba da budu ispunjeni kako bi direktor bio oslobođen od odgovornosti. Prema tome, pažnja dobrog privrednika bi trebalo da predstavlja naš pojam dužnosti pažnje, dok bi ostale uslove trebalo tretirati kao elemente pravila poslovne procene.

Nepostojanje ličnog interesa

Cilj pravila poslovne procene je zaštita direktora od građanskopravne odgovornosti zbog nepostupanja u skladu sa dužnošću pažnje. Prema tome, ovaj institut se vezuje isključivo za dužnost pažnje. Ako se donošenjem poslovne odluke zađe u domen primene dužnosti lojalnosti, nema mesta za pravilo poslovne procene. Prema nekim našim autorima, nepostojanje ličnog interesa ne treba smatrati konstitutivnim elementom pravila poslovne procene.⁷⁰ Ovo stanovište je ispravno, jer svaka od dve dužnosti koje poznaje naše pravo (dužnost pažnje i dužnost lojalnosti) ima svoj domen primene. Poslovna odluka koja se nalazi u domenu primene dužnosti lojalnosti, ne može biti zaštićena pravilom poslovne procene. Zakon ne poznaje pravilo poslovne procene kod dužnosti lojalnosti, a shodna primena ne bi dolazila u obzir.

Američka sudska praksa jedinstvenog je stava da se odsustvo sukoba interesa smatra uslovom za primenu pravila poslovne procene. Ovakav stav prihvataju

⁷⁰ M. Vasiljević (2011), op. cit., 32.

i neka zakonodavstva, ali i autoritativni model zakoni.⁷¹ Praktične razlike između ova dva sistema nisu velike. U našem pravnom sistemu se domen primene pravila poslovne procene sagledava iz ugla obuhvata pojma ličnog interesa kod dužnosti lojalnosti, te svi oni pravni poslovi, odnosno pravne radnje koje ne potpadaju pod taj pojam mogu biti zaštićeni pravilom poslovne procene. Suprotno našem sistemu, sistemi kod kojih je nepostojanje ličnog interesa izričit (negativan) uslov za primenu pravila poslovne procene, primenjuju standard ličnog interesa onako kako je definisan kod dužnosti pažnje.

TERET DOKAZA ISPUNJENOSTI USLOVA ZA PRIMENU PRAVILA POSLOVNE PROCENE

Do sada je bilo reči samo o materijalnoj strani pravila poslovne procene, koja se svodi na propisivanje blažih uslova za odgovornost direktora zbog ponašanja koje nije bilo u skladu sa dužnošću pažnje. Za direktore je jednako značajna i procesnopravna strana pravila poslovne procene, koja se fokusira na teret dokaza ispunjenosti ovih uslova. Na pitanje ko ima obavezu da u postupku utvrđivanja odgovornosti direktora dokaže ispunjenost uslova za primenu pravila poslovne procene uporedna zakonodavstva odgovaraju na dva, potpuno suprotna načina.

U američkom pravu se primenjuje pretpostavka da su direktori postupali u skladu sa dužnošću pažnje. Da bi oborio pretpostavku, tužilac treba da dokaže da nije ispunjen neki od uslova za primenu pravila poslovne procene (na primer, da postoji sukob interesa, da je direktor postupao u lošoj veri, da odluka nema racionalnu poslovnu svrhu, i sl.). Kada se pretpostavka obori, pravilo poslovne procene gubi svoju zaštitnu svrhu. Tada teret dokazivanja prelazi na direktora, koji ako želi da se oslobodi odgovornosti treba da dokaže potpunu pravičnost poslovne odluke za društvo i njegove nosioce rizika poslovanja (tzv. test potpune pravičnosti).⁷² Uvođenjem procesne pretpostavke u korist direktora se na dosledan i celovit način sprovodi njihova zaštita.

Drugi sistem primenjuju neke države evropsko-kontinentalne pravne tradicije, poput Nemačke i Austrije, koje su prilikom preuzimanja instituta dužnosti

⁷¹ ALI, *Principles of Corporate Governance: Analysis and Recommendations*, paragraf 4.01(c) (1); EMCA, Sec. 10.01(3)(a); australijski *Corporations Act*, Sec. 180(2)(b); austrijski *AktG*, § 84(1a). Iako nije izričito napisano, ovakav stav preovlađuje i u Nemačkoj. G. Krieger, V. Sailer u: K. Schmidt, M. Lutter (Hrsg.), op. cit., 1063.

⁷² Bernard S. Sharfman, „The Importance of the Business Judgment Rule“, *New York University Journal of Law and Business*, No. 1, Vol. 14, 2017, 50–53.

pažnje i pravila poslovne procene izvršile određena prilagođavanja. Jedna od tih modifikacija se vezuje upravo za procesnopravnu poziciju direktora u postupku utvrđivanja građanskopravne odgovornosti. Prema tim rešenjima, teret dokazivanja uslova za primenu pravila poslovne procene je na direktorima, a ne na tužiocima. Argumentacija za ovakvo rešenje je dvostruka. Prvo, ako bi se prihvatilo suprotno pravilo, prema kome je teret dokazivanja nepostojanja uslova za primenu pravila poslovne procene na tužiocu, direktori bi bili prekomerno privilegovani. Činjenica da je standard odgovornosti niži od standarda ponašanja je dovoljna privilegija koja se daje direktorima. Na ovaj način se ostvaruje kompromis između dve vrednosti: potreba da se očuva diskrecija članova uprave i potreba da se članovi uprave učine odgovornim za posledice svojih poslovnih odluka.⁷³ Drugo, većina dokaza potrebnih za primenu pravila poslovne procene se nalaze u sferi uticaja članova uprave.⁷⁴ U našoj teoriji postoje i suprotni stavovi, prema kojima dokazivanje postojanja svih uslova za primenu pravila poslovne procene „predstavlja gotovo nerešiv zadatak“.⁷⁵

Poslednja dva srpska zakona o privrednim društvima su na različite načine uredila pitanje tereta dokazivanja. Zakonom iz 2004. godine ovo pitanje je ostalo neuređeno. Zbog toga se primenjivalo opšte procesnopravno pravilo, a to je da teret dokazivanja da je direktor postupio protivno dužnosti pažnje snosi ono lice koje to tvrdi (lat. *onus probandi incubit actori*).⁷⁶ Prema tome, tužilac je bio dužan da dokaže da nisu ispunjeni svi uslovi propisani zakonom.

Važeći zakon menja ovo rešenje, tako što propisuje da lice na koje se primenjuje dužnost pažnje koje „dokaže da je postupalo u skladu sa ovim članom nije odgovorno za štetu koja iz takvog postupanja nastane za društvo“.⁷⁷ Dakle, nedvosmisleno je teret dokazivanja primene pravila poslovne procene na direktorima.

U konkretnom slučaju, raspored tereta dokazivanja je sledeći. Tužilac podnosi tužbu za naknadu štete protiv direktora koji je postupio protivno dužnosti pažnje. Tužilac može biti samo privredno društvo ili to mogu biti i akcionari koji podnose derivativnu tužbu u svoje ime, a za račun društva. U tužbi tužilac mora da pruži sledeće dokaze: 1) da je tuženo lice subjekt dužnosti pažnje; 2) da odluka koja je doneta

⁷³ Stephen M. Bainbridge, „The Business Judgment Rule as Abstention Doctrine“, *Vanderbilt Law Review*, No. 57, 2004, 84.

⁷⁴ Sličan zaključak nudi i australijska sudska praksa. Michael Legg, Dean Jordan, op. cit., 415–418.

⁷⁵ T. R. Kovačević, op. cit., 153–154.

⁷⁶ *Ibidem*, 153.

⁷⁷ ZOPD, čl. 63(4).

spada u kategoriju poslovnih odluka;⁷⁸ 3) da je društvo pretrpelo štetu i 4) da postoji uzročna veza između donete poslovne odluke i nastale štete. Ako je tuženi prilikom donošenja poslovne odluke imao i lični interes, onda je tužilac dužan da dokaže i postojanje ličnog interesa tuženog. Podnošenjem svih ovih dokaza od strane tužioca nastupa oboriva pretpostavka da je tuženi postupio protivno dužnosti pažnje.⁷⁹ Ovakav zaključak je u skladu sa opštim pravilom našeg odštetnog prava, prema kome štetnik odgovara po principu subjektivne odgovornosti sa pretpostavljenom krivicom.⁸⁰

Tuženi, tj. lice koje je navodno prekršilo dužnost pažnje, može se osloboditi odgovornosti primenom pravila poslovne procene ako dokaže: 1) da je odluka bila zasnovana na adekvatnim informacijama i 2) da postoji racionalna osnova za donošenje poslovne odluke (odluka je doneta u razumnom uverenju da je u najboljem interesu društva). Alternativno, tuženi se ne mora pozivati na pravilo poslovne procene, već može dokazivati da je postupio u skladu sa dužnošću pažnje, a to znači sa pažnjom dobrog privrednika.

ZAKLJUČNE OPSERVACIJE

Osnovni problem srpskog shvatanja pravila poslovne procene je nedovoljno precizna zakonska regulativa. Čitanjem relevantnog člana neko može da zaključi da srpsko pravo ni ne poznaje pravilo poslovne procene. No, imajući u vidu da ono što je propisano dobrim delom odgovara uporednopravnom pojmu pravila poslovne procene, ovakav zaključak ne bi bio ispravan. Međutim, ako se i prihvati ideja da ovaj institut poznajemo, onda se javlja drugi problem, a to je kakav je odnos ovog instituta sa dužnošću pažnje. Opet, jezičkim tumačenjem se zaključuje da su u srpskom pravu dužnost pažnje i pravilo poslovne procene izjednačeni, tj. da između njih nema razlike. Ni ovakav stav ne treba prihvatiti, jer bi poistovećivanjem ta dva pojma pravilo poslovne procene izgubilo praktičan značaj. Umesto toga, kreativnim tumačenjem treba zauzeti sledeća dva stava:

– prvo, dužnost pažnje u srpskom pravu treba razumeti kao pažnju dobrog privrednika i

– drugo, pravilo poslovne procene pruža zaštitu onim direktorima koji mogu da dokažu da je poslovna odluka bila zasnovana na adekvatnim informacijama i da je postojao racionalni osnov za njeno donošenje.

⁷⁸ U najvećem broju slučajeva će pitanje da li je doneta poslovna odluka biti pravno pitanje, na koje će sud morati da dà odgovor po službenoj dužnosti. M. Winner, op. cit., 20.

⁷⁹ J. Veličković, op. cit., 83.

⁸⁰ M. Vasiljević (2011), op. cit., 35.

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APPLICATION OF THE BUSINESS JUDGMENT RULE

Summary

The business judgment rule was introduced into Serbian law almost three decades ago. Although a reasonable period for acclimatization to this Anglo-Saxon transplant has long passed, the impression is that the conditions for its application are still not sufficiently understood. This paper provides a detailed analysis of three conditions explicitly stated in our Company Law: a rational basis for making a business decision, acting in good faith, and acting in accordance with the standard of care of a good businessman. In addition, two other conditions that are not explicitly mentioned in our law are analyzed: the reliance of the business decision on adequate information and the absence of personal interest. The main problem with the Serbian understanding of the business judgment rule is the insufficiently precise legal regulation. The relationship between the duty of care and the business judgment rule is particularly unclear. The author advocates for the acceptance of a position that the concepts of duty of care and the business judgment rule should not be equated. The duty of care should be understood as the care of a good businessman, while the business judgment rule should be understood as providing protection to those directors who can demonstrate that the business decision was based on adequate information and that there was a rational basis for making it.

Key words: duty of care, director, care of a good businessman, good faith, company

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SUD U KONEKSITETU PRAVDE

ALEKSANDRA MAGANIĆ

AKTIVNA LEGITIMACIJA U SPOROVIMA O KLIMATSKIM PROMJENAMA

Nevjerojatna snaga prirode koja se intenzivira i očituje u prirodnim katastrofama kojima su izložena i područja koja do sada to nisu bila, čovječanstvu donose alarmantnu poruku – vrijeme je da se poduzmu odlučni koraci u borbi za ublažavanje posljedica klimatskih promjena. Borba za ostvarenje tih ciljeva pravnim putem očituje se u vođenju sporova o klimatskim promjenama. Ovo novo pravno područje, koje kao takvo nije neposredno uređeno pravnim pravilima, temelji se na nekoliko važnih činjenica. Jedna od njih jest da borba za zdraviji životni okoliš traje već izvjesno vrijeme te da se uz zdravi okoliš, kao nova sintagma razvija i pojam klimatskih promjena, odnosno mjera koje se poduzimaju da bi se klimatske promjene ublažile. Zbog toga su uspjesi (ali i neuspjesi) tih sporova, pravna iskustva koja se prelijevaju preko granica nacionalnih pravnih sustava i djeluju kao precedenti za sve buduće procese. U skladu s tim, u radu će u središtu pozornosti biti klasična procesualistička pitanja – tko je potencijalni tužitelj, a tko tuženik, kojem sudu ili nekom drugom tijelu se obratiti te što se tužbenim zahtjevom traži. Ipak, prosuđujući da je od krucijalne važnosti upravo ovlaštenje za pokretanje sporova o klimatskim promjenama, primarno ćemo se baviti aktivnom legitimacijom.

Ključne riječi: sporovi o klimatskim promjenama, actio popularis, aktivna legitimacija, udruge za zaštitu okoliša, kolektivna pravna zaštita

U V O D

Interes javnosti za sporove o klimatskim promjenama raste, o čemu svjedoči i nevjerojatan rast broja slučajeva koji se tom tematikom bave. Prema izvješću

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Grantham Research Institute on Climate Change and the Environment iz lipnja 2024.¹ baza podataka Sabin Centra,² bilježi 2.666 sporova o klimatskim promjenama. Sedamdeset posto sporova o klimatskim promjenama pokrenuto je nakon 2015. odnosno nakon prihvaćanja Pariškog sporazuma.³ Čak 233 spora pokrenuta su 2023. godine.⁴ Sukladno tome, statistički podaci nas upozoravaju da je tematika sporova o klimatskim promjenama postala modernom temom od izvanrednog značaja za opstanak čovječanstva.

Nedavne odluke Europskog suda za ljudska prava o sporovima o klimatskim promjenama,⁵ posebnu pažnju su usmjerile na osobe ili tijela koja su ovlaštena pokrenuti ih, pri čemu je položaj udruge za zaštitu okoliša kao aktivnih sudionika u realizaciji zahtjeva za ublažavanje štetnih posljedica nespornih promjena klime bio gotovo središnja tema odluke u slučaju *Verein KlimaSeniorinnen Schweiz*.

S druge strane, unatoč tome što spor u predmetu *Carême* nisu pokrenule udruge za zaštitu okoliša, već gospodin Daniel Carême, i ova je odluka bila zanimljiva s aspekta ovlaštenika na pokretanje tih sporova. Naime, gospodin Carême zahtjev je podnio u svoje ime i kao gradonačelnik općine Grande-Synthe, budući da je tu funkciju vršio do srpnja 2019, nakon čega je izabran u Europski parlament i preselio se u Bruxelles. On je tvrdio da Francuska nije poduzela dovoljne mjere kako bi spriječila klimatske promjene koje su štetno utjecale na njegovo pravo na život i poštivanje njegovog privatnog i obiteljskog života, pozivajući se na povrede čl. 2 i čl. 8 Konvencije o zaštiti ljudskih prava i temeljnih sloboda.⁶ Općina Grand-Synthe bila je ekstremno izložena klimatskim promjenama, osobito poplavama.

¹ Joana Setzer, Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2, <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf>, 20. 10. 2024.

² Climate Change Litigation Databases, <https://climatecasechart.com/>, 20. 10. 2024.

³ Pariški sporazum o klimatskim promjenama (dalje u tekstu: Pariški sporazum) zaključen je 12. prosinca 2015. godine, a stupio je na snagu 4. studenog 2016. godine nakon ratifikacije Europske unije. Do prosinca 2016. sporazum su potpisale 194 države članice UNFCCC, a njih 118 su ga ratificirale. Glavni cilj sporazuma je ograničavanje globalnog zatopljenja na temperature znatno ispod 2°C.

⁴ J. Setzer, C. Higham, op. cit., 2.

⁵ *Verein KlimaSeniorinnen Schweiz protiv Švicarske*, zahtjev br. 53600/20 od 7. travnja 2024; *Carême protiv Francuske*, zahtjev br. 7189/21 od 7. travnja 2024; *Duarte Agostinho i dr. protiv Portugala i 32 države*, zahtjev br. 39371/20 od 7. travnja 2024. Dakle, sve tri odluke donesene su istog dana, ali samo u predmetu *Verein KlimaSeniorinnen Schweiz protiv Švicarske* donesena je odluka o meritumu. U ostala dva predmeta zahtjevi nisu bili dopušteni.

⁶ Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda, *Narodne novine* – MU, br. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17. (dalje u tekstu: Konvencija).

Tek naznake nekih legitimacijskih problema koji su razmatrani u praksi Europskog suda za ljudska prava, ali i brojnim drugim predmetima o klimatskim promjenama, ukazuje na to da je ova tema od primarnog značaja za ostvarivanje ciljeva koji se namjeravaju ostvariti njihovim vođenjem. Zbog toga ćemo kroz bogatu praksu sudova nastojati prikazati tko su bili ili bi mogli biti tužitelji u sporovima o klimatskim promjenama te kakvi su se eventualno problemi pojavili u ostvarivanju njihove aktivne legitimacije. Osim toga, zadaća ovog rada bit će i oslikati položaj udruge za zaštitu okoliša kao potencijalnih tužitelja u sporovima o klimatskim promjenama, kao i pravnom putu koji im u ostvarivanju zahtjeva za pružanje pravne zaštite predstoji. U okviru tako postavljenih ciljeva prikazat ćemo i problematiku aktivne legitimacije u sporovima o klimatskim promjenama proizašlu iz odluka ESLJP-a u predmetima *Verein KlimaSeniorinnen Schweiz* i *Carême*.

TKO SU TUŽITELJI U SPOROVIMA O KLIMATSKIM PROMJENAMA

Sporovi o klimatskim promjenama definiraju se kao svi sporovi čiji se predmet odlučivanja odnosi na klimu. Često se sagledaju kao instrument putem kojeg određena ovlaštena tijela ili pojedinci parnični postupak nastoje iskoristiti za poduzimanje mjera u cilju ublažavanja klimatskih promjena i osiguranje sredstava koja bi služila u tu svrhu. Sabin Center sporove o klimatskim promjenama određuje kao sporove pokrenute pred sudskim ili kvazisudskim tijelima koji uključuju materijalna pitanja znanosti o klimatskim promjenama, politike i prava.⁷ Iz navedenog proizlazi da je riječ o definicijama koje su određene pojedinim ključnim elementima tih postupaka – s obzirom na cilj koji se njima nastoji ostvariti, s obzirom na sudionike koji u tim sporovima sudjeluju i s obzirom na tijela koja o tim sporovima odlučuju.

Prateći pojedine zanimljive predmete iz bogate prakse sporova o klimatskim promjenama razvidno je da se kao tužitelji mogu pojaviti pojedinci, skupine građana, udruge, zaklade, tvrtke ili vlade.

Leghari

U predmetu *Leghari*⁸ *pakistanski poljoprivrednik* tužio je pakistansku vladu za propuste zbog neprovođenja Nacionalne politike klimatskih promjena iz 2012. i Okvira za provedbu politike klimatskih promjena (2014–2030). On je tvrdio da

⁷ J. Setzer, C. Higham, op. cit., 7.

⁸ *Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 and 14 September 2015, <https://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/>, 21. 10. 2024.

bi vlada trebala nastaviti s naporima za ublažavanje klimatskih promjena ili prilagodbu te da je neuspjeh vlade da ispuni svoje ciljeve rezultirao neposrednim učincima na sigurnost vode, hrane i energije u Pakistanu. Takvi su propusti povređivali njegovo pravo na život. Žalbeni sud prihvatio je žalbu gospodina Legharija i utvrdio da je kašnjenje i letargija države u provedbi Okvira povrijedila temeljna prava građana. Osim toga, sud je naložio da relevantni ministri u vladi imenuju glavnu osobu za klimatske promjene i predstave popis mjera do 31. prosinca 2015. te naložio osnivanje Povjerenstva za klimatske promjene sastavljeno od predstavnika ključnih ministarstava, nevladinih organizacija i tehničkih stručnjaka za praćenje mjera koje je vlada trebala poduzeti. Odlukom od 14. rujna sud je imenovao 21 osobu u Povjerenstvo i dodijelio im različite ovlasti.

Lliuya

Na drugom kraju svijeta u Peruu gospodin *Saúl Luciano Lliuya*, peruanski farmer koji živi u Huarazu, u studenom 2015. podnio je tužbu protiv RWE-a, najvećeg proizvođača električne energije u Njemačkoj,⁹ pred zemaljskim (okružnim) sudom u Essenu u Njemačkoj,¹⁰ u kojoj je zatražio utvrđenje da RWE doprinosi klimatskim promjenama i naknadu štete. U tužbi gospodina Lliuya koju je podržala i njemačka nevladina organizacija *Germanwatch*, navedeno je da RWE, svjesno doprinosi klimatskim promjenama emitiranjem značajne količine stakleničkih plinova (GHG) te da na taj način snosi i odgovornost za topljenje planinskih ledenjaka u blizini grada Huaraza u kojem on živi. Topljenje planinskih ledenjaka izazvalo je akutnu prijetnju jer je Palcacocha, ledenjačko jezero smješteno iznad Huaraza, doživjelo značajan volumenski porast od 1975, koji se dramatično ubrzao od 2003. Gospodin Lliuya je RWE-ove emisije okarakterizirao kao smetnju zbog koje je tužitelj imao nadoknadive troškove za ublažavanje. Tvrdi da je RWE doprinio emisijama koje su odgovorne za klimatske promjene, time i za rast jezera, zatražio je od suda da naloži RWE-u da mu nadoknadi dio troškova za koje se očekuje da će on i vlasti Huaraza imati radi postavljanja zaštite od poplava. Izračunati udio iznosio je 0,47% ukupnog troška, isti postotak kao procijenjeni doprinos RWE-a globalnim industrijskim emisijama stakleničkih plinova od početka industrijalizacije (od 1715. godine nadalje).

U vrijednosnom smislu radilo bi se oko 17.000 eura, pri čemu financijski probitak koji bi gospodin Lliuya ostvario nije od značaja, budući da su sami troškovi

⁹ *Luciano Lliuya v. RWE AG*, Case No. 2 O 285/15 Essen Regional Court, On Appeal, <https://climatecasechart.com/non-us-case/liiuya-v-rwe-ag/>, 21. 10. 2024.

¹⁰ Njem. *Landgericht Essen*.

vještačenja koji su se morali predujmiti iznosili 20.000 eura. Stoga ciljevi koji su se namjeravali ostvariti vođenjem ovoga postupka nisu bili usmjereni na stjecanje dobiti, već na poruku koja je trebala vrijediti za cijeli svijet. Naime, radi se o tome da se donese odluka koja bi imala obilježja precedenta, jer bi se druge osobe pogođene tim postupanjem na nju mogle pozvati i na taj način ostvariti dodatni pritisak na postupanje politike.¹¹

Zemaljski sud odbacio je tužbene zahtjeve gospodina Lliuye za utvrđenje i privremenu mjeru zabrane rada te zahtjev za naknadu štete. Sud je smatrao da gospodinu Lliuyi ne može pružiti učinkovitu zaštitu (jer se njegova situacija ne bi promijenila čak i ako bi RWE prestao emitirati) kao i da se u složenim komponentama uzročno-posljedične veze ne može uočiti nikakav „linearni uzročno-posljedični lanac“ između pojedinih emisija stakleničkih plinova i određenih utjecaja klimatskih promjena.

Međutim, Viši zemaljski sud u Hammu,¹² u povodu žalbe je u studenom 2017. priznao tužbu kao valjanu i dopuštenu i naložio da se u predmetu provede dokazni postupak. U dokaznom postupku mora se utvrditi a) je li dom gospodina Lliuye ugrožen poplavama i odronima blata kao rezultat nedavnog povećanja volumena ledenjačkog jezera koje se nalazi u blizini i b) kako RWE-ove emisije doprinose tom riziku. Žalbeni sud će preispitati ekspertizu o RWE-ovim emisijama CO₂, doprinosu tih emisija klimatskim promjenama, rezultirajućem utjecaju na ledenjak Palcaraju i doprinosu RWE-ovog udjela odgovornosti za izazivanje rezultirajućih učinaka. Zbog pandemije COVID-a terenski posjet morao je biti nekoliko puta odgođen. U svibnju 2022. obavljen je posjet lokaciji u andskom gradu Huarazu. Suci Višeg zemaljskog suda (OLG) u Hammu, vještaci koje je imenovao sud i odvjetnici obiju stranaka otputovali su u Peru kako bi se ispitalo prijeti li kući tužitelja mogući poplavni val s glečerskog jezera Palcacocha iznad grada. Sudski vještaci sačinili su nalaz i mišljenje, a usmena rasprava očekivala se u 2023. godini.

Juliana

U predmetu *Juliana*, dvadeset i jedan mladi tužitelj podnio je ustavnu tužbu zbog povreda klime protiv američke vlade 2015. godine.¹³ U obrazloženju je navedeno da je vlada afirmativnim pristupom uzrokovala klimatske promjene i prekršila ustavna prava najmlađe generacije na život, slobodu i imovinu, kao i da nije

¹¹ Alexander Graser, Christian Helmrich, *Strategic Litigation*, Nomos, Baden-Baden, 2019, 126.

¹² Njem. *Oberlandesgericht Hamm*.

¹³ *Juliana v. United States*, U.S. District Court for the District of Oregon, case No. 947F.3d1159 (9th Cir.), <https://climatecasechart.com/case/juliana-v-united-states/>, 22. 10. 2024.

zaštitila temeljne resurse od javnog interesa. Devet godina Ministarstvo pravosuđa SAD podnosilo je zahtjeve kojima je utjecalo na odgodu postupka. Krajem 2023. sutkinja Okružnog suda u Okrugu Oregon presudila je u korist *Juliane* i dopustila nastavak postupka, da bi već u veljači 2024. Ministarstvo pravosuđa ponovno zatražilo odgodu (sedmi put). Unatoč tome što su članovi Kongresa, znanstvenici za dječja prava, profesori prava i svjetski stručnjaci potpisali *amicus brief* u prilog tužiteljima *Juliane* te isticali načela Deklaracije o neovisnosti i obveze predsjednika Bidena da štiti njihova prava, žalbeni sud Okruga Oregon (Devetog okruga) odbio je zahtjeve tužitelja za ponovno saslušanje ili preispitivanje *en banc*.¹⁴

Montana

Slično tome, 2020. je 16 mladih tužitelja koje je zastupao *Our Children's Trust* tužilo državu Montanu jer nije zaštitila njihovo ustavo pravo na čist i zdrav okoliš. U postupku pred okružnim sudom tvrdili su da energetska politika države Montane održava sustav temeljen na fosilnim gorivima koji doprinosi klimatskim promjenama i krši ustavno pravo mladih tužitelja na čist i zdrav okoliš, kao i njihovo pravo da traže sigurnost, zdravlje, sreću i dostojanstvo pojedinaca. Niži sud presudio je u korist tužitelja i odlučio da je *Montana Environmental Policy Act*, koji je zabranjivao državi da razmatra emisije stakleničkih plinova kao čimbenik pri provođenju energetskih projekata bio neustavan.¹⁵

Urgenda

Predmet *Urgenda* pokrenula je zaklada *Urgenda* i 886 građana tužbom za zaštitu kolektivnih interesa, a tužili su nizozemsku vladu ističući da su ciljevi smanjenja GHG bili nedovoljni, što je rezultiralo kršenjem građanske dužnosti brige koju je država dužna provoditi prema tužiteljima na temelju pravila nizozemskog odštetnog prava. Tužitelji su tvrdili da su takvim ponašanjem povrijeđena njihova prava na život te privatni i obiteljski život zaštićeni prema čl. 2 i 8 Konvencije koja se u Nizozemskoj neposredno primjenjuje. Postupak je vođen kroz tri različite sudske instance, da bi konačno Vrhovni sud utvrdio konvencijske povrede prava na život i prava na privatni i obiteljski život prema čl. 2 i 8 te naložio nizozemskoj vladi da smanji nacionalne emisije za 25% do 2020. u usporedbi s vrijednostima iz 1990, ostavljajući pritom vladi da izabere način na koji će provesti ta smanjenja.

¹⁴ Our Children's Trust, <https://www.ourchildrenstrust.org/juliana-v-us>, 22. 10. 2024.

¹⁵ *Held v. Montana*, <https://www.aclu.org/cases/held-v-montana>, 22. 10. 2024.

Neubauer

U predmetu *Neubauer*, osim *Luise Neubauer*, klimatske aktivistice, ukupno je *devet mladih tužitelja* smatralo da su njemačke mjere za zaštitu od klimatskih promjena nedovoljne zbog čega je podnijelo ustavnu tužbu. Njemački ustavni sud utvrdio je da odredbe Zakona o zaštiti klime od 12. prosinca 2019,¹⁶ o nacionalnim klimatskim ciljevima i godišnjim dopuštenim količinama emisije do 2030. godine, nisu u skladu s ustavnim pravima jer nedostaju mjere za daljnje smanjenje emisija od 2031. godine. Sukladno tome smatralo se da je zakon nesrazmjerno narušio temeljna prava budućih generacija. Odluka je specifična po tome što priznaje nepovratne učinke klimatskih prijelomnih točaka za buduće generacije.¹⁷ Slijedeći odluku BVerfG-a KSG je izmijenjen 18. kolovoza 2021.¹⁸

U rujnu 2024. podnesena je nova ustavna tužba protiv njemačke vlade. Ovaj put su tužitelji *Greenpeace e. V.*¹⁹ i *Germanwatch e. V.* i pojedinačni podnositelji, od kojih je jedna od podnositeljica klimatska aktivistica Luisa Neubauer, ukupno *54.000 pojedinačnih podnositelja*.²⁰ Predmet ustavne tužbe je bolja (učinkovitija) zaštita klime.

Friends of Earth Netherlands et al. v. Royal Dutch Shell

U svibnju 2021. Okružni sud u Haagu proglasio je *Shell* odgovornim za izazivanje opasnih klimatskih promjena. Kao rezultat postupka koji su pokrenuli nizozemski *Friends of Earth (Milieudéfense)* zajedno sa 17.000 tužitelja i šest drugih organizacija, sud je presudio da *Shell* mora smanjiti svoje emisije CO₂ za 45% u roku od 10 godina. Ova povijesna presuda ima ogromne posljedice za *Shell* i druge velike zagađivače na globalnoj razini.²¹

Nova tužba nizozemskog *Friends of Earth* podnesena je u siječnju 2024. protiv *ING-a*. *ING* je prema riječima direktora *Friends of Earth-a* bankar klimatske krize, pri čemu je ta banka bila meta zbog svoje veličine i utjecaja. Smatra se da

¹⁶ Bundes-Klimaschutzgesetz vom 12. Dezember 2019 (BGBl I S. 2513) das durch Artikel 1 des Gesetzes vom 15. Jul 2024 (BGBl. 2024 I Nr. 235) geändert worden ist. (dalje u tekstu: KSG).

¹⁷ Opširnije v. Helen Arling, „The German Federal Constitutional Court’s Climate Decision and its Implications for International Law“, *German Yearbook of International Law*, Vol. 64, Duncker&Humblot, Berlin, 2021, 407–422.

¹⁸ Erstes Gesetz zur Änderung des Bundes-Klimaschutzgesetz v. 18. august 2021, (BGBl I 3905).

¹⁹ Njem. *eingetragene Verein*; registrirana udruga.

²⁰ Zukunftsklage, <https://zukunftsklage.greenpeace.de/>, 23. 10. 2024.

²¹ *The People vs. Shell case*, <https://www.foei.org/people-vs-shell-case/>, 23. 10. 2024.

budući da financiraju onečišćivače, igraju ključnu ulogu u klimatskim promjenama. Iz *ING-a* su odgovorili da su uvjereni da (već) poduzimaju učinkovite mjere u borbi protiv klimatskih promjena te da je održivost dio njihovog ukupnog strateškog usmjerenja. *ING* je u prosincu iznio planove za postupno ukidanje svog financiranja projekata razvoja nafte i plina do 2040. To je izazvalo kritike klimatskih aktivista u to vrijeme jer pokazuje nedostatak bilo kakve ambicije. U pravnom smislu, *Friends od Earth* je upravnom odboru *ING-a* poslao pismo s detaljima tužbe i zahtjevima, što je preliminarni korak potreban prije podnošenja tužbe pred građanskim sudom u Nizozemskoj.²²

UDRUGE ZA ZAŠTITU OKOLIŠA

Nesporni utjecaj udruga za zaštitu okoliša kao pokretača sporova o klimatskim promjenama ili kao podupiratelja, u pravilu nezaštićenih pojedinaca čiji uspjesi u samostalnoj borbi protiv vlada ili moćnih korporacija nisu odviše izgledni, utječu na potrebu da se rad i djelovanje udruga za zaštitu okoliša posebno rasvijetli. Prema podacima Sabine Centra za pravo o klimatskim promjenama,²³ i Grantham istraživačkog instituta,²⁴ većinu sporova o klimatskim promjenama pokreću upravo nevladine organizacije ili pojedinci ili kombinacija tih dvaju tužitelja. To vrijedi i za 2023. godinu, jer u više od 70% slučajeva u SAD i ostatku svijeta kao tužitelji su uključeni ili pojedinci ili nevladine organizacije (udruge) ili kombinacija tih dvaju tužitelja. Taj trend odražava nastojanje sudionika civilnog društva, od kojih bi neki inače mogli biti isključeni iz donošenja odluka o klimatskim promjenama i odražava porast klimatskih parnica. Međutim, u SAD je gotovo 20% slučajeva podnesenih 2023. uključivalo vladine sudionike kao tužitelje, To su često bile vlade saveznih država koje su osporavale federalne odluke klimatske politike.²⁵

Ono što svakako impresionira je broj uključenih pojedinaca u pojedine postupke koji ukazuje na to da se građani žele uključiti u pitanja koja duboko pogađaju njihovu egzistencijalnu bit (primjerice, *Urgenda*, *Friends of Earth Netherlands et al. v. Royal Dutch Shell*, nova ustavna tužba u Njemačkoj protiv vlade, koja uz *Greenpeace* i *Germanwatch* uključuje 54.000 podnositelja).

Ovo je pitanje dakako usko vezano i uz modele kolektivne pravne zaštite koji u angloameričkim, ali izgleda i u nekim europskim modelima kolektivne pravne

²² *The People vs. Shell case*, <https://www.foei.org/people-vs-shell-case/>, 23. 10. 2024.

²³ Engl. Sabine Centar for Climate Change Law's.

²⁴ Engl. Grantham Research Institute.

²⁵ J. Setzer, C. Higham, op. cit., 18.

zaštite, primjerice poput Nizozemske, izvrsno funkcioniraju. Sljedeće pitanje koje se može pojaviti jest bi li pojedinac ili udruga za zaštitu okoliša u Hrvatskoj mogli pokrenuti sporove o klimatskim promjenama, dakle pitanje bi li udruge za zaštitu okoliša mogle pokrenuti postupke kolektivne pravne zaštite u koje bi, mogli biti uključeni i nezadovoljni građani?

Udruge za zaštitu okoliša u Hrvatskoj

Naime, sukladno Zakonu o zaštiti okoliša,²⁶ da bi udruga za zaštitu okoliša imala aktivnu legitimaciju za pokretanje postupka potrebno je da budu ispunjene pretpostavke propisane zakonom. Tako čl. 167, st. 1 ZZO-a u dijelu zakona koji se odnosi na pristup pravosuđu propisuje da ima vjerojatan pravni interes u postupcima uređenim ovim Zakonom u kojima je predviđeno sudjelovanje zainteresirane javnosti smatrat će se *svaka fizička i pravna osoba* koja zbog lokacije zahvata i/ili zbog prirode i utjecaja zahvata ili koja je pogođena ili će vjerojatno biti pogođena štetom u okolišu može, u skladu sa zakonom, dokazati da joj je narušeno pravo. Drugim riječima, pravo na pristup pravosuđu u postupcima koji se tiču sudjelovanja zainteresirane javnosti imaju fizičke i pravne osobe koje zbog lokacije zahvata i/ili zbog prirode i utjecaja zahvata ili koja je pogođena ili će vjerojatno biti pogođena štetom u okolišu može, u skladu sa zakonom dokazati da joj je narušeno pravo.

Pritom se u čl. 167, st. 2 ZZO-a određuje da se podrazumijeva da ima dovoljan (vjerojatan) pravni interes u postupcima uređenim ovim Zakonom u kojima je predviđeno sudjelovanje zainteresirane javnosti i *udruga civilnog društva* koja djeluje na području zaštite okoliša ako je: 1. registrirana sukladno posebnim propisima o udrugama te da joj je statutom kao cilj određena zaštita i unaprjeđenje okoliša, uključujući i zaštitu ljudskog zdravlja i zaštitu ili racionalno korištenje prirodnih dobara, te 2. registrirana u smislu podstavka 1. ovoga stavka najmanje dvije godine prije nego je započeo postupak tijela javne vlasti o zahtjevu povodom kojega iskazuje svoj pravni interes, te ako dokaže da je u tom razdoblju aktivno sudjelovala u aktivnostima vezanim za zaštitu okoliša na području grada ili općine gdje ima registrirano sjedište sukladno svojem statutu.

Stoga, da bi udruga za zaštitu okoliša imala pravo na pristup pravosuđu, mora biti registrirana za postizanje ciljeva koji se tiču unaprjeđenja i zaštite okoliša, postojati najmanje dvije godine prije nego što je počeo postupak tijela javne vlasti u kojem ona iskazuje i svoj pravni interes za sudjelovanjem te aktivno sudjelovati u razdoblju koje prethodi pokretanju toga postupka.

²⁶ Zakon o zaštiti okoliša, *Narodne novine*, br. 80/13, 153/13, 78/15, 12/18, 118/18, u daljnjem tekstu: ZZO.

Razlike u pretpostavkama koje mora ispuniti fizička ili pravna osoba iz čl. 167, st. 1 ili udruga civilnog društva iz čl. 167, st. 2 ZZO-a odnose se na okolnosti temeljem kojih se prosuđuje vjerojatnost pravnog interesa u postupku. Tako u slučaju da se pravo na pristup pravosuđu priznaje fizičkoj ili pravnoj osobi iz čl. 167, st. 1, *smatrat će se da ima vjerojatan pravni interes* u postupcima uređenim ovim zakonom u kojima je predviđeno sudjelovanje zainteresirane javnosti ako koja zbog lokacije zahvata i/ili zbog prirode i utjecaja zahvata ili koja je pogođena ili će vjerojatno biti pogođena štetom u okolišu može, u skladu sa zakonom, *dokazati da joj je narušeno pravo*. Dakle, smatrat će se da ima vjerojatni pravni interes ako dokaže da joj je narušeno pravo.

Nasuprot tome, kada je riječ o udruzi civilnog društva *podrazumijeva se da ima dovoljan (vjerojatan) pravni interes* u postupcima uređenim ovim zakonom u kojima je predviđeno sudjelovanje zainteresirane javnosti ako je: *1. registrirana za postizanje ciljeva koji se tiču unaprjeđenja i zaštite okoliša, 2. postoji najmanje dvije godine prije nego što je počeo postupak tijela javne vlasti u kojem ona iskazuje i svoj pravni interes za sudjelovanjem te aktivno sudjeluje u razdoblju koje prethodi pokretanju toga postupka.*

Slijedom navedenog, da bi fizička ili pravna osoba imala pravo na pristup pravosuđu prema odredbama ZZO-a ona će u prilog vjerojatnosti svoga pravnog interesa za sudjelovanje u postupku osporavanja akta javne vlasti morati dokazati da joj je narušeno pravo. Drugim riječima, ako osobno njoj nije narušeno pravo ili ako jest, ali ona to prije nego što je namjeravala pokrenuti postupak nije uspjela dokazati, ona neće moći pristupiti pravosuđu u kontekstu osporavanja akta javne vlasti, odnosno podnošenja žalbe odnosno tužbe. Ovakvo rješenje zaslužuje kritiku jer bi pristup pravosuđu fizičke ili pravne osobe bio ograničen uspješnošću dokazivanja da joj je zbog lokacije zahvata i/ili zbog prirode i utjecaja zahvata ili pogođenosti ili vjerojatnosti da će biti pogođena štetom u okolišu bilo narušeno njezino pravo.²⁷

Nešto drugačiji je slučaj kada se analizira pravo na pristup pravosuđu udruge civilnog društva jer ona neće morati dokazivati narušenost prava (čak niti prava njenih članova), već će se podrazumijevati da ona ima dovoljan (vjerojatan) pravni interes ako ispunjava zakonom propisane pretpostavke koje mora ispuniti udruga za zaštitu okoliša (u smislu cilja, vremena osnivanja i razdoblja aktivnosti). I ona će u kontekstu prava na pristup pravosuđu imati pravo osporavati odgovarajući upravni akt tijela javne vlasti, za koji je ovim zakonom, odnosno posebnim zakonom predviđena mogućnost podnošenja žalbe odnosno tužbe, te izjaviti žalbu Ministarstvu,

²⁷ O pojedinim legitimacijskim problemima u ostvarivanju zahtjeva za zaštitu okoliša opširnije v. Aleksandra Maganić, „Procesnopravni aspekti građanskopravne zaštite okoliša“, *Građanskopravna zaštita okoliša Modernizacija prava* (ur. Jakša Brabić), knjiga 38, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2017, 21–52.

odnosno podnijeti tužbu nadležnom sudu u skladu s ovim zakonom i posebnim zakonom, a radi osporavanja zakonitosti akata, radnji ili propusta (čl. 168, st. 2 ZZO).

Zakon o klimatskim promjenama i zaštiti ozonskog sloja,²⁸ udruge spominje u kontekstu javnosti. Naime, u čl. 7, st. 3 propisuje se da građani, kao pojedinci i/ili organizirani u strukovne udruge i udruge radi ublažavanja klimatskih promjena, prilagodbe klimatskim promjenama i zaštite ozonskog sloja pridonose svojim djelovanjem ostvarivanju ciljeva ublažavanja klimatskih promjena, prilagodbe klimatskim promjenama i zaštite ozonskog sloja. Dakle, određeno je da građani kao pojedinci ili organizirani u strukovne udruge ili udruge radi ublažavanja klimatskih promjena pridonose svojim djelovanjem ostvarivanju ciljeva ublažavanja klimatskih promjena. Zbog toga bi trebalo očekivati da im na raspolaganju stoje instrumenti putem kojih će ostvarivati svoj doprinos u ostvarivanju tih ciljeva. Međutim, zakon ništa ne određuje o instrumentima koje bi građani ili udruge mogli koristiti u svrhu ublažavanja klimatskih promjena.

U dijelu zakona koji se odnosi na pojmovna određenja propisano je da je javnost jedna ili više osoba, u skladu s nacionalnim propisima ili praksom, udruge, organizacije ili skupine osoba (čl. 9, tač. 12 Zakona o klimatskim promjenama). Pritom nije jasno odnosi li se sintagma iz navedene odredbe *u skladu s nacionalnim propisima ili praksom* na ranije donesene i primjenjivane odredbe o pravu na pristup pravosuđu fizičkih ili pravnih osoba iz čl. 167, st. 1 ZZO-a i udruga za zaštitu okoliša iz čl. 167, st. 2 ZZO-a. Ako da, to bi značilo da se navedeni subjekti mogu pojaviti kao osobe aktivno legitimirane za pokretanje postupaka za poništenje akata javne vlasti koji nisu u dovoljnoj mjeri učinkoviti da bi se njima mogle ublažavati posljedice klimatskih promjena.

Kratka analiza odredbi ZZO i Zakona o klimatskim promjenama ukazuje na to da bi se kao potencijalni osporavatelji akata javne vlasti koji bi se odnosili na zaštitu okoliša ili klimatske promjene mogle pojaviti fizičke ili pravne osobe, ako ispunjavaju zakonom propisane pretpostavke iz čl. 167, st. 1 ZZO-a ili udruge za zaštitu okoliša, ako ispunjavaju pretpostavke iz čl. 167, st. 2 ZZO-a. Put upravnopravne zaštite obuhvaćao bi dvije instance – upravno tijelo i drugostupanjsko upravno tijelo, kao i dvije sudske instance – upravni sud i Visoki upravni sud Republike Hrvatske. Navedene četiri instance (dvije upravne i dvije upravnosudske) iziskivale bi višegodišnji put pravne zaštite, koji bi morao biti iscrpljen, kako bi tražitelji pravne zaštite potencijalno mogli podnijeti ustavnu tužbu i pozvati se na povredu ustavnog prava. Ovo osobito zbog toga što je prema čl. 3 Ustava Republike Hrvatske,²⁹ očuvanje

²⁸ Zakon o klimatskim promjenama i zaštiti ozonskog sloja, *Narodne novine*, br. 127/19, u daljnjem tekstu Zakon o klimatskim promjenama.

²⁹ Ustav Republike Hrvatske, *Narodne novine*, br. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14, u daljnjem tekstu: Ustav RH.

prirode i čovjekova okoliša jedna od najviših vrednota ustavnog poretka Republike Hrvatske i temelj za tumačenje Ustava. Osim toga, država osigurava uvjete za zdrav okoliš te je svatko dužan, u okviru svojih ovlasti i djelatnosti, osobitu skrb posvećivati zaštiti zdravlja ljudi, prirode i ljudskog okoliša (čl. 69, st. 2 i 3 Ustava RH).

Dvojbeno je bi li se građani Ustavnom sudu Republike Hrvatske mogli neposredno obratiti iako prethodno nisu iscrpili pravni put, jer čl. 63 Ustavnog zakona o Ustavnom sudu Republike Hrvatske,³⁰ propisuje da će Ustavni sud pokrenuti postupak po ustavnoj tužbi i prije no što je iscrpljen pravni put i u slučaju kad se osporenim pojedinačnim aktom grubo vrijeđaju ustavna prava, a potpuno je razvidno da bi nepokretanjem ustavnosudskog postupka za podnositelja ustavne tužbe mogle nastati teške i nepopravljive posljedice. Stoga, ako bi bile ispunjene navedene pretpostavke koje Ustavni zakon o Ustavnom sudu RH propisuje, bilo bi prostora i za odlučivanje o pravu na zdrav okoliš jer je potpuno razvidno da bi nepokretanjem ustavnosudskog postupka za podnositelja ustavne tužbe mogle nastati teške i nepopravljive posljedice. S obzirom na strašne poplave i iznenadne odrone zemlje koji su pogodili nekolicinu zemalja Europske unije s velikim brojem ljudskih žrtava i koji su rezultat klimatskih promjena, za podnositelja ustavne tužbe koji nije iscrpio redovni put pravne zaštite u takvim bi okolnostima uistinu mogle nastati teške i nepopravljive posljedice. S druge strane, svjesni smo iznimno rijetkih slučajeva u kojima bi Ustavni sud bio spreman postupati i prije no što je redovni pravni put bio iscrpljen.

Međutim, ako bi se zahtjev trebao ostvarivati protiv Republike Hrvatske, postupak bi se potencijalno mogao provoditi u građanskom sudskom postupku, tužbom protiv Republike Hrvatske uz sve specifičnosti u parničnom postupku koje ta tužba donosi.³¹

Aktivna legitimacija za pokretanje postupaka kolektivne pravne zaštite za zaštitu okoliša u Hrvatskoj

Posebna problematika odnosila bi se na slučajeve u kojima bi udruge za zaštitu okoliša nastojale osigurati učinak odluke koja bi trebala obuhvatiti veliki broj građana, na znatno široj razini od pojedinačnog slučaja. U takvim bi se slučajevima zapravo radilo o kolektivnoj pravnoj zaštiti, o tome da udruga (a ne pojedinac) nastupa s pozicije interesa većeg broja pripadnika određene grupe ili klase, dakle kolektivnih interesa ili prava. Primjera u kojima su se udruge za zaštitu okoliša

³⁰ Ustavni zakon o Ustavnom sudu Republike Hrvatske, *Narodne novine*, br. 99/99, 29/02, 49/02.

³¹ Čl. 186a Zakona o parničnom postupku, *Narodne novine*, br. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14, 70/19, 80/22, 114/22, 155/23, u daljnjem tekstu: ZPP.

pojavljivale kao nositelji zahtjeva za ublažavanje klimatskih promjena iz prezentirane prakse je pregršt, poput *Urgende*, *Greenpeace*, *Germanwatcha* i sl.

Tužba za zaštitu kolektivnih interesa ili prava uređena je odredbama ZPP-a (čl. 502a–502h). Tako udruge, tijela, ustanove ili druge organizacije koje su osnovane u skladu sa zakonom, koje se u sklopu svoje registrirane ili propisom određene djelatnosti bave zaštitom zakonom utvrđenih kolektivnih interesa i prava građana, *moгу, kad je takvo ovlaštenje posebnim zakonom izrijeком predviđeno i uz uvjete predviđene tim zakonom*, podnijeti tužbu (tužba za zaštitu kolektivnih interesa i prava) protiv fizičke ili pravne osobe koja obavljanjem određene djelatnosti ili općenito radom, postupanjem, uključujući i propuštanjem, teže povređuje ili ozbiljno ugrožava takve kolektivne interese i prava (čl. 502a, st. 1 ZPP-a). Osim toga, propisano je da interesi iz st. 1. ovoga članka mogu biti *interesi koji se tiču čovjekova okoliša* i životne sredine, zatim moralni, etnički, potrošački, antidiskriminacijski i drugi interesi, koji su zakonski zajamčeni i koji moraju biti teže povrijeđeni ili ozbiljno ugroženi djelatnošću, odnosno općenito postupanjem osobe protiv koje se tužba podnosi (čl. 502a, st. 2 ZPP-a).

To bi zapravo značilo da bi postupak kolektivne pravne zaštite okoliša mogle pokrenuti samo udruge za zaštitu okoliša čija bi aktivna legitimacija za pokretanje takvih postupaka bila izrijeком propisana zakonom i uz uvjete propisane time zakonom. No je li tome uistinu tako? Prije svega, ZZO propisuje koje pretpostavke mora ispuniti udruга za zaštitu okoliša da bi mogla imati pravo na pristup pravosuđu (u smislu registracije, vremenskog razdoblja prije uključivanja u postupak osporavanja akta javne vlasti i aktivnosti koju mora ostvarivati u tom razdoblju), ali nigdje izrijeком ne predviđa da bi te udruge bile aktivno legitimirane pokrenuti postupak kolektivne pravne zaštite. Na koji bi način trebalo pristupiti toj problematici i kada su u pitanju sporovi o klimatskim promjenama?

Smatramo da neovisno o tome što aktivna legitimacija za pokretanje postupaka kolektivne pravne zaštite okoliša (ili potencijalno za ublažavanje klimatskih promjena) nije izrijeком propisana zakonom, ona bi bila nužna za ostvarivanje prava i interesa članova udruge koje ona štiti i interesa za čije se ostvarenje zalaže (kolektivnih interesa). Razloga je tome više. Prije svega, pojedinac koji bi se borio sam protiv u pravilu izrazito moćne korporacije teže će ostvariti uspjeh u parnici, no što će to biti u slučaju ako sudjeluje potpomognut nekom renomiranom organizacijom koja je sudjelovala u velikom broju sporova o klimatskim promjenama ili ekološkim akcijama. Tu su naravno i razlozi financijske prirode, jer pojedinac sam ne raspolaže s dostatnim financijskim sredstvima za pokretanje i vođenje postupaka, a problemi će se u pravilu pojaviti čim se zatraži predujam za troškove vještačenja, koji su u okolišnim stvarima vrlo visoki. Osim toga, već ranije smo istaknuli da budući da upravno-pravni put pravne zaštite okoliša pretpostavlja četiri instance, može se očekivati da

će predugo trajati, s prilično neizvjesnim krajem i u pravilu izostalim ostvarenjem prava građana koja se odnose na okolišna pitanja. Zbog svega toga bi aktivna legitimacija udruga za zaštitu okoliša za pokretanje postupaka kolektivne pravne zaštite bila neophodna. U nastavku teksta ćemo vidjeti da se tim problemom bavio i ESLJP.

Konačno, neka komparativna iskustva država Europske unije pokazuju da je kolektivna pravna zaštita okoliša učestala metoda pravne zaštite građana u okolišnim stvarima.³² Tako se primjerice u Danskoj postupci kolektivne pravne zaštite mogu pokrenuti zbog povreda ljudskih prava ili prava okoliša. U Francuskoj ovlaštene osobe ili tijela mogu biti dio grupe u grupnoj tužbi za zaštitu okoliša, a tužbu može podnijeti samo certificirana udruga djelujući na zaštiti okoliša ili potrošačkih prava. Podnijeti tužbu za zaštitu kolektivnih interesa u domeni zaštite okoliša može se i u Italiji i Portugalu.³³ Konačno, neka nizozemska iskustva iz postupaka kolektivne pravne zaštite smo već prethodno analizirali.

Premda smatramo da se aktivna legitimacija udruga za zaštitu okoliša, neovisno o tome što nije izrijekom propisana zakonom (ZZO-om) u postupcima kolektivne pravne zaštite treba primjenjivati, odnosno, drugim riječima da udruge za zaštitu okoliša trebaju pokretati postupke kolektivne pravne zaštite okoliša ili sporove koji se odnose na ublažavanje posljedica klimatskih promjena, osiguranje pravne predvidljivosti i pravne sigurnosti nalagalo bi se da se *de lege ferenda* takva odredba unese u odgovarajuće zakonske akte. U Francuskoj ovlaštene osobe ili tijela mogu biti dio grupe u grupnoj tužbi za zaštitu okoliša, a tužbu može podnijeti samo certificirana udruga djelujući na zaštiti okoliša ili potrošačkih prava.

AKTIVNA LEGITIMACIJA ZA POKRETANJE SPOROVA O KLIMATSKIM PROMJENAMA U PRAKSI ESLJP-a

Verein KlimaSeniorinnen Schweiz protiv Švicarske

Odlukom ESLJP-a u predmetu *Verein KlimaSeniorinnen Schweiz protiv Švicarske* utvrđena je povreda prava na obiteljski i privatni život iz čl. 8 Konvencije u kontekstu klimatskih promjena i povreda prava na pristup pravosuđu iz čl. 6 Konvencije. Riječ je o iznimno važnoj odluci kojom ESLJP uspostavlja značajan precedent utvrđenjem dužnosti država da provode učinkovite klimatske promjene.

³² EJF Monitoring Report #2 2022 „A Barometer of Collective Redress Regulation in Europe“, European Justice Forum, Brussels, March 2022, <https://europeanjusticeforum.org/recent/news/ejf-issues-the-second-monitoring-report-on-collective-redress-regulation-in-europe/>, 25. 10. 2024.

³³ EJF Monitoring Report #2 2022 „A Barometer of Collective Redress Regulation in Europe“, European Justice Forum, Brussels, March 2022, 11–12.

Presuda naglašava ključnu vezu između ljudskih prava i zaštite okoliša potvrđujući da neuspjeh u rješavanju problema klimatskih promjena na odgovarajući način predstavlja kršenje prava na poštivanje privatnog i obiteljskog života.³⁴

Međutim, središnju točku ove odluke predstavljali su problemi koji su se vezivali uz pitanja aktivne legitimacije udruge i mogućnost da udruga pretrpi povrede određenih ljudskih prava. Naime, kao podnositelji zahtjeva protiv Švicarske pred ESLJP-om su se osim Udruge *KlimaSeniorinnen* Švicarska pojavile i četiri švicarske državljanke koje su sve bile članice te udruge. Udruga je osnovana s ciljem promicanja i provedbe učinkovite zaštite klime u ime svojih članova. Članice udruge su žene koje žive u Švicarskoj i u pravilu imaju više od 70 godina. Uglavnom, podnositeljice su u zahtjevu pozivale na to kako su toplinski valovi, nastali kao posljedica klimatskih promjena, negativno djelovali na njihov život i zdravlje. Razmatrajući povrede na koje su se podnositeljice pozivale,³⁵ ESLJP je u odnosu na povrede koje je razmatrao, razdvojio položaj udruge od položaja koji su imale pojedinačne podnositeljice.

Ključno je bilo da je ESLJP u odnosu na udrugu *KlimaSeniorinnen* Švicarska razdvojio pitanje njezina prava na zastupanje (*locus standi*) od statusa žrtve te da je utvrdio da se udruga može pojaviti pred ESLJP-om kao podnositeljica a) ako je zakonito osnovana, b) ako slijedi svrhu radi koje je osnovana te c) ako je kvalificirana da u djeluje u ime svojih članova radi zaštite prava zaštićenih Konvencijom. Budući da je udruga *KlimaSeniorinnen* Švicarska ispunjavala sve navedene uvjete, bila je ovlaštena na zastupanje svojih članova.

Sud je istaknuo da Konvencijom nije utvrđeno kao posebno konvencijsko pravo – pravo na zaštitu okoliša, međutim da bi ga trebalo izvesti iz prava na privatni i obiteljski život. Sukladno tome, utvrdio je da Švicarska nije ispunila svoje pozitivne obveze koje su obuhvaćene čl. 8 Konvencije.

S druge strane, budući da su domaća tijela i sudovi osporavali udruzi *KlimaSeniorinnen* Švicarska aktivnu legitimaciju za postupke koji su se ticali klimatskih promjena, oni uopće nisu razmatrali status udruge podnositelja zahtjeva te se nisu bavili sadržajem njezina zahtjeva. U takvim okolnostima, sud je iznašao da je pravo udruge na pristup sudu bilo ograničeno na način da je bila ugrožena sama bit prava iz čl. 6, st. 1 Konvencije.³⁶

³⁴ Switzerland: Failing to comply with European Court's ruling on climate protection not an option, <https://www.icj.org/switzerland-failing-to-comply-with-european-courts-ruling-on-climate-protection-not-an-option/>, 25. 10. 2024.

³⁵ Podnositelji su se pozivali na povrede čl. 2 (pravo na život), i 8 (poštivanje privatnog i obiteljskog života), 6 (pravo na pristup pravosuđu) i 13 (pravo na djelotvoran pravni lijek) Konvencije.

³⁶ Opširnije o predmetima *Verein KlimaSeniorinnen Schweiz protiv Švicarske*, *Carême protiv Francuske* i *Duarte Agostinho i dr. protiv Portugala i 32 države v. Aleksandra Maganić*, „Sporovi o

Carême protiv Francuske

U legitimacijskom smislu zanimljiva je i odluka ESLJP-a *Carême protiv Francuske*. U tom predmetu podnositelj gospodin Daniel Carême podnio je zahtjev protiv Francuske tvrdeći da nije poduzela dovoljne mjere kako bi spriječila klimatske promjene koje su štetno utjecale na njegovo pravo na život i poštivanje njegovog privatnog i obiteljskog života, prema čl. 2 i 8 Konvencije.

Gospodin Carême zahtjev je podnio u svoje ime i kao gradonačelnik općine Grande-Synthe, Funkciju gradonačelnika vršio je do srpnja 2019, nakon čega je izabran u Europski parlament i preselio se u Bruxelles. Općina Grand-Synthe izložena je klimatskim promjenama, osobito poplavama.

U svojoj odluci ESLJP se ključnim je smatrao da nakon što je podnositelj zahtjeva postao član Europskog parlamenta i preselio u Bruxelles, jedina konkretna veza s općinom bila je činjenica da tamo živi njegov brat. Međutim, prema ustaljenoj praksi Suda odrasli braća i sestre ne mogu se pozivati na aspekt obiteljskog života iz čl. 8 Konvencije.³⁷

Podnositelj zahtjeva je već u prvom zahtjevu kao adresu svoga prebivališta naveo općinu Grand-Synthe, iako ona u vrijeme podnošenja zahtjeva to više nije bila i on uopće nije živio u Francuskoj. S obzirom na to, nije mogao tvrditi da bi mogao imati status žrtve prema čl. 34 Konvencije. Sud nije prihvatio argument podnositelja zahtjeva da je zahtjev podnio kao bivši gradonačelnik Grande-Synthea, jer sukladno praksi ESLJP-a decentralizirane vlasti koje vrše javnu funkciju nemaju pravo podnijeti zahtjev Sudu prema čl. 34 Konvencije. U takvim okolnostima Sud je prigovor podnositelja zahtjeva proglasio nedopuštenim, jer je bio nespojiv *ratione personae* s odredbama Konvencije.³⁸

UMJESTO ZAKLJUČKA

Sporovi o klimatskim promjenama uzbudljiva su priča o pokušaju različitih osoba ili tijela, neovisno o tome gdje žive, da pokrenu i ostvare raznovrsne zahtjeve o ublažavanju posljedica klimatskih promjena. Uspjesi ostvareni u takvim postupcima pokazuju da i pravni instrumenti mogu biti od presudnog značaja za čovječanstvo, jer svaka pobjeda malog čovjeka iz bilo koje zemlje može, snagom

klimatskim promjenama pred Europskim sudom za ljudska prava“, *Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća*, Zbornik radova X međunarodnog savjetovanja (ur. Dinka Šago), Pravni fakultet u Splitu, Split, 2024, 61–84.

³⁷ Tač. 81.

³⁸ Tač. 83 i 85.

svoje uvjerljivosti i logičkom pravnom argumentacijom utjecati na stotine drugih. Ne osporavajući značaj sadržaja zahtjeva, metode pravne zaštite u okvirima kojih se ti postupci odvijaju, jasno je da bez tužitelja nema parnice,³⁹ zbog čega aktivna legitimacija za pokretanje sporova o klimatskim promjenama postaje središtem istraživačkog interesa.

Unatoč tome što priča o sporovima o klimatskim promjenama može biti inicirana aktivizmom i snagom volje pojedinca, koji će se često dugotrajno boriti s vjetrojama, moderni tijek i razvoj ovih postupaka obilježavaju aktivnosti i nastojanja različitih udruga za zaštitu okoliša, koje se aktivno uključuju u procese zaštite (ljudskih) prava onih čija su prava grubo povrijeđena. Autoritet koji su pojedine od njih izgradile sudjelujući u brojnim procesima često je jedna od bitnih pretpostavki za realizaciju uspjeha u sporovima o klimatskim promjenama. Sinergija udruga i nezadovoljnih građana iziskuje postojanje jasnih i jednostavnih modela kolektivne pravne zaštite u okviru kojih se mogu ostvarivati njihovi brojni ciljevi.

Konačno, ne manje bitno, u suvremenim sporovima o klimatskim promjenama kao tužitelji se pojavljuju mladi predstavnici novih i budućih generacija, zabrinuti za okolišne i klimatske uvjete u kojima bi tek *pro futuro* trebali živjeti. Kao jedan od načina koji bi trebao donijeti bolje sutra, oni vide upravo sporove o klimatskim promjenama.

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ACTIVE LEGITIMATION IN CLIMATE CHANGE LITIGATION

Summary

The overwhelming power of nature, intensifying and manifesting in natural disasters even in regions previously unaffected, brings humanity an alarming message: it is time to take decisive steps to mitigate the impacts of climate change. The legal fight to achieve these goals is taking form in climate change litigation. This emerging legal field, not directly regulated by specific legal rules, rests on several key principles. One of these is the recognition that the pursuit of a healthier environment has been ongoing for some time, and with this pursuit, concepts of climate change and the measures taken to mitigate it have evolved. Therefore, both the successes and failures of these litigations serve as legal precedents, transcending national legal systems and informing future cases globally. In line with this, the focus of this paper will be on classical procedural questions: who is the potential plaintiff,

³⁹ Lat. *Nemo iudex sine actore*.

who is the defendant, which court or body to approach, and what is being sought through the legal claim. However, considering that the authorization to initiate climate change litigation is of crucial importance, our primary focus will be on active legitimation.

Key words: climate change litigation, actio popularis, active legitimation, environmental protection associations, collective legal protection

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ANDREA PILETTA MASSARO

TOWARDS A RENEWED APPROACH TO THE EU SINGLE MARKET AND ITS COMPETITIVENESS: LAST CALL FOR THE EUROPEAN INTEGRATION

After decades when the European Union was providing social and economic prosperity and peace to its Citizens, the last years marked a sort of setback for the integration process. The financial crisis, the massive migrations, Brexit, the pandemic, and the invasion of Ukraine underlined all the weaknesses of the European Union. Anyway, the lack of responsiveness towards these exogenous negative inputs is caused by endogenous limitations of the institutional framework of the same EU. In particular, the procedures and the praxis adopted during the foundational stage of the Union cannot now take the pace of the enlarged Union in a global context characterised by instability and huge transformations, such as the advent of AI or the termination of the globalised world as it was known. In such a context, the Union is called to react in order to preserve its space of freedom, and, in particular, to keep in place the features that transformed the Single Market in a model characterised by high levels of competitiveness and economic development, thus without lowering the social protection guaranteed by the EU Treaties. For the purpose of suggesting the necessary lines of reform, the present paper will analyse the two recent reports issued by Mr. Enrico Letta and Mr. Mario Draghi, so as to better fine-tune the reforms proposal needed by the EU to keep its relevance in the international political, social and economic scenario.

Key words: European Union, single market, candidate member States, fundamental freedoms, European integration

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INTRODUCTION: EUROPEAN STATES HAVE BECOME
A HISTORICAL ANACHRONISM

[...] I wrote in 1917 and I repeat now thirty years later: European states have become a historical anachronism.

[...]

As rail communications and navigation, steam and motor, took the place of sailing, and the peoples were approached by telephone, by telegraph with and without wires and by air navigation, this little European flowerbed of ours openly showed its ineptitude to endure so many different sovereignties. In vain, sovereign states elevated around them; high customs barriers to maintain their economic self-sufficiency.

Barriers only help to impoverish peoples, to slander them against each other [...]

If we do not know how to bring a human and modern ideal to a lost and uncertain Europe on the way forward, we are lost and Europe is lost with us. There is a frightening ideal vacuum on this continent of ours. (That atomic bomb, which we fear so much, unfortunately lives in each of us. Above all, we must not be afraid of the atomic bomb, but of the evil forces that triggered its use. We must oppose this unleashing; and the only way forward is the preaching of the good news.)

[...]

In a Europe where rabid returns to pestilent nationalistic myths are observed everywhere, where suddenly patriotic currents are discovered in those who until yesterday professed internationalist ideas, in this Europe in which at every turn are seen with horror to reform war tendencies, it is urgent to carry out a work of unification. Work, I say, and not preaching.

It is a vain thing to preach peace and harmony when Hannibal urges at the gates, when nationalistic passions are once again burning in the minds of too many Europeans. It is not enough to preach the United States of Europe and to hold congresses of parliamentarians. What does it matter that the parliaments of these tiny states which make up the uniform Europe, renounce part of their sovereignty for a parliament in which the peoples of Europe are directly represented in an elected chamber in their unity, without distinction between state and state and in proportion to the number of inhabitants and in the chamber of states, the individual states are represented for the same number.

This is the only ideal worth working for; the only ideal capable of saving the true independence of peoples, which does not consist in weapons, customs barriers, the limitation of railway systems; in river, port, electric and similar to the national territory, but in schools, arts, customs; cultural institutions, in everything that

gives life to the spirit and makes each people know how to contribute something to the spiritual life of other peoples.

[...]

We must not be afraid to defend the ideas that will only save Europe. The power of ideas is still today – that Europe is not, fortunately, totally barbaric and is not yet a supine worshipper of material things – the power of ideas is still the force that in the long run the world.¹

Luigi Einaudi, former President of the Italian Republic, but also previously President of the Italian Central Bank, Dean of the University of Torino and one of the most influential economist in Italy and Europe, pronounced the quoted lines in 1947. However, this speech seems tailored for the current economical and geopolitical scenario, and, for sure, an affirmation keeps echoing: *European states have become a historical anachronism.*

The present era has something in common with 1917, when Einaudi first outlined this concept, years before the creation of the European Coal and Steel Community, and with 1947, when the whole speech was pronounced in favour of the adhesion of Italy to what were, at the time, the European Economic Communities.

The European Union has probably represented one of the most ambitious political and legal experiment in history: Twenty-seven Countries united in some of the most sensitive legal fields, constituting a Single Market and promoting a subset of key common values and fundamental rights. Moreover, historically these Countries or were fighting against themselves (the two World Wars are never to be forgotten, but also the wars conducted during the XIX century) or were part of completely different legal and cultural traditions (think of the Western and the Eastern part of Europe: Not so long back in time there was a real wall – an ‘iron curtain’ – between them).

The EU project dates back exactly after the devastation left in Europe by the Second World War, in a very complex geopolitical context, when the two blocks that characterised the Cold War scenario of the following decades were taking shape. The six founding Countries (and, among them, three of the protagonists of the just ended conflict: France, Germany, and Italy) decided to cooperate, and, in particular, to put together the production of coal and steel, some of the materials which were at the basis of the war industry.² Today, after decades of peace and prosperity,

¹ Luigi Einaudi, Speech delivered on Tuesday 29 July 1947 before the Constituent Assembly of Italy, available at (in Italian) <https://www.fondazioneLuigieinaudi.it/einaudi-perche-non-possiamo-non-dirci-europei/>, accessed 2 September 2024, free translation by the Author.

² David J. Gerber, *Law and Competition in Twentieth Century Europe*, Oxford University Press, Oxford, 1998, 336.

this could be taken for granted, but at the time, it was not. The shaping of this ‘Community’ was designed and pondered wisely: The founding fathers understood the importance of first integrating the economical aspects (as the name European Economic Communities was underlining) among the member States, and then, after the realisation of this objective – already very ambitious – a strengthened political union would have followed. This was exactly what happened, with the succession from the EEC to the EC and, finally, to the EU.³ The same progressive integration occurred also in the market, and here, as well, the terminology adopted is telling: From a ‘Common Market’, the Member States reached an ‘Internal Market’ in the Single European Act of 1986.⁴

This integration process flowed smoothly, and the Community delivered peace and economic progress to the involved Countries’ citizens and entrepreneurs. Indeed, during the first decades, the main objective was exactly the creation of the Single Market by means of eliminating all the barriers to trade among the member States. Central in this process was the articulation of the so-called ‘Four Freedoms’: The free movement of goods, capitals, services, and people.⁵ However, the described integration’s path occurred in such a way also because the Countries involved were historically and legally part of the same tradition, rooted in the Roman heritage, and rules were based upon the two main codification models, the French *Code Civil* and the German BGB. Moreover, part of this project were the three main European economies plus three other smaller Countries, but sharing a very close tradition and characterised by a high level of economic development.

The real ‘test bench’ for this ambitious union occurred when the geopolitical scenario was shaken by the disaggregation of the socialist block, both with regard to the Soviet Union and the Balkans socialist Countries. Then, the true enlargement of the Union took place, with the integration of Countries which were characterised by completely different legal systems, property conceptions, and economic conditions.⁶ Anyhow, also after this events the expansion of the Union – coupled

³ For a history of the development of the EU see Steve Peers, Catherine Barnard, *European Union Law*, Oxford University Press, Oxford, 2023, 10–31.

⁴ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, Oxford, 2022, 17–19.

⁵ S. Peers, C. Barnard, op. cit., 20–21.

⁶ Gian Antonio Benacchio, “Jugoslavia: evoluzione e crollo di un modello”, *Rivista di diritto civile*, Vol. II, 1991, 361 ff.; Gian Antonio Benacchio, “National Courts and Comparative Law – The States of Former Yugoslavia (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Macedonia and Montenegro)”, *Judicial Cosmopolitanism, The Use of Foreign Law in Contemporary Constitutional Systems* (ed. Giuseppe Franco Ferrari), Brill Nijhoff, Leiden, 2019, 745 ff.; Gianmaria Ajani, *Il modello post-socialista*, Giappichelli, Torino, 2008.

with the parallel definition of the monetary union in quite a large number of Member States – proceeded quite regularly, and the integration into the EU brought significant advantages to the new Member States, as we had the opportunity to show in another work.⁷

However, this apparently almost untroubled flow was soon challenged by various events, among which a prominent role was for sure played by the financial crisis started in 2008 in the U.S. The fact that the EU structure was passing from a solid achievement to a castle of glass started to appear evident when the project of a Constitutional Treaty for the Union was rejected by France and the Netherlands in the respective referenda.⁸ This showed a sort of change in the enthusiasm towards the European integration, and the importance of this ‘alarm bell’ was probably underestimated. The following events are part of the recent history, but for sure they showed the ‘heaviness’ of the EU structure and, probably, an excess of formalism in a fluid geopolitical reality, which is in continuous evolution. In fact, the just mentioned reject of the constitutional Treaty showed exactly the EU’s burdensome and rigid decision-making process, characterised by crossed vetoes and the need to always find compromises, which then bring to immobilism. The problem is that in a fast-moving world, immobilism is synonym of irrelevance.

The reaction to the economic crisis, the management of the Greek debt situation, the total incapability of managing the flux of migrants, the Brexit, and the excessively regulatory approach towards innovation led to a stagnation that is impacting the competitiveness of the EU, with all the related consequences on the social sphere.⁹ This led, *inter alia*, to the rise of inequality rates, to a growing unemployment, which, in turn, favoured the ascent of anti-European and populist movements, that leverage the dissatisfaction of people to their advantage, by proposing protectionist and nationalistic solutions, which, by quoting again Einaudi, are *anachronistic*.

In addition, the ‘last’ certainty of the European project, which was the delivery of peace for decades in the European continent after WWII, fell with the wretched invasion of Ukraine in 2022, which – unfortunately – showed again the divisions inside the EU and, at a certain extent, its irrelevance in the geopolitical scenario.

⁷ Andrea Piletta Massaro, “Market Integration and Competition as a Way to Strengthen the Rule of Law and Democracy in the Enlarged European Union”, *EU and comparative law issues and challenges series*, Vol. 8, 2024, 333 ff., available at <https://hrcak.srce.hr/ojs/index.php/eclic/article/view/32282/16412>, accessed 14 October 2024.

⁸ S. Peers, C. Barnard, op. cit., 27.

⁹ *Ibidem*, 31–35.

This article aims at analysing the reasons that led the EU to the current precarious situation, in order to offer policy solutions directed at revamping the propulsive force of the European project. In order to do so, particular attention will be paid to the Single Market – *i.e.*, the economic dimension of the EU – especially by relying on the recent reports issued, respectively, on the status of the Single Market and on the competitiveness of the EU by two former Italian Prime Ministers, Mr. Enrico Letta¹⁰ and Mr. Mario Draghi.¹¹

THE ROOTS OF THE EU MODEL'S CRISIS: INSTITUTIONAL UNSUSTAINABILITY

In the introduction multiple reasons behind the crisis of the EU model, and in particular of the Single Market, have been enlisted. However, the majority of them, such as the reliance on other Countries for energy or raw material supply, or the changed geopolitical landscape, are *exogenous* factors which impacted and are impacting the development of the EU. These issues need to be addressed, but in a second stance. What is needed to be first understood are the *endogenous* factors which led the Union to be like 'unarmed' in front of the mentioned societal and economic transformations. These endogenous factors refer to the institutional structure of the Union. In fact, the configuration envisaged by the Treaties was conceived for a restricted group of Countries, sharing quite similar economic and social structures and objectives. The various enlargements brought with themselves

¹⁰ Enrico Letta, "Much more than a market. Speed, security, solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens", April 2024, available at <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>, accessed 14 October 2024. See also Enrico Letta, *Molto più di un mercato. Viaggio nella nuova Europa*, Il Mulino, Bologna, 2024.

¹¹ Mario Draghi, "The future of European competitiveness. Part A – A competitiveness strategy for Europe", September 2024, available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20-%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 14 October 2024; Mario Draghi, "The future of European competitiveness. Part B – In-depth analysis and recommendations", September 2024, available at https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf, accessed 14 October 2024; see also Address by Mr. Mario Draghi at the presentation of the report on the Future of European competitiveness in the European Parliament, 17 September 2024, available at https://commission.europa.eu/document/download/fcbc7ada-213b-4679-83f7-69a4c2127a25_en?filename=Address%20by%20Mario%20Draghi%20at%20the%20Presentation%20of%20the%20Report%20on%20the%20future%20of%20European%20competitiveness.pdf, accessed 14 October 2024.

a progressively increasing weight on institutions which were not able to sustain it, bringing to a sort of collapse of the equilibrium built during the foundation years. The structure resulting from the Treaty of Lisbon formally incorporated the European Council into the EU Institutions,¹² but did not change its nature, since it remains a venue where decisions are taken according to the traditional international law method of consensus, which means that a compromise needs to be reached among the positions of 27 States. It is also true that the European Council does not participate in the EU ordinary legislative procedure, but it is the place where the more genuinely political decisions, addressing the development of the Union, are taken. In addition, the weight of the 27 Member States' instances influences the ordinary legislative procedure through the Council of the European Union, where decisions are now taken according to a qualified majority vote, which ponders the vote of Member States according to the size of their population, plus certain cases, such as in relation to taxation or environmental law, where unanimity is required.¹³ The shift from unanimity to a qualified majority in the ordinary legislative procedure was adopted exactly in order to ease the functioning of the Council of the EU after the various enlargements, and for sure it has to be regarded as positive. However, in a framework composed by 27 Member States (with all the differences already mentioned) also a qualified majority represents a significant hurdle. This is proven by the level of compromise that is required in order to pass legislative acts and also by how lengthy the legislative *iter* is. The Draghi report affirmed that in order to pass a piece of legislation the EU takes on average 19 months from the Commission proposal,¹⁴ which is a timeframe absolutely inadequate for dealing with the mentioned challenges that the Single Market and the EU itself are called to face. This, in turn, brings to a potential overregulation, reached through compromise solutions and overlapping or not coordinated policies. An example of this can be seen in the framework constituted by Directive (EU) 2014/104,¹⁵ on private actions for damages in the context of infringement of competition law, together with Directive (EU) 2020/1828,¹⁶ on a representative actions for consumers and Regulation (EU)

¹² S. Peers, C. Barnard, *op. cit.*, 70.

¹³ *Ibidem*, 60–63.

¹⁴ M. Draghi, *op. cit.* (Part A), 63.

¹⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for the infringements of competition law provisions of the Member States and of the European Union, published in OJ of the EU 5 December 2014, L 349/1.

¹⁶ Directive (UE) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in the OJ of the EU 4 December 2020, L 409/1.

2022/1925, the so-called Digital Markets Act (DMA).¹⁷ If the first Directive aims at creating a level playing field for consumers in the context of private antitrust enforcement, it lacks to introduce a harmonised collective redress regime. This, given the widespread, but ‘small claim’ nature of competition law infringements, represents a particularly relevant deficiency of the Damages Directive. However, when the subsequent Directive 2020/1828 was in discussion, it was almost given for granted that the lack of the 2014 Directive with regard to collective redress would have been solved by the introduction of the EU-wide representative action regime.¹⁸ These expectations were frustrated when Directive 2014/104 did not figure into the scope of Directive 2020/1828, as enucleated in its Annex 1. However, last but not least, the recently adopted DMA Regulation amended Directive 2020/1828 by adding the DMA itself into the scope of the latter Directive. This example shows how what for sure was a compromise position, that hindered the creation of a proper level playing field in the context of antitrust private enforcement by not including this subject into the scope of the most useful tool for consumers damaged by a mass tort arisen from the violation of general competition rules. On the contrary, violations of the DMA, which for sure entail a very difficult degree of evidence (already in the quantification of damages, since reference is made to services which are almost often offered for a zero-price consideration) can be enforced by consumers through the representative action mechanism introduced by Directive 2020/1828. In addition, not having introduced Directive 2014/104 into the scope of Directive 2020/1828 leave the field of collective redress in antitrust private enforcement to the regulatory competition among Member States, hence creating the contrary of what a level playing field should be, both for consumers and enterprises.

Under another perspective, the need for an unanimous vote in subjects quite delicate for the future of the Union, such as taxation, brings to the result of not reaching a complete and matured evolution of the Single Market, since certain key aspects are not harmonised, thus leading to differences among Member States who can attract companies with a more generous fiscal policy and Member States which observe the transfer of these companies towards the more favourable fore, with all the consequent, respectively, advantages for the State of destination and disadvantages for State of departure.

¹⁷ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) published in the OJ of the EU 12 October 2022, L 165/1.

¹⁸ See, *inter alia*, European Consumer Organisation (BEUC), *Proposal for a Directive on Representative Actions*, available at https://www.beuc.eu/publications/beuc-x-2018-094_representative_actions_beuc_position_paper.pdf, accessed 14 October 2024.

Having regard to the more prominently practical viewpoint, the described scenario shows an Single Market which for sure does not lack the necessary competences and talents, but which is not able to give real shape to the innovations and inventions that European researchers found out.¹⁹ By using a metaphor, it is like if European researchers develop a perfect chassis for a Formula One car, but the European Union is not able to provide this chassis with the adequate engine to express its full potential. In this case what a chassis constructor would do? Changing the engine supplier, which is exactly what happens, since – out of the metaphor – a plethora of EU startups moved to the United States, where their project had the opportunity to be funded and fully realised. Indeed, the Draghi report shows that *between 2008 and 2021, close to 30% of the “unicorns” founded in Europe – startups that went on to be valued over USD 1 billion – relocated their headquarters abroad, with the vast majority moving to the US.*²⁰ Therefore, as suggested by Enrico Letta’s report, the creation of a *fifth freedom* to enhance research, innovation and education in the Single Market.²¹

All these factors, here briefly summarised, have a detrimental impact on the global competitiveness of the EU and on its foundational values, since a Union without the propulsive force of a healthy and completed Single Market is unable to provide the objectives that lie at its the ‘constitutional’ core.

THE WAY FORWARD: FLEXIBILITY, SIMPLIFICATION, AND RELIANCE ON THE COMMON VALUES

Given the considerations laid down in the previous paragraph, a further enlargement of the European Union, such as the one planned in the Western Balkans,²² requires a quite profoundly redesigned institutional and policy setting. In fact, for the Single Market to provide all the positive outcomes that the entrance of new Countries could bring both to themselves and to the Union, an improved and more sustainable institutional framework appears needed. In particular, if the Single Market – especially in perspective – will be unable to deliver prosperity, innovation, economic growth, and all the subset of rights which are part of the *acquis communautaire*, it would lose its propulsive and attractive force. Just to be

¹⁹ M. Draghi, op. cit. (Part A), 2.

²⁰ *Ibidem*.

²¹ E. Letta, “Much more than a market...”, 19–22.

²² European Commission, *Enhanced EU engagement with the Western Balkans*, available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/enhanced-eu-engagement-western-balkans_en, accessed 14 October 2024.

clear, notwithstanding all the issues mentioned in this article, the Single Market remains a point of reference and a sure flywheel for new entrant Countries' growth, as demonstrated in another work.²³ However, what is needed is not to exhaust this positive feedback loop with what we can call stagnation or, worse, dependency and irrelevance vis-à-vis other geopolitical and economic actors, such as China or the United States.

From a theoretical point of view, the suggested recipe for a 'revamping' of the European Union is first that of coming back to its roots, which appeared to have been partially lost. This means, in other words, to come back to what is the most precious heritage of the EU and which always distinguished it as a model. Reference is made to the Treaties, and especially the more 'constitutional' part of them. For this purpose, the main Treaty provision which comes at stake is Article 3 TEU. Paragraph 1 proclaims that *the Union's aim is to promote peace, its values and the well-being of its peoples*. This constitutes a foundational affirmation, since mention is made to peace, but – unfortunately – the promotion of peace (as the Cold War taught) passes through a high level of deterrence (*si vis pacem para bellum*), which, currently, and with a war at its borders, the EU is not capable of offering, since only ten Member States spend more than or equal to 2% of their GDP in defence, as required by the NATO commitments.²⁴ In other ways, historically, the EU 'outsourced' its defence to the United States, and this task was not coordinated among the Member States, at the point that, as illustrated by the Draghi Report, the provision of military items to Ukraine showed how every EU Country had different operational standards, which in most of cases were not interoperating among them.²⁵ Therefore, the Union is already not complying with this first part of the provision above reported, because in such a fluid geopolitical scenario it has not the necessary strength to promote Peace through deterrence (as, in a way, the invasion of Ukraine showed). Therefore, much more efforts and convergence are needed by Member States on this point. Already since the foundation of the EU, a defence union (European Defence Community, EDC) was envisaged,²⁶ but, like many other times in the EU's development, it remained on the paper, as national jealousies prevailed. Moreover, after having reached coordination in the field of defence, more efforts are needed by the Union to improve independency and innovation in the defence field. To do so, extraordinary ways of financing, such as common debt,

²³ A. Piletta Massaro (2024), op. cit.

²⁴ M. Draghi, op. cit. (Part A), 50.

²⁵ *Ibidem*, 55.

²⁶ S. Peers, C. Barnard, op. cit., 14–15.

must be taken into consideration, since we are referring to a vital interest of all Member States, which can be achieved just through a joint effort at the EU level.²⁷

The just made mention to innovation leads to the second part of the analysed Article 3, paragraph 1, TEU, where the well-being of EU's citizens is declared as a goal of the Union. This represents a quite 'challenging' statement, since it can almost be compared with the *pursuit of happiness* proclaimed in the U.S. Declaration of Independence. Anyhow, according to our general constitutional subset, well-being is delivered when the dignity dimension of the person, intended as the right to self-determine its existence, both economically and socially, is granted. This passes through freedom but also economic well-being or independence. The latter, in our system, is provided by the market, which in the European Union is conceived along the lines of the *highly competitive social market economy* portrayed in Article 3, paragraph 3, TEU. According to the same provision, this concept develops along *balanced economic growth, full employment, social progress, quality of the environment, technological advance*. Moreover, the Single Market shall also deliver *social justice, economic, social and territorial cohesion, solidarity among Member States*.

Although at a first sight the abovementioned concepts may appear disentangled, they are not, and they form part of an *unicum* (which, banally, we can call Single Market) where all of them are linked, and the failure to deliver one of them will impact the satisfaction of the other ones. In fact, for instance, the pursuit of the green transition necessarily passes through innovation and technological advance efforts, and only a successful transition will guarantee social progress and economic growth. The question is whether the Single Market is currently capable of delivering these outcomes. The answer, appears to be negative, or at least not as it should. Indeed, the green transition, especially with regard to electric vehicles, is almost 'backfiring', since the price of EVs is particularly high, not allowing a great part of the European population to afford them, with the effect of showing this transition as a sort of 'elitist' will (surfaced by almost all the populist parties). Moreover, differences in innovation levels among Member States remain,²⁸ notwithstanding the solidarity requirement set out above, and cohesion appears far to be reached, leading a large number of especially young and talented Europeans to migrate from less developed Member States to the richest ones, thus leading to a negative feedback loop where the former sustain the education of these individuals but then the latter take

²⁷ M. Draghi, op. cit. (Part A), 62.

²⁸ European Commission, Europe's innovation performance steadily improving but at different speeds between Member States, 8 July 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3666, accessed 14 October 2024.

advantages of it, and the development gap between these Countries keeps increasing (in what is called a ‘development trap’).²⁹ This represents a sort of distortion of the fundamental freedom of movement of people (and workers), and it is addressed in an impeccable way by the Letta Report. In fact, the right to seek better opportunities in another Member State represent a cornerstone of the European project and of the Market. Anyhow, as suggested by the Letta Report, alongside the right to migrate, the Union must guarantee to a Member State’s citizen the *right to remain* in her/his community of choice.³⁰ This is without any doubt part of the cohesion requirement provided for by Article 3, paragraph 3, TEU, but also of the well-being of a citizen, since migrating to another Member State should be a choice and not a forced necessity, given the poor development conditions of certain areas of the Union.

The reasoning reported above pretended to be a sort of summary of the main open issues regarding the EU Single Market, which cause discrepancies with the requirements set out by the Treaties. Anyway, the question is how to better align the reality of the Single Market with such provisions. The simple answer is by fully realising the Union, a Union which is really as such, and not just with regard to certain situations or policies. A quite huge list of recommendations is contained in the Draghi and Letta Reports, and it is not the aim of this work that of ‘competing’ with them, especially given the prestige of the two Authors. Therefore, the following part of the present paper will synthetically provide some suggestions.

First and foremost, the Single Market ought to be completed. With the latter term is meant to really become a unique market, since until there will be huge differences in taxation, wages, social security conditions, etc., deep differences among Member States will remain, leading always to a Union based on different paces. To do so, more joint initiatives are needed, especially in the fields of innovation and the green economy. These efforts need to be financed and the innovative ideas developed in European Universities must find an opportunity to be implemented in the EU, without having the need to move to the U.S. to make these ideas reality. In this context, a much coordinated effort is needed at the EU level, in order to have a really unique market and not 27 national markets unified. The implementation of this task passes also through common debt, this must be said plain and straight. As the Draghi Report observed, this is part of the common evolution of the Union as such, and it is not directed at financing temporary needs of some Member States. The response to the COVID pandemic through the implementation of the Next Generation EU fund constituted a positive example in this sense, but this must become a structural ‘weapon’ of

²⁹ E. Letta, “Much more than a market...”, 92–93.

³⁰ *Ibidem*, 91; E. Letta, *Molto più di un mercato*, 169.

EU's policy, which also needs to be revamped as a unified one, and not as the merger of various national instances.³¹ The current scenario teaches that there is no more space for competition among Member States, because the competition – and strong – is outside the EU, and it can be handled just through a deeply unified response.

Additionally, for the purpose of achieving all the goals and objectives listed above, as already mentioned, the decisional process and the institutional structure of the Union ought to be redesigned, with the objective of finally switching from the intergovernmental decisional process to an almost fully unified one. In doing so, an amendment of the Treaties appears necessary, in order to confer more powers to the Commission and the Parliament, and to dilute the possibility of vetoes in the two Councils. This should lead to a faster procedure in answering to the competitive instances that the Union will face, especially by means of a less burdensome legislative procedure, which should also produce legislative acts less influenced by the need to reach compromise positions, which usually decrease the degree of effectiveness and applicability of the approved legislation. The Draghi report also enlist the instrument of enhanced cooperation among Member States provided for by Articles 326–334 TFUE to implement certain policy objectives in case some Countries are unwilling to do it. It can represent for sure a good instrument in some specific situation, especially because it does not require a reform of the Treaties and it is already available, but the risk is that of creating an even more fragmented Union, with tier A and tier B Countries in the level of development. Therefore, only the suggested institutional changes may lead to a structure which is capable of directing the future development of the Union, by providing the view necessary for developing an sustainable and effective industrial policy which can increase the EU's competitiveness and, as a result, the well-being of European citizens.

Finally, having regard to the normative framework, often constellated by Directives or lately or not perfectly transposed into the national legal systems, the Letta Report affirms that *EU Institutions should unequivocally prioritise the use of Regulations in the formulation of Single Market binding rules. When the use of directives remains unavoidable or preferable, it is imperative to make two key choices to ensure their effective implementation.*³² Furthermore, the same Report suggests what may be a disruptive innovation in the full implementation of the Single Market, which is the creation of a European Code of Business Law. This should work as the 28th legal system of the EU, parallel to the national ones, that businesses can choose to regulate their operations withing the Single Market.³³

³¹ M. Draghi, op. cit. (Part A), 61–62.

³² E. Letta, "Much more than a market...", 10.

³³ *Ibidem*, 108.

COMPETITION AND COMPETITIVENESS: SYNONIMS OR OPPOSITES?

It might seem a *jeu de mots*, but essential in achieving the necessary level of competitiveness of the Single Market is a proper competition policy. First, it is necessary to disentangle the question regarding whether competition is an obstacle for the EU's competitiveness or if, contrarywise, it is a propulsive force. There is not a straightforward and plain answer, but, generally, competition must be seen as a positive feature, also required by the Treaties, through the adjective *highly competitive* positioned exactly before the expression social market economy in Article 3, paragraph 3, TEU. However, an excess of competition or a competition regime which is not linked with the other Union's policy, will not provide the hoped advantages, and, also, it can be detrimental for the Single Market's development. This is why, as required also by Article 7 of the Treaty on the Functioning of the European Union, all the Union's policies must be aligned, and no exception is made for competition law.

In particular, the big trade-off regarding *internal* competition in the European Market and *external* competitiveness of the Single Market has regard to the conception of industrial policy. The point is that of finding the right equilibrium between the maintenance of contestability of the various markets composing the Internal one, thus avoiding excessive concentrations of economic power which can turn to be detrimental for consumers and for the society in itself, but, at the same time, to implement the industrial policy decisions needed to scale-up some European companies which face fierce external competition in sectors where scale constitutes a necessary requirement (the best example is represented by the aviation industry, with Airbus).³⁴ This is particularly important with regard to merger control or cooperation agreements among firms. Having regard to the latter, the Treaties already provide for instruments aimed at allowing firms to cooperate for the purpose of developing new innovative products. This discourse has been revamped by the debate around the role that competition policy should play in the green transition and the decarbonisation process.³⁵ The instruments already available are especially research and development agreements³⁶ and the newly introduced sustainability

³⁴ M. Draghi, op. cit. (Part B), 299.

³⁵ Andrea Piletta Massaro, "Back to the Treaties: Towards a 'Sustainable' Competition Law", *Revija za evropsko pravo*, No. 25, 2023, 13 ff.; Simon Holmes, "Climate change, sustainability and competition law", *Journal of Antitrust Enforcement*, 2020, No. 00, 1 ff.; Julian Nowag (ed.), *Research Handbook on Sustainability and Competition Law*, Edward Elgar, Cheltenham, 2024.

³⁶ Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, published in OJ of the EU 2 June 2023, L 143/9.

agreements.³⁷ Moreover, and for more general innovation purposes, an important road can be represented by the exemption clause contained in Article 101, paragraph 3, TFUE.³⁸ However, more guidance and the development of praxis in this field by the Commission are particularly needed for European firms to cooperate and reach a critical scale in certain sectors without fearing to be sanctioned for the violation of competition provisions.

Contemporarily, the degree of concentration in the Single Market must be controlled, in order to keep markets contestable and to deliver to consumers and citizens the positive by-products that only form a noble kind of competition can flow.³⁹ In particular, great attention should be paid to *de facto* monopoly positions in the digital sectors, which can, through abuses of dominance behaviours or by means of predatory acquisitions, stifle innovation in these markets. In the interest of the EU, especially, it is important to avoid that foreign dominant companies could hinder the innovation efforts performed by domestic companies. Steps in this direction have been taken through the application of existing competition rules both by the Commission and the National Competition Authorities. In particular, important precedents were set with the *Google Shopping*⁴⁰ and *Google Android*⁴¹ cases by the Commission and with the *Facebook* case decided by the German

³⁷ Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, published in OJ of the EU 21 July 2023, C 259/1 (for sustainability agreements, see Chapter 9).

³⁸ Gian Antonio Benacchio, *L'Unione Europea e il diritto privato*, CEDAM, Padova, 2024, 314–316.

³⁹ About the concept of noble competition, see Maurice Eitel Stucke, Ariel Ezrachi, *Competition Overdose. How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, HarperCollins, New York, 2020, 254 ff.

⁴⁰ European Commission, decision 27 June 2017, case AT.39740, *Google Search (Shopping)*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, accessed 30 September 2024. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 (accessed 30 September 2024) and a summary of the decision has been published in the Official Journal of the EU, 12 January 2018, C 9/11. See also General Court, decision 10 November 2021, case T-612/17, *Google LLC and Alphabet, Inc. v. Commission (Google Shopping)*; Court of Justice, decision 10 September 2024, case C-48/22 P, *Google and Alphabet v. Commission (Google Shopping)*.

⁴¹ European Commission, decision 18 July 2018, case AT.40099, *Google Android*, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, accessed 30 September 2024. The relevant press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (accessed 30 September 2024) and a summary of the decision has been published in the Official Journal of the EU, 28 November 2019, C 402/19. See also General Court, decision 14 September 2022, case T-604/18, *Google LLC and Alphabet, Inc. v. Commission (Google Android)*.

Bundeskartellamt⁴² and the *Android Auto* case concluded by the Italian Autorità Garante della Concorrenza e del Mercato (AGCM).⁴³ Anyhow, the imposition of pecuniary fines and the length of proceedings makes these decisions less effective in restoring competition, since a pecuniary sanction is like the *cost of running business* for the tech giants and this does not revive companies which were pushed out of the market as a result of the incumbent's anticompetitive behaviour. A step in the sense of solving these issues has been taken with the adoption of the mentioned DMA Regulation, which established a sort of quasi-regulatory *ex ante* framework directed at digital gatekeepers. Anyhow, doubts about the real effects of the DMA's enforcement can be casted, since the capillary surveillance task required to the Commission appears particularly burdensome.⁴⁴ Moreover, the main sanctions remain pecuniary and behavioural ones, with structural remedies relegated in a defiled position, whilst they could have played a more prominent role, at least for the sake of increasing the level of deterrence.

Probably, the solutions introduced in Germany with the tenth amendment to the Competition Act (GWB)⁴⁵ could have proved more effective, since they constitute a more tailored mixture of *ex ante* regulation of competition and proper

⁴² Bundeskartellamt, decision 6 February 2019, *Facebook*, available (in English) at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5, accessed 30 September 2024. The relevant Bundeskartellamt press release is available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2 (accessed 30 September 2024), whilst a summary of the decision is available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4, accessed 30 September 2024. See also Court of Justice, decision 4 July 2023, case C-252/21, *Meta*.

⁴³ Autorità Garante della Concorrenza e del Mercato, decision 27 April 2021, case A529, *Enel X – Android Auto*, available at (in Italian only) https://www.agcm.it/dotcmsdoc/allegati-news/A529_chiusura.pdf, accessed 30 September 2024. The relevant press release (in Italian only) is available at <https://www.agcm.it/media/comunicati-stampa/2021/5/A529>, accessed 30 September 2024.

⁴⁴ Andrea Piletta Massaro, “The Rising Market Power Issue and the Need to Regulate Competition: A Comparative Perspective Between the European Union, Germany, and Italy”, *Concorrenza e Mercato*, No. 29, 2022, 2023, 40.

⁴⁵ The relevant Bundeskartellamt press release, *Amendment of the German Act against Restraints of Competition*, 19 January 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html, accessed 14 October 2024. See also OECD, *Annual Report on Competition Policy Developments in Germany*, 10 June 2021, 5, available at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2021\)11&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2021)11&docLanguage=En), accessed 14 October 2024; Jens-Uwe Franck, Martin Peitz, “Digital Platforms and the New 19a Tool in the German Competition Act”, *Journal of European Competition Law & Practice*, No. 7, Vol. 12, 2021, 513 ff.

competition law tools.⁴⁶ Moreover, particularly important is the single degree appeal mechanism envisaged by this reform, aimed at reducing the times of competition proceedings. However, the overlap with the DMA and the supremacy clause contained in the latter could in a way have defused much of the German reform's potential, although the German act – conversely to the DMA and, in our opinion, correctly – can be applied also to companies which operate in markets other than the digital ones.

Furthermore, and especially thanks to the German *Facebook* decision, the need for a 'multi-tool' approach to competition law, therefore based upon policies such as data protection or consumer protection, is much needed.⁴⁷ In this direction, it must be positively welcome the use of the abuse of economic dependence, as strengthened by the Italian Legislator in 2022⁴⁸ and present also in France.⁴⁹ This tool allows to sanction the subjugation of a company along the supply chain perpetrated by an economically powerful firm without having to demonstrate the dominance on the market and the harm to competition, instead required in case pure competition rules would be applied.

Additionally, a very powerful instrument could be represented by the market investigation tool, recently introduced in the German GWB, but also present, in different shapes, in the DMA, and part of the UK Competition and Market Authority (CMA)'s toolbox since years.⁵⁰ Synthetically, this proceeding allows the relevant competition Authority to investigate a market where there are signals of competition concerns, for the purpose of conducting an investigation and to apply tailored measures directed at restoring competition in such a market.

Finally, a renewed approach, based upon *fairness* in the market as a conceptual lodestar, should be inaugurated, in the sense of providing competition enforcement with a 'multi-value' subset,⁵¹ which allows for the flourishing of a sustainable

⁴⁶ A. Piletta Massaro, *The Rising Market Power Issue and the Need to Regulate Competition...*, 30–35.

⁴⁷ *Ibidem*, 40–42.

⁴⁸ Law 5 August 2022, no. 118, published in the *Official Journal of the Italian Republic* 18 August 2022, No. 188, Article 33, amending Article 9 of Law 18 June 1998, no. 192, published in the *Official Journal of the Italian Republic* 22 June 1998, No. 143.

⁴⁹ Code de Commerce, Article L420-2, alinéa 2. See A. Piletta Massaro, *The Rising Market Power Issue and the Need to Regulate Competition...*, 39.

⁵⁰ Enterprise Act 2002, Part 4, Chapter 1. See Richard Whish and David Bailey, *Competition Law*, Oxford University Press, Oxford, 2024, 498 ff.

⁵¹ Andrea Piletta Massaro, "Il diritto della concorrenza tra obiettivi di policy e proposte di riforma: verso un approccio multi-valoriale", *La Cittadinanza Europea Online*, 2021, No. 0, 65 ff.

kind of competition, in line with the values underlying the EU Treaties and not only with the aim of favouring economic interests only. In particular, such a competition parameter should be tailored by the Commission and the competition Authorities in a way that the healthy degree of competition is always maintained in the various markets, in order to provide the fair ratio of quality, prices, choice and innovation to the consumers, but also to the society as a whole. Innovation, in particular, needs to be promoted through a correct balance of competition forces active on the market, by finding the right equilibrium between the inverted U shape that commonly is used to describe the interaction between competition and innovation.⁵² For this purpose, a strengthened market investigation tool could represent the right solution for competition Authorities, and especially for the Commission, to correct – when and if needed – the movements of the Smithian *invisible hand* in the market.

CONCLUSION: NOTHING IS LOST, BUT IT IS NOT FOR GRANTED

The scenario portrayed in this work and in the reports prepared by Mario Draghi and Enrico Letta for sure poses more than one concern about the future developments of the European integration process. In particular, it shows what we can define as a sort of ‘ineffectiveness’ of the EU’s actions (of course, this must be taken as a general observation, and not with regard to every specific sector). In particular, it seems that the EU has lost its propulsive force, in particular for ‘grounding’ in the economy all the innovative potential it has. The strength of the EU model has always been the social market economy concept, where at a strong innovation rate and economic performance was paired a very high level of social protection and welfarism. This made the EU Single Market model attractive at the point that in few decades the Union passed from 6 to 27 (they were even 28) Countries, with a quite long list of candidate States on hold waiting for joining. The strength and the societal impact of the social market economy model cannot be abdicated because it would simply be contrary to the social contract that we, as European, signed by entering the EU, with all the values that the EU collected also from the various national Constitutions.⁵³ However, we have to be aware that

⁵² Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith, Peter Howitt, “Competition and Innovation: An Inverted-U Relationship”, *The Quarterly Journal of Economics*, 2005, No. 120, Vol. 2, 701 ff. On the relationship between competition and innovation see also Ariel Ezrachi, Maurice Eitel Stucke, “Digitalisation and its impact on innovation”, Report for the European Commission, 24 August 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/203fa0ec-e742-11ea-ad25-01aa75ed71a1/language-en>, accessed 14 October 2024.

⁵³ On the influence of the various Member States’ constitutional traditions – although with regard to property – see Court of Justice, decision 13 December 1979, case 44/79, *Hauer*.

we reached a point, where a very high degree of integration in the Single Market has been reached, but it is not enough anymore, and it is not enough because the international scenario changed and it now requires the EU to 'grow' and to be independent, to be *faber sui quisque fortunae*. In order to do so, Europe has to rely on its own values, on the capabilities of European researchers and companies, on its strong cultural roots, and reshuffle its institutional background accordingly. Until now the EU's structure can be described through the same metaphor that Juillot de la Morandière used to describe the continuously reformed (but on the old structure) French *Code Civil*, i.e., like an old building, with signs of refurbishments, but which cannot hide the age.⁵⁴ By continuing this metaphor, the EU has now to build a brand new building (for instance through the adoption of the mentioned European Code of Business Law), but without changing its foundations, which has to constitute the value basis for a new, more inclusive and sustainable European Union, fit for the challenges that the current times present. Only like this the values contained in the TEU, in the Charter of Fundamental Rights of the EU, and in the Member States' Constitutions can provide again a long period of innovation, prosperity, social, institutional and economic sustainability, and peace.

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KA OBNOVLJENOM PRISTUPU JEDINSTVENOM TRŽIŠTU EU
I NJEGOVOJ KONKURENTNOSTI: POSLEDNJI POZIV
ZA EVROPSKE INTEGRACIJE

Rezime

Posle decenija u kojima je Evropska unija svojim građanima pružala socijalni i ekonomski prosperitet i mir, poslednje godine su obeležile neku vrstu nazadovanja procesa integracija. Finansijska kriza, masovne migracije, Bregzit, pandemija i invazija Ukrajine istakli su slabosti Evropske unije. U svakom slučaju, nedostatak odgovora na ove negativne egzogene inpute je uzrokovan endogenim ograničenjima institucionalnog okvira same EU. Konkretno, procedure i prakse usvojene u fazi osnivanja Unije danas ne mogu da idu u korak sa proširenom Unijom u globalnom kontekstu koji karakterišu nestabilnost i velike transformacije, kao što je pojava veštačke inteligencije ili kraj globalizovanog sveta kakvog smo poznavali. U tim okolnostima, Unija je pozvana da reaguje kako bi sačuvala svoje područje slobode i posebno, da bi zadržala osobenosti koje su transformisale

⁵⁴ Leon Juillot De La Morandière, "The Reform of the French Civil Code", *University of Pennsylvania Law Review*, No. 97, Vol. 1, 1948, 6.

jedinstveno tržište u model koji karakteriše visok nivo konkurentnosti i ekonomskog razvoja, bez umanjenja socijalne zaštite, garantovane ugovorima EU. U cilju predlaganja neophodnih pravaca reformi, ovaj rad analizira dva nedavna izveštaja Enrika Lete i Marija Dragija, kako bi se precizirao predlog reformi neophodan da EU zadrži svoju relevantnost u međunarodnom političkom, društvenom i ekonomskom scenariju.

Ključne reči: *Evropska unija, jedinstveno tržište, zemlje kandidati, osnovne slobode, evropske integracije*

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REVIEW PAPER

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ALFREDO FERRANTE

**ON THE LEGAL NATURE OF THOUGHT AND
THE ESSENCE OF THE PERSON: REFLECTIONS
FROM THE PERSPECTIVE OF ARGENTINE
AND COMPARATIVE PRIVATE LAW**

Taking Argentinean law as a starting point and making some references to current trends in foreign legal systems - with particular attention to French law, Chilean jurisprudence and the proposed reform of the Brazilian Civil Code - this paper reflects on the possible future regulation of the so-called “neuro-rights”. In order to do this, it is considered appropriate to identify the legal nature of thought in relation to the essence of the person and a reconstruction of the legal definition of “person” is carried out. It is noted that private and civil law has been influenced by philosophy and theology throughout the different epochs and that there has been a progressive separation between the regulation of the body and the person. It defends the adoption of a legal concept of “person” that takes up the Boethian and Thomistic conception and offers arguments

Dr. Alfredo Ferrante, Associate Professor of Comparative Private Law, University of Pavia, Italy, e-mail: alfredo.ferrante@unipv.it. The contribution is intended for writings in honour of Prof. José W. Tobías. With this paper I have tried to make some considerations on the central role of the human person and its ontological dimension, as Tobías has pointed out in one of his writings (For example, José W. Tobías, “Los actos de disposición de parte separadas del cuerpo y el proyecto de código civil y comercial”, *Revista de Derecho de Familia y de las Persona*, No. 4, 2013; José W. Tobías, *Tratado de Derecho Civil – Parte General*, Vol. 3, La Ley, Buenos Aires, 2018; José W. Tobías, “Una concepción integral de la persona humana”, *Jurisprudencia Argentina*, 2019; José W. Tobías “El consentimiento informado y sus límites”, *Revista de Derecho de Familia y de las personas* 2019; José W. Tobías, “Los derechos personalísimos, los avances científicos y las nuevas tecnologías”, *Las nuevas Tecnologías y el Derecho*, (Ed. J. W. Tobías), Thomson Reuters - La Ley, Buenos Aires, 2020).

to show that a positivisation of “neuro-rights” would be counterproductive for the very protection of the person and his or her freedom of thought.

Key words: *thought, person, body, “neuro-rights”, comparative law, civil law, personal law*

INTRODUCTION

Hence the idea of this paper which, in its essence, consists of some reflections on the person, the body, and consent. More precisely, the aim of this paper is to understand the legal nature of thought in relation to the essence of the person.

It is necessary to build this aspect on the observation that, in some contexts, reference has begun to be made to so-called “neuro-rights”;¹ showing that, in the near future, thought-reading practices will spread by means of new and incredible neurotechnological machines and artificial intelligence. It is therefore necessary to ask to what extent a personality or highly personal right (“*derecho de la personalidad*” or “*personalísimo*”) to free thought that is not caged in a technological processing device could be configured. The reason for this analysis is not theoretical, but rather has a practical purpose, given that in some countries certain aspects are already taking shape, as will be seen in this sense and throughout this paper, the references made to the Chilean and Brazilian experience.

Taking Argentinean law as a starting point and making some references to current trends in foreign legal systems – with particular attention to French law, Chilean jurisprudence and the proposed reform of the Brazilian Civil Code - this paper reflects on the possible future regulation of the so-called “neuro-rights”. So, based mainly on Argentine and Hispanic literature, this paper will begin by describing the progressive separation that occurs between person and body (II) and the trilateral relationship that involves these in relation to the legal concept of thing or good (“*cosa*” or “*bien*”) (III). Subsequently – once thought has been associated as an essential element of the person (IV) – the possibility of recognition by the legislator or jurisprudence of the so-called “neuro-rights” will be assessed in order to opt for the opposite position (V). Finally – and before drawing some

¹ The American Association for the Advancement of Science, The Dana Foundation, *Neuroscience and the Law, Brain, Mind and The Scales of Justice* (ed. Brent Garland), Dana Press, New York, 2004; Semir Zeki, Oliver Goodenough, *Law and the Brain*, Oxford University Press, Oxford, 2006; Michael Freeman, Oliver R. Goodenough, *Law, Mind and Brain*, Ashgate, Burlington, 2009; Michael Freeman, *Law and Neuroscience*, Oxford, 2010; Amedeo Santosuosso, *Le neuroscienze e il diritto*, Ibis, Pavia, 2009; Martínez Gómez Jesús Armando, Pérez González Edgar, *Bioética, neuroética y neuroderechos. Realidades y perspectivas en el siglo XXI*, Tirant Humanidades, Ciudad del México, 2023.

conclusions (VII), thought will be configured as the essence of the person, but at the same time as a possible externalised *corpus* (VII).

THE *TMESI* BETWEEN PERSON AND BODY

To say person is to say fiction, even more so when it comes to defining it legally. This fiction has its origins in Greek theatre, where the person was reflected in the theatrical mask and in the sound it generated.²

Hence, this fiction – which has also passed through the ages through the contrast with “*persona ficta*” and moral person³ – has come to be embodied in the identification of the modern understanding of a ‘person’ as an antithetical creation that is contrasted with the legal person. However, it should be noted that while codifications often define the legal person,⁴ they do not define the ‘other’ person, which, as will be seen, in some cases is referred to as ‘physical’. In this case, the attempt to identify the person in its symbiosis with the body, with its physique, is observed. This is why the identification of the person, in this sense, from the legal point of view, indirectly resents a Roman influence which identified the attribution of rights in physical-corporeal perfection.

It is therefore curious that although several codifications refer to the physical person in order to delineate this category, which is opposed to the legal one, they do not define it. This is the case of some codification models. It is striking, therefore, that even the Italian recodification of 1942, when delineating the rights of personality – i.e. those associated with the person – refers to the ‘physical’ person, but does not define it⁵ and even, in part, distances itself from it, since it

² In fact, it is the etymology of the word “person” that signifies the different sound that the voice came to assume behind it - through (“*per*”) the “sound” (“*sona*” from sonar) - and which was embodied by the use of the mask, also encouraging acoustics. Helga María Lell, “Perspectiva histórica da metáfora do conceito jurídico de pessoa. Etimologia e ideias na Antiguidade”, *Dikaion Revista de Fundamentación Jurídica*, Vol. 28, No. 2, 310-332; José Miguel Lorenzo Arribas, *Persona, personaje y performatividad*, https://cvc.cervantes.es/el_rinconete/anteriores/agosto_06/23082006_01.htm, 15. 10. 2024.

³ See Jean Pierre Baud, *Il caso della mano rubata: una storia giuridica del corpo*, Giuffrè, Milano, 2003, 81.

⁴ On this reconstruction of the concept of the legal person in Roman law see for example Gianluca Mainino, “Dalla persona alla persona giuridica: La persona in Gaio e il caso delle ‘istituzioni’ alimentari nell’esperienza giuridica romana”, *Studia et Documenta Historiae et Iuris*, LXX, 481-498.

⁵ Thus, the first title of the first book of the Codice civile (Arts. 1-10) speaks of “*persone fisiche*”, without defining them.

considers birth not as a defining criterion of the person but as the attribution of legal capacity (Art. 1 CCit).⁶

In this way, the person – although influenced by the Greek tradition – under the traditional conception of codification in continental law, receives a Roman influence. This is produced by glossing *a contrario* the corporeal physicality that derives from the concept of the *monstra* in Roman law.

Thus, Paul already affirmed that ‘they are not children, those who, outside of what is customary, are procreated in a form contrary to that of the human race, as if a woman had given birth to something monstrous or prodigious. But the childbirth which enlarged the offices of the human limbs, to a certain extent seems perfect; and thus, it will be counted among the children.’⁷

In Roman law the essentiality associated with personality, which today *mutatis mutandis* could be thought of as associated with personality rights, is found in the requirement not only of vitality, but of ‘human form.’⁸ It is in this sense, it can be observed, that the choice of the Argentine legislator of 2015 is welcome,⁹ since – contrary to traditional codes - he prefers to refer to the ‘human person’ (“*persona humana*”).¹⁰ In this way, now, the reference to man allows transcending the physical form and the body, since it rather assumes a ‘literally’ earthlier meaning, i.e.,

⁶ Tobías develops this aspect by systematising Italian doctrine and noting that the association between person and legal capacity is a stage in the evolution of the concept of person. See José W. Tobías, *Tratado de Derecho Civil – Parte General*, I, La Ley, Buenos Aires, 2018, 335 ff.

For Tobías, this view is wrong because “you have capacity because you are a person and not the other way around”. J. W. Tobías (2018), op. cit, 350.

⁷ Digesto 1, 5, 14, *Cuatro Sententiarium*. “*PAULUS libro quarto sententiarum. Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstrosum aliquid aut prodigiosum enixa sit. partus autem, qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus et ideo inter liberos connumerabitur*”: se utiliza la traducción de Justiniano.1889. *Cuerpo del derecho civil romano a doble texto, traducido al castellano del latino, Primera parte Instituta-Digesto*, Idelfonso García Del Corral (trad.), I. Barcelona, I: 214-215.

⁸ Gian Battista Impallomeni, “In tema di vitalità e forma umana come requisiti essenziali alla personalità”, *Iura- Rivista internazionale di diritto romano e antico*, No. 22, 1971, 114; See also Jean Pierre Baud, *Il caso della mano rubata: una storia giuridica del corpo*, Giuffrè, 2003, 77.

⁹ Furthermore, for Tobías, the fact that the current Argentine Code - unlike Art. 51 CC Vélez - does not define the person, cannot be considered a mistake, since “it is a notion that comes from nature and is prior to the law”. J. W. Tobías (2018), op. cit., 349.

¹⁰ Thus, Book I, Title One of the Argentine Civil and Commercial Code speaks of “*Persona Humana*” as opposed to “*persona juridica*”, which is an “entity” to which the legal system confers the capacity to acquire rights and contract obligations for the fulfilment of its object and the purposes of its creation (Art. 141). See J. W. Tobías (2018), op. cit., 329 ff.

being the fruit of the *humus* of the ‘*pachamama*’ and, in this sense, assimilating a corporeal manifestation that, in part, transcends its physicality.

The abandonment of the corporeal features of the person can be seen in the change to the new concept of the human person (Art. 19 Cód. Civ. y Com. y ss.) with respect to the previous one and in the abandonment that the Civil Code of Vélez made of the material and corporeal aspects by referring to ‘persons of visible existence’ (“*personas de existencia visible*”)¹¹ with ‘characteristic signs of humanity’ (“*signos característicos de humanidad*”)¹². Thus, nowadays, the human person and his or her rights are predominant¹³ according to the approach that characterises public law regulations or constitutional rights, international treaties¹⁴ and which has been embodied in the constitutional principles of several countries.¹⁵

In a different view and model, the person has been legally conceived not only as ‘physical’, but also – under scholastic and Grotian influence (which will contribute to the creation and consolidation of personality rights¹⁶ (“*derechos de la personalidad*”) and, later, to the *derechos personalísimos* – as ‘natural’. However, this has sometimes generated a situation of instability between these two concepts, given the co-existence of both within the same legal text, which, therefore – *nolens o volens* – intermingles them, leading not only to a definitional absence of the person, but also to a conceptual absence of the person.¹⁷ In this sense, sometimes iusnaturalist and

¹¹ Title II of Chapter II of Book I of the Civil Code of Vélez.

¹² Art. 51 Civil Code of Velez.

¹³ Tobías acutely observes that this undergoes two “filtrations”, thus, the “physical” person is “filtered” in Art. 1513 of the Argentine Civil and Commercial Code and in the reform of Art. 1 of Law 24.240 operated by Law 26.994. J. W. Tobías (2018), op. cit., 350.

¹⁴ See for example Art. 1 of the Universal Declaration of Human Rights according to which “all human beings are born free”.

¹⁵ Thus, for example, Art. 2 of the Italian *Costituzione* speaks of the inviolable rights of mankind.

¹⁶ See for example, Federico De Castro y Bravo, “Los llamados derechos de la personalidad”, *Anuario de Derecho Civil*, Vol. 12, No. 4, 1959, 1237-1276. On the concept of *ius in re ipsum*, Baltasar Gómez de Amescua, “Tractatus de potestate in seipsum”, *Mediolani, apud Petrum Martyrem Locarnum*, 1609.

¹⁷ This is the example of the Spanish legal system where reference is made to the “physical” person (Arts. 9, 10, 206, 211, 222, 281, 753 CCesp), to then identify them (in Title II, Chapter I of Book I) as “natural persons” (see also arts. 29 and 40) as opposed to the “legal persons” of Chapter II (see Art. 35). The physicality and naturalness of the person is also observed in the current Brazilian codification: in fact, Title I of Book I of the Brazilian Civil Code speaks of “*Das Pessoas Naturais*”, affirming that their existence ends with death (Art. 60) and that their life is inviolable (Art. 21), but later refers to natural persons (Arts. 128, 188, 190, 225). It should be noted, however, that when referring to the family and the principles of dignity, reference is made to “*pessoa humana*” (Art. 226 §7), an aspect which is also found in Art. 1 III of the Brazilian Constitution, which emphasises the “human” person (see also Art. 34 let. b).

positivist theories¹⁸ intermingle and the concepts of natural, physical and human interact with each other. Thus, there are models which, although they identify the person as natural, make express reference to the individual of the human species.¹⁹

What is certain is that, although the concepts of person and body, as can be seen, can coexist today even in the same legal text, their legal symbiosis, that existed in the past, must be abandoned.²⁰

Despite this, a deeper analysis leads to the assertion that the dichotomy between person and body was already to be found in some traditional aspects of Roman or continental law. Thus, the person can be born before the body (a concept now found in Art. 19 Cód. Civ. y Com. and before the Roman *infans conceptus*) – or die before the body, as the concept of civil death (“*muerte civil*”)²¹ already demonstrated. Moreover, the connubium between person and body no longer applies in the modern legal perspective – proof of this is the regulation and progressive expansion of acts of disposition of one’s own body, which, although with ethical and bioethical limits, move on a different plane from that of the identification of the body as a good/thing (*infra*); in fact, this has contributed to the separation of body and person.

The field of bioethics powerfully shows the will to regulate the body and its parts in a specific way and to keep it separate from the person. This innovative aspect in some codes²² – which has led to a dynamic concept of person²³ – has been

¹⁸ See J. W. Tobías, op. cit., 331 ff.

¹⁹ This is the model of the Chilean Civil Code, which contrasts legal persons with natural persons (Art. 54), after referring to the concept of the individual of the human species (Arts. 25 and 55). This same model is repeated by transplantation in the Colombian legal system (respectively Arts. 73 t 33 and 74 CC Colombia).

²⁰ This aspect was legally enshrined in the opinion of the French Council of State - also known as the “Braibant” report - at the end of the 1980s, which affirmed that “the body is the person” (Art. 25). See Conseil d’État, *Sciences de la vie – De l’éthique au Droit*, La documentation française, 1988, in particular 9 ff. Baud brilliantly dismantles this aspect in this essential work: J. P. Baud, op. cit. On the separation between person and body see Aurel David, *Structure de la personne humaine: essai sur la distinction des personnes et des choses*, PUF, Paris, 1955.

²¹ Very clear in that sense is J. P. Baud, op. cit., 72 ff.

²² In this sense, see Art. 5 *Codice civile Italiano*. Also, see Umberto Breccia, Alessandro Pizzorusso, *Atti di disposizione del proprio corpo*, Pisa University Press, Pisa, 2007. In more detail, Stefano Rodotà, Paolo Zatti, *Trattato di biodiritto. Il governo del Corpo*, Giuffrè, Milano, 2011. As Tobías points out, the current Art. 56 Cód. Civ. y Com. derives from this rule. He notes how the principle has been reshaped in the light of the personalist principle embodied in the Italian Constitution of 1948. J. W. Tobías (2018), op. cit., 115 ff.

²³ The balance between the person, human dignity and the disposition of the body and the balance of technological development is taken as a key issue in the Council of Europe Convention

clearly reflected and consolidated in others. In this sense, the French experience – abandoning its traditional position (*supra*) – has been one of the pioneers in reforming its Civil Code and separating the person²⁴ and the body²⁵ into two distinct provisions. In this way, the French legal system has endeavoured to undertake a process of restructuring the person, which has led since the 1990s to the need to regulate in the Civil Code ‘respect for the human body’ (“*respeto del cuerpo humano*”)²⁶ – which must now be treated with dignity even after death²⁷ – requiring bioethical safeguards that have led to the almost frenetic remodelling of the provisions introduced.²⁸ All this has led to the protection of genetic characteristics,²⁹ including the dissemination of brain tests such as MRI scans,³⁰ and the system will be remodelled in 2021.³¹

However, the question arises as to whether the same treatment should also be given to other non-corporeal aspects linked to the intellect and thought: is there room to speak of rights linked to this sphere, and is it relevant to speak of and regulate so-called ‘neuro-rights’?

for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (“Oviedo Convention”) of 4 April 1997.

²⁴ Art. 16 French Civil Code: “*La loi assure la primauté de la personne, interdit toute atteinte à la dignité de celle-ci et garantit le respect de l'être humain dès le commencement de sa vie*”.

²⁵ Art. 16-A French Civil Code: “*Chaque un a droit au respect de son corps. Le corps humain est inviolable. Le corps humain, ses éléments et ses produits ne peuvent faire l'objet d'un droit patrimonial*”.

²⁶ According to Chapter III, Title I, Title I of Book I dedicated to “persons” in the French Civil Code (Arts. 16 to 16-99): the reform starts with the *Loi n. 94-653 du 29 juillet 1994 relative au respect du corps humain, JORF n°175 du 30 juillet 1994*.

²⁷ Thus, the *Loi n. 2008.1350*, of 19 December, in addition to modifying and completing Art. 16-2, introduces it in a new provision: Art. 16-1-1 French Civil Code.

²⁸ Thus, *la Loi n° 2004-800 du 6 août 2004 relative à la bioéthique* perfects, in general, all the reform carried out in 1994 (arts. 16-3, 16-10 a 16-13). Article 16-11 was subsequently amended by *Loi 2011-267, du 14 mars, d'orientation et de programmation pour la performance de la sécurité intérieure*.

²⁹ Concerning the “*caractéristiques génétiques*” and the “*empreintes génétiques*”, see Arts. 16-10 and 16-13 French Civil Code. On the “*techniques d'imagerie cérébrale*”, Art. 16-4 French Civil Code says: “*Les techniques d'imagerie cérébrale ne peuvent être employées qu'à des fins médicales ou de recherche scientifique ou dans le cadre d'expertises judiciaires, à l'exclusion, dans ce cadre, de l'imagerie cérébrale fonctionnelle. Le consentement exprès de la personne doit être recueilli par écrit préalablement à la réalisation de l'examen, après qu'elle a été dûment informée de sa nature et de sa finalité. Le consentement mentionne la finalité de l'examen. Il est révocable sans forme et à tout moment*”.

³⁰ See Art. 16-14 French Civil Code: *Loi 2011-814*, de 7 julio *relative à la bioéthique, JORF n°0157* of 8th of July 2011.

³¹ *Loi n° 2021-1017* of 2nd of August 2021 *relative à la bioéthique, JORF n°0178* of 3rd of August de 2021. Art. 16-8-1 has been introduced and Art. 16-4, 16-10 and 16-14 of the French Civil Code have been amended.

PERSON, BODY AND THING

For the sake of the free development of the rights of the person and of the personality and, even more so, of the *derechos personalísimos*, a uniqueness between the person and his physicality – and thus corporeality – cannot be accepted, and, therefore, one should move away from the physical concept of the human person and, therefore, distance oneself from its merely corporeal/materialistic conception.

Thus, in this context, a must-read should be a book from the 1990s: ‘The Case of the Stolen Hand’,³² which deals with the legal history of the body and its separation from the person, starting with a case that the author himself describes as ‘science fiction-jurisprudence’, in which he tries to analyse what the legal solution would be for a person who fraudulently steals a hand that another person has accidentally amputated.

The author suggests three possible solutions: one, in which the subject could be convicted of a crime against property (theft); another, through a conviction for mutilation – given that the hand would have been irreversibly detached from the body as the individual could not undergo surgery – or even a third possibility, that is, that of being acquitted. Without revealing the author’s interesting arguments here, it is worth noting how the problem of the body, considered as a thing (good) separate from the person, requires a thorough treatment, as well as the need to consider the relationship between person and body. From the legal point of view. From a legal point of view, therefore, the above needs to be intertwined with the legal concept of thing (good), and an attentive reader will note how this may create some legal friction, since ‘person’ and ‘good’ have traditionally been legally distinct, as evidenced by the main structures of the civil codes, under the influence of the Gayan differentiation.

In the current view, ‘person’, ‘body’ and ‘thing’ (‘good’), in the legal sense and as an object,³³ suffer from a confusion which sometimes seems to create some perplexities³⁴ and which cannot be properly grasped either by the jurist or the legislator.

It would certainly be useful to have a classification of the parts of the body according to whether they are reproducible or non-reproducible, but the aim here is not to carry out a detailed study on the possible unavailability/availability of parts of the body (donation of eggs, sperm, prostitution, blood, etc.), but rather to observe,

³² J. P. Baud, *L'affaire de la main volée: Une histoire juridique du corps*, Seuil, Paris, 1992. The Italian translation made in 2003 is used here.

³³ Cfr. Srts. 17 & 56 57 Argentinian Cod. Civ. Com.

³⁴ Here it is appropriate to refer to the interesting reflections made in Miguel Federico De Lorenzo “El cuerpo humano que se vuelve cosa, cosas que se vuelven cuerpo humano”, *Revista Jurídica Argentina, La Ley*, Buenos Aires, 2010.

as has already been brilliantly,³⁵ emphasised, the importance of identifying the legal nature of living matter separate from the body and to note that ‘the body is a thing, but it is not just any thing’.³⁶

In this specific case, therefore, the reasoning here is not about the parts of the body, but about the thought and to assess whether it can be a ‘thing’ or rather a ‘person’... or should it perhaps be understood that it is neither a ‘thing’ nor a ‘person’, as has been affirmed³⁷ in dealing with the question of the embryo?

*Thought as an indispensable element of the person:
thought is a person in law*

The concept of person is not exclusively a legal concept, but has necessarily been nourished from the philosophical, theological and metaphysical spheres; legal concepts or definitions created *ad hoc*, such as that of ‘citizen’, which, moreover, has at some point served for the attribution of civil rights,³⁸ are another matter. Thus, the concept of the person is born from philosophical and theological perspectives, to later develop in legal and ethical spheres.

Therefore, in order to understand the relationship between the person and thought, it is necessarily appropriate to go back - even though other philosophical and theological visions can be considered - and make our own the Boethian vision according to which ‘*persona est rationalis natura individua substantia*’,³⁹ later taken up by St. Thomas. So St. Thomas, wishing to qualify the difference between the individual and the person, noted that if the former is indistinct, the latter is not, thus associating the person with man.⁴⁰ In this way, a kind of evolution of the Boethian

³⁵ The origin was the problematic issue of the sacredness of the blood of Christ, claiming that it did not change its nature once it had been shed. See Benedict XIV, *De Servorum dei beatificatione et beatorum canonizatione*, Prati, Vol. II, Cap. XXX, 1839; J. P. Baud (2003), op. cit., 159 ff.

³⁶ Baud notes that this aspect would be the trait d’union of canonist and civilist doctrine, although they would diverge in other respects. See J. P. Baud (2003), op. cit., 83-85 ff.

³⁷ Thus, the embryo would be neither a human body nor a biological material. Reflections on the issue of in vitro fertilisation and embryonic stem cells can be found at Bernard Edelman, *Ni chose, ni personne. Le corps humain en question*, Hermann, Paris, 2009.

³⁸ This was the model, for example, of Art. 1 *Codice civile* of 1865, which established that, in contrast to the foreigner (and partly taking up the contrast with *ius gentium*) “*ogni cittadino gode dei diritti civili, purché non ne sia decaduto per condanna penale*”.

³⁹ Boezio, *De persona et duabus naturis contra Eutychem et nestorium*, III, 3 (PL, 64, 1343).

⁴⁰ Thus, it states that “*persona igitur in quacumque natura significat id quod est distinctum in natura illa; sicut in humana natura significat has carnes, haec ossa, et hanc animam, quae sunt principia individuantia hominem*”. See Tommaso D’Aquino, *Summa Theologiae*, I:29-4.

‘individual substance’ took place, which in turn had taken inspiration and genesis from the substance and essence that have some of their philosophical roots⁴¹ in Porphyry,⁴² Aristotle and Plato and which also found vigour from the theological point of view with St Augustine.⁴³

Thus, in St. Thomas, the association between rational individual and person is consolidated,⁴⁴ and therefore ‘person’ is not only substance and individualism, but also has a rational nature⁴⁵ and this nature is expressed through thought.

In this sense, ‘thought’ becomes interpenetrated with the person and his essence and becomes an indispensable element of the person, so that ‘thought’ is juridically a ‘person.’

*Right to free thought as a personality right (“derecho de la personalidad”),
or a highly personal right (“derecho personalísimo”)?*

Once the idea that thought is person (or at least intrinsically belongs to it) has been clarified, the question of whether it can be configured as a personality right (“derecho de la personalidad”) or a highly personal right (“derecho personalísimo”) linked to thought must be assessed and addressed. In this sense, the first logical step is to ask whether it is appropriate to recognise and regulate it, thus

On St. Thomas’ interpretation of Boethius’ definition of person in the commentary on the four books of Peter Lombard’s Sentences. See Francisco Rego, “El concepto de persona en el Scriptum super Sententiis Petri Lombardi de Santo Tomás”, *Scripta Medievalia*, 2009, 131 ff.

⁴¹ More broadly see Enrique Gómez Arboleya, “Más sobre la concepción de persona”, *Revista de estudios políticos*, No. 49, 1950, 107-124.

⁴² Porfirio, *Isagoge*, Rusconi, Milano, 1995 Latin version of Severinus Boethius (Giuseppe Girgenti: preface, introduction, translation and apparatus).

⁴³ See María del Carmen Dolby Múgica, “El Ser personal en San Agustín”, *Revista española de Filosofía Medieval*, No. 13.

⁴⁴ The association between rational individual and person (“*omne individuum rationalis naturae dicitur persona*”) can also be seen in the *Summa Theologiae*, I, q. 29, a. 3 ad. 2). Technically these ideas are embodied - as Rego shows very well - in *De Genesi ad litteram* (III, 20, 30, where it is stated that the relationship with rationality: “*in eo factum hominem ad imaginem Dei, in quo irrationalibus animantibus antecellit. Id autem est ipsa ratio, uel mens, uel intelligentia, uel si quo alio vocabulo commodius appellatur*”) and in the *De Trinitate*, where the idea of the person as something individual and singular (VII, 6, 11) and its substance related to man (XV, 7, 11: “*Singulus quisque homo una persona est*”) is reflected. F. Rego, op. cit., 134.

⁴⁵ See for example Fabrizio Amerini, “Tommaso d’Aquino, il concetto di persona e la bioética”, *La persona come categoria bioetica. Prospettive umanistiche* (ed. Maria Zanichelli), FrancoAngeli, Milano, 2019, 95-111.

configuring it as a new ‘neuro-right’. This aspect will therefore be addressed below, before noting that in some countries, case law - in Chile (V.1), or the legislator himself, in Brazil (V.2) - seeks to recognise ‘neuro-rights’ by linking them to the cerebral sphere.⁴⁶ Finally, some reasons are given for preferring to avoid such regulation (V.3).

*The jurisprudential recognition of the right to the protection
of the privacy of brain information*

It should be noted that Chilean jurisprudence⁴⁷ has been one of the pioneers in civil laws countries in recognizing ‘neuro-rights’, but it has done so in a peculiar way: a) indirectly, that is, by means of an appeal for protection relating to the violation of rights concerning personal data, b) to justify the elimination of previously stored data, given that the purchaser of a device that collects information on the electrical activity of the brain and obtains data on gestures, movements, preferences, reaction times and cognitive activity of the user had unsubscribed from the services of the device.⁴⁸ The case is very curious because the plaintiff was the former senator Guido Girardi, who was the one who presented a bill on ‘neuro-rights’ to Parliament.⁴⁹ Here it should be noted that Chile has pushed for its regulation, not only through this initiative, but also through the attempt to introduce this right at

⁴⁶ It should be recalled that, with regard to the processing of brain images, the French legislator has introduced Art. 16-14 in its Civil Code, according to which they “may only be used for medical or scientific research purposes or in the framework of forensic examinations, with the exception of functional brain imaging. The patient’s express consent must be obtained in writing before the examination is carried out, after the patient has been duly informed of its nature and purpose. The consent must specify the purpose of the examination. It may be revoked without formalities at any time”.

⁴⁷ Supreme Court of Chile, Third Chamber, 9 August 2023, *Girardi v. Emotiv*, Case No. 105.065-2023.

⁴⁸ This was the non-invasive, non-therapeutic, mobile electroencephalogram-type neurotechnology device designed for self-quantification, field research, not for sale as a medical device, called Insig. See Emotiv, <https://www.emotiv.com/products/insight>, 15.10.2024.

⁴⁹ *Proyecto de Ley* initiated by motion of Senators Girardi, Goic and Chahuán, Coloma and De Urresti, on the protection of “neuro-rights” and mental integrity, and the development of research and neurotechnologies. Bulletin N° 13.828-19. Art. 2 of the draft defined “neuro-rights” as “New human rights that protect the privacy and mental and psychic integrity, both conscious and unconscious, of individuals from the abusive use of neurotechnologies” and “neural data” as “information obtained, directly or indirectly, through the activity patterns of neurons, accessed by advanced neurotechnology, including both invasive and non-invasive brain recording systems”. These data contain a representation of psychic activity, both conscious and subconscious, and correspond to the most intimate aspect of human privacy.

a constitutional level within the new constituent process.⁵⁰ This constituent process, although it has failed for the moment, has nevertheless opened the door constitutionalizing of this right.⁵¹

The regulation of “neuro-rights”

The current draft of the Brazilian Civil Code not only aims to introduce a new book on ‘digital rights’, but also provides for the express regulation ‘*da pessoa no ambiente digital*’, including a series of provisions regulating ‘neuro-rights’.⁵² Without wishing to dwell on this subject here, and without intending to deal with it exhaustively, it should be noted that the regulation provides⁵³ for some relevant aspects in its articles, introducing part of the regulation in the Civil Code and another in the General Law on the Protection of Personal Data.⁵⁴

With regard to the regulation that should be introduced in the Civil Code, it is established that ‘neuro-rights’ are expressly related to human dignity ‘in its physical, moral and intellectual dimension’,⁵⁵ considering that these are an inseparable part of the personality and ‘may not be transmitted, renounced or limited’.

It states that ‘Neuro-rights are those protections aimed at preserving the mental privacy, personal identity, free will, fair access to brain enhancement, mental integrity and protection against bias, of natural persons through the use of neurotechnologies’ with a list of these including:

‘a) the right to cognitive freedom: the use of neurotechnologies in a coercive manner or without consent is prohibited;

⁵⁰ On this point see for example María Isabel Cornejo Plaza, “Consagración constitucional del neuroderecho a la aumentación o neuromejora cognitiva en Chile: implicancias y desafíos”, *Bioética, neuroética y neuroderechos. Realidades y perspectivas en el siglo XXI* (eds. Jesús Armando Martínez Gómez, Edgar Pérez González), Tirant Humanidades, Ciudad del México, 2023, 281-296.

⁵¹ Pablo López-Silva, Raúl Madrid, “Sobre la conveniencia de incluir los neuroderechos en la Constitución o en la ley”, *Revista Chilena de Derecho y Tecnología*, Vol. 10, No. 1, 2021, 53-76.

⁵² See Parecer nº 1 – *Subcomissão de Direito Digital da cjcodcivil, integrante da Comissão de Juristas responsável pela revisão e atualização do Código Civil (CJCODCIVIL), criada pelo Ato do Presidente do Senado (ATS) nº 11, de diciembre de 2023. Membro da subcomissão: Laura Contrera Porto (Subrelator), Laura Schertel Mendes e Ricardo Resende Campos.*

⁵³ At this stage, the proposal does not indicate the number of the provisions of the Civil Code, marking each with “Art. X”.

⁵⁴ *Lei nº 13.709, de 14 de agosto de 2018 (Lei Geral de Proteção de Dados Pessoais).*

⁵⁵ “The protection of personality rights is ensured as an instrument aimed at safeguarding human dignity and neuro-rights, comprehensively encompassing individuality in its physical, moral and intellectual dimensions.”

b) the right to free will: the right to make free and competent decisions in the use of brain-machine interfaces, without manipulation of thoughts, feelings or mental states;

c) the right to mental privacy: the right to protection against unauthorised or unwanted access to brain data, without commercial sale or transfer;

d) the right to mental integrity: the right not to have one's mental activity manipulated by neurotechnologies, and not to have control over one's behaviour altered or removed without consent;

e) right to continuity of personal identity and mental life: protection against alterations to personal identity or behavioural coherence, prohibiting unauthorised alterations to the brain or brain activity;

f) right to fair access: the right to fair and equitable access to cognitive enhancement or augmentation technologies, which should be guided by the principles of justice and equity;

g) the right to protection against bias: discriminatory or biased practices based on brain data are prohibited.

However, after having identified these rights, it is clarified that their use and access is allowed by specific provisions.⁵⁶

The legislator also wants to complement the regulations of the Civil Code with some amendments to the General Personal Data Protection Act by underlining a new protection of mental privacy, cognitive freedom, free will and mental integrity (Art. 2. VIII) and introducing the regulation of the so-called 'neural data' (*datos neuronales*), which are data collected directly from the neural system of a natural person,⁵⁷ and regulating, in addition, the processing of 'brain data' which may be processed with or without informed consent, *mutatis mutandis*, as often as necessary, e.g. – among others – in cases of protection of the life or physical integrity of the data subject or of a third party, and for the protection of health.⁵⁸

⁵⁶ Thus, it is stated that in relation to the rights just listed: "Neuro-rights and the use of or access to brain data may be regulated by specific rules, provided that the protections and guarantees afforded to personality rights are preserved".

⁵⁷ In this sense, the following provision is foreseen: "Art. 5 For the purposes of this Law, the following are considered: XX - neural data: first-order data collected directly from the neural systems of a natural person (including both brain and nervous systems) and second-order inferences based directly on these data."

⁵⁸ In Chapter II of Law 13.709, a section IV would be introduced, which would provide that "Art. X - The processing of personal brain data may only occur in the following cases: I - when the data subject or his legal representative consents, specifically and separately, for specific purposes; II - without the need for consent of the data subject, in cases where it is indispensable for: a) the protection

It can therefore be observed that the regulation of ‘neuro-rights’, although they are considered personality rights and cannot be transmitted, renounced or limited, can be ‘processed’ and stored. In short, the possibility of absorbing brain information by means of neurotechnology (whose maximum emblem is thought) would be allowed, even without consent, for the sake of protecting the life or physical integrity of the person concerned or of a third party and of protecting health; in other words, by enhancing the rights of the individual, it would paradoxically be possible to limit his or her own rights.

Against regulation

In the current state of affairs, if it were assumed that the (supposed) right to free thought (or any other right to cerebral information assimilable to this) were not only a right, but also a highly personal one, Art. 55 Cód. Civ. y Com. should apply, and, therefore, consent could, in addition to other aspects,⁵⁹ be freely revocable. Now, although it could potentially be revocable, *de facto* – given its intrinsic typology and characteristics – it will hardly be so. Even more so in a system in which the use of neurotechnology – together with artificial intelligence – will be able to extract and collect data and manage it through algorithms. The automatic processing of perceived brain information and its eventual disclosure – even to third parties – could be completely uncontrolled and the subject would therefore not be protected. This means that private law will be confronted with ethical values that are sometimes difficult to regulate or impose.⁶⁰ Pathological situations have already been addressed in relation to artificial intelligence in the use of algorithms which, in some cases, would be detrimental to the rights of the individual⁶¹

of the life or physical integrity of the data subject or a third party; and b) the protection of health, exclusively in procedure carried out by health professionals, health services or health authorities.”

⁵⁹ As not to be presumed and admitted only if not contrary to law, morals or decency.

⁶⁰ In fact, Pope Francis, referring to artificial intelligence, notes that: “Artificial intelligence, then, ought to be understood as a galaxy of different realities. We cannot presume a priori that its development will make a beneficial contribution to the future of humanity and to peace among peoples” and “Nor is it sufficient simply to presume a commitment on the part of those who design algorithms and digital technologies to act ethically and responsibly”. See Pope Francis, Artificial Intelligence and Peace, message of His Holiness for the 57th World Day of Peace, <https://www.vatican.va/content/francesco/en/messages/peace/documents/20231208-messaggio-57giornatamondiale-pace2024.html>, 15.10.2024.

⁶¹ Thus, in the United States, it is noted that menstruation tracking apps record, along with sexual cycles, mood swings and other potentially sensitive data that could in some cases violate users’ privacy and informed consent. See Tahsin Ahmed, “LEAK! The Legal Consequences of Data Misuse in Menstruation-Tracking Apps”, *California Law Review*, Vol. 111, No. 6, 2023, 1979-2000.

or even lead to racial discrimination.⁶² Therefore, any handling of data must be carefully controlled or excluded.

It is clear, therefore, that in the context dealt with here there would be little point in the indemnity protection that could be justified under a broad definition of damage to the intrusion into the life of others in the sense of Art. 1770 of the Argentinian Cod. Civ. Com. Once the data has been inserted into the 'big data', there would be no going back, no matter how much the judgements order the re-establishment of the *status quo ante* or the deletion of the data or information. There would be a high risk that such information would be processed automatically and, in certain cases, even without the consent of the subject. Since there are no concrete guarantees of the restoration of the status quo ante due to technological patterns and their continuous evolution, the subject would be left unprotected, *a fortiori*, and could be identified as a weak, consumer or hypervulnerable subject.

Therefore, to recognise the right to free thought as a right would be to decree its own hanging. Recognising the 'neuro-right' would make it possible to regulate it and, therefore, to authorise data trafficking in this sense, thus causing irreparable damage to the inviolability of the person (as required by Art. 51 of the Argentinian Cod. Civ. Com.) that even the highest financial compensation cannot compensate. However, this aspect would become even more complex if it were admitted that the application of Art. 1770 Argentinian Cod. Civ. Com. would not find application in the interests of a historical-systematic interpretation of Art. 51, since the revocability of the rights would not entail⁶³ damages as the right of the injured party to claim the damages caused by the revocation (unless otherwise provided by law) was deliberately omitted, as was foreseen in the antecedents from which the provision derives.⁶⁴ Thought as an essential part of the person, volitional manifestation and externalised *corpus*.

Given that it has been stated that it would be advisable not to regulate or recognise the rights associated with the treatment of thought, we will now examine some of these aspects in greater depth, configuring the true nature of thought in accordance with what has been set out here.

⁶² It is noted that Property technologies (PropTech), which contributes to the use of innovations that automate real estate transactions, generates automatic tenant selection associated with machine learning algorithms that process data such as credit scores, eviction records and criminal records. The automation of these markets could even lead to racial discrimination and segregation in housing. See Nadiyah Humber, "A Home for Digital Equity: Algorithmic Redlining and Property Technology", *California Law Review*, Vol. 111, No. 5, 2023, 1421-1484.

⁶³ In this sense, Tobías speaks of "*omisión deliberada*", J. W. Tobías (2018), op. cit., 49.

⁶⁴ These are Art. 115 of the Executive's Draft and Art. 108 of the 1998 draft reform of the Argentine Civil Code; J. W. Tobías (2018), op. cit., 47 & 49.

Thought is free to be externalised in manifestations of various kinds: corporeal manifestations, movements, inertia, literary and artistic creations, etc. However, it cannot be encapsulated beforehand, since it is part of the person himself, being one of his characterising fundamentals.

Thought becomes legally relevant at the moment of its external manifestation, thus becoming an externalised *corpus* under two aspects: a) the manifestation of volition (which can legally shape the will to negotiate or to bind oneself) b) externalisation in what we already know as *corpus mysticum* - as opposed to *corpus mechanicum* - and which has entered the world of private law through intellectual property or copyright. What is certain is that in the latter case there is a clear separation between *corpus mechanicum* and *corpus mysticum*⁶⁵ and the proof is that, although third parties can acquire ownership of the former, they can in no case acquire ownership of the latter, which always remains in capo of the subject as a kind of 'spiritual property'.⁶⁶ Therefore, it is the will of externalisation – and not a previously informed consent authorising a prior cerebral reading – that is the only way to separate it from the person and give it a new form that allows it to enter the sphere of negotiation to give form to an obligation (even natural) to contractual consent or to be embodied in material goods or works that could be the object of contracts.

In relation to the manifestation of the negotiating will, the legal problem may eventually be that of assessing or choosing which theory of manifestation of will to adopt, for example, whether the moment of emission or reception, but what is certain is that the processing of thought cannot be referred to a mere consent, albeit informed, – which intends, prior to emission and externalisation – to manage, store or process the subject's thought or brain information by means of neurotechnology. Thought, in this sense, cannot be a contractual or negotiable object until it is manifested externally by the express will - and not the consent – of the subject.

In this way, to recognise, to positivise 'neuro-rights' would mean legally unprotecting the person and undermining his or her inviolability. In this sense, the freedom to be a person is also the freedom to produce thought, which can only be freely decided if it is eventually embodied in a juridical act, and which, however, will not – on its own – be the object of this act, where it is still part of the

⁶⁵ See M. Are, "Beni immateriali (diritto privato)", *Enciclopedia del Diritto*, V, Giuffrè, Milano, 1959, 244 ff; Paolo Greco, "Beni immateriali", *Novissimo Digesto Italiano*, II, Utet, Torino, 1958, 356-366; Giovanni Pugliese, "Dalle 'res incorporales' del diritto romano ai beni immateriali di alcuni sistemi giuridici odierni", *Rivista trimestrale di diritto e procedura civile*, XXXVI, 1982, 1136 ff.

⁶⁶ An interesting reconstruction of the *Geistiges Eigentum* (spiritual property) with a particular focus on literary works and copyright can be found in Guido Alimena, "Dalla materia del libro alla forma dell'opera. La genesi illuministica della geistiges Eigentum", *Teca*, No. 5, March 2014, 55 ff.

person himself. The thought is part of the person, it is a person, it is only when it is separated from it that it becomes an available corpus and possibly a marketable object, but with different and special characteristics compared to a normal type of thing. However, as long as it is 'inside' the volitional sphere, it is not appropriate for the legal world.

Thinking, moreover, includes acts that are not strictly associated with negotiability *strictu sensu*, so that 'reading thoughts' by means of neurotechnology could lead to predictive patterns, even of all other types of thoughts, and even to a future remodelling of the theory of error and the relationship between vice error and obstacle error. Thus, all kinds of brain information of that thought belong to the person and are part of him and only of him. Indeed, it is only through thinking and brain processing that complex results can be arrived at through the transformation of ideas.

This is consistent and does not conflict with any of the theories of wills (receptive, non-receptive, etc.) that serve to consolidate the creation or the binding nature of a legal act or obligation. During the act of thinking, the will is still *in nuce*: to read it beforehand would mean to break the person himself and his freedom. Moreover, it would mean controlling his or her thought patterns by means of future algorithms that could help to influence the subject to (or in) subsequent acts, even with the intervention of artificial intelligence-induced control.

The person, in this sense, will be inviolable⁶⁷ and his thought will be inviolable as long as he is in it. The thought, therefore, will be a 'person', and once outside, by means of a consolidated will and not by means of a simple act of consent, it will be *corpus*, and as *corpus* it can enter the legal sphere, whether this takes the form of a more or less receptive manifestation of will or is embodied in the *corpus mysticum* that can be related, for example, to intellectual property or copyright. In this sense, there must not only be a principle of inviolability of certain parts of the human body,⁶⁸ but also of the person himself and his essence, an essence of which thought is an inseparable part. It is in this context that one of the maximum expressions of Art. 19 of the Argentinean National Constitution assumes and must assume relevance, and which must therefore dialogue with the sources of private law and with the – appropriate – concept of person, in this way, as has been claimed,⁶⁹ the primacy of the person in the constitutional norms can be adequately fulfilled.

⁶⁷ Art. 51 Argentinian Cod. Civ. Com. Tobías has emphasised that the inviolability of the person is also a value for the Supreme Court of the Nation (fallo 323:3229); J. W. Tobías (2019), op. cit., 42.

⁶⁸ Expressly set out in French law in Art. 16-A French Civil Code.

⁶⁹ J. W. Tobías (2019), op. cit., 1142-1164.

CONCLUSIONS

It is appropriate to understand the legal constraints that have given rise to a concept of person⁷⁰ that is in total connubiality with the bodily aspects. This does not mean denying the principle of the inviolability of the body, but enhancing it to constitute the essence of the person, the highest manifestation of which is thought. This means going back to the Boethian conception and that of St. Thomas, both of which emphasise the importance of thought and intellect in identifying the person and transplanting it into the legal sphere. This is not entirely unreasonable if one considers that the *corpus mysticum*, in its juridical sense, which the Thomist⁷¹ perspective takes up from Ecclesiology, abandoning its metaphysical and theological approach, is subsequently rooted in the juridical sphere and consecrated to Private Law. And the ‘ingenuity’, which justifies the juridical coverage of the *corpus mysticum*, is nothing other than thought.

What has just been stated is confirmed by the fact that it was already clear – from the conception of one of the first laws in this sense – that “a true production (...) is a means by which thought becomes a fact”⁷² and this was stated by the pen of an illustrious jurist who at that time also acted as a codifying jurist.

To configure a personality or highly personal right (*derecho de la personalidad* or *personalísimo*) relating to thought or to the management of brain information would lead to the opposite effect to the one that justifies it, and would not achieve its protection. This will be compatible with the protection of other rights that

⁷⁰ The conception of personhood related to reasoning, although the latter begins to develop at the synaptic level after a few weeks, would not be incompatible with Art. 19 Argentinian Civil Code (which takes conception as the point of reference for the existence of the human person), since rights and obligations, although retroactive, are acquired - according to Art. 21 - from birth, i.e. only on condition that the synaptic and neuronal process is complete and effective.

⁷¹ See Miguel Ponce Cuellar, *La naturaleza de la Iglesia según Santo Tomás*, Eunsa, Pamplona 1980.

⁷² “Una vera produzione (...) è un mezzo per lo quale il pensiero diventa un fatto”. Relation to the draft law (also known as the “Scialoja relation” since he drafted it) with which the first Italian law was approved. “*Sui diritti spettanti agli autori delle opere dell’ingegno*” (Law No. 2337 of 25 June 1865). See, Michelangelo Castelli, Giovanni De Foresta, Giovanni Arrivabene, Carlo Matteucci, Antonio Scialoja, “Relazione dell’Ufficio Centrale al Progetto di legge relativo alla proprietà letteraria ed artistica (24 ottobre 1864)”, *Leggi, Regolamento e disposizioni sui diritti spettanti agli autori delle opere dell’ingegno*, Tipografia Tofani, Firenze 1867, 10. Scialoja had already dealt with the subject in an earlier paper: Antonio Scialoja, *Su la proprietà de’ prodotti d’ingegno e sua pignorazione*, Napoli, 1845. On this point, see Laura Moscati, “Tra le carte di Antonio Scialoja avvocato e legislatore dei diritti sulle opere dell’ingegno”, *Rassegna Forense*, No. 3-4, 2014, 1031-1046. A systematisation of the subject in pre-Unitarian Italy can also be found here.

complement and, at the same time, differ from this one. Thus, freedom of expression, the processing of personal data or the right to privacy are rights that must be protected and, nevertheless, remain separate, although related to thought and its protection once it has been externalised.

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O PRAVNOJ PRIRODI MISLI I SUŠTINI LIČNOSTI: RAZMATRANJA IZ PERSPEKTIVE ARGENTINSKOG I UPOREDNOG PRIVATNOG PRAVA

Rezime

Polazeći od argentinskog prava i uz osvrt na trendove u stranim pravnim sistemima – sa posebnim osvrtom na francusko pravo, čileansku sudsku praksu i predloženu reformu brazilskog Građanskog zakonika – autor u ovom radu razmatra moguće regulisanje takozvanih “neuro-prava” u budućnosti. Autor smatra da je, u tom cilju, potrebno identifikovati pravnu prirodu misli u odnosu na suštinu ličnosti uz rekonstrukciju njene pravne definicije. Takođe, ističe se da je građansko pravo kroz različite epohe bilo pod uticajem filozofije i teologije, te da je došlo i do postepenog razdvajanja regulative tela i ličnosti. U radu se zastupa ideja o usvajanju pravnog koncepta “ličnosti” koji se oslanja na Boetijevu i Tomističku koncepciju i ističu se argumenti koji ukazuju na to da bi pozitivizacija “neuro-prava” bila kontraproduktivna za samu zaštitu ličnosti, kao i slobodu misli.

Ključne reči: misao, ličnost, telo, “neuro prava”, uporedno pravo, građansko pravo, lična prava

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CHINA'S LOGISTICS AND TRADE BARRIERS AS A DETERMINANT OF CURRENT DISRUPTIONS IN GLOBAL ANTIMONY SUPPLY CHAINS

China, the leader in global antimony supply, dictates the market conditions for the sale/purchase of this raw material on all continents. The current trade and logistics barriers that the most populous country in the world has introduced in this area have led to a deficit of this raw material affecting the supply chain management of the defense and battery manufacturing industries. The price of antimony has reached a record historical level, which makes it difficult to establish efficient and effective supply chain management in these industrial sectors from the aspect of cost efficiency. Considering that the defense industry is the driving force behind the growth and development of the world economy, it can be concluded that the long-term consequences of the long duration of the barriers will be incalculable for the GDP of many countries.

Key words: *China, trade and logistics barriers, antimony supply chain management, supply chain management of the defense industry, supply chain management of the battery manufacturing industry*

INTRODUCTION

For years, China has maintained the status of the world's largest producer of antimony with approximately 48% of global supplies.¹ It is one of the key inputs for

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¹ See Antimony under scrutiny: China's export restrictions and global supply chain implications, <https://corporateconnect.com.au/antimony-under-scrutiny-chinas-export-restrictions-and-global-supply-chain-implications/>, 15. 10. 2024.

producing batteries, accumulators, and lead cores for ammunition. There is a strong correlation between the success of the supply chain management of the antimony production industry – the success of the supply chain management of the battery and accumulator industry – and the defense industry supply chain management (primarily the ammunition production segment). The mentioned interdependence is based on the fact that the lead-antimony alloy has the status of an input for the defense industry, and it is achieved by 1) the production of lead-antimony alloy ingots and 2) the recycling of batteries and accumulators of which this alloy, which is poured, is an integral part. Through trade measures, China dictates the current relationship between supply and demand, as well as price conditions, in the domain of antimony on a global level,² which directly affects the global supply chain of the dedicated industry, the driving force behind the economic growth and development of many countries in the world. The first part of the paper deals with the global antimony production industry, with special reference to the position of China's leader. The second part of the paper deals with the impact of China's current trade and logistics barriers on the global supply chain of the lead-antimony alloy production industry, which is reflected in the supply chain management of both the battery and accumulator industry and the ammunition production industry (defense industry segment). The last, third, part analyzes future trends in the global antimony market and its effects on the supply chain management of dependent industries.

GLOBAL ANTIMONY INDUSTRY – LEADING POSITION OF CHINA

Antimony (Sb) is a pure element widely used in various industry segments: production of batteries and accumulators, production of medicines, production of ammunition, production of plumbing materials, etc. In recent years, it has become a critical element due to the increase in global demand and China's dominance in primary production.³ Considering the global growth and development of the battery and accumulator manufacturing industry and the ammunition manufacturing industry (as a segment of the defense industry), antimony is one of the most important secondary raw materials in the global framework.⁴ Antimony is used in

² Elmira Moosavi-khoonsari, Sina Mostaghel, Andreas Siegmund, Jean-Pierre Cloutier, "A Review on Pyrometallurgical Extraction of Antimony from Primary Resources: Current Practices and Evolving Processes", *Processes*, Nr. 10, 2022, 1590.

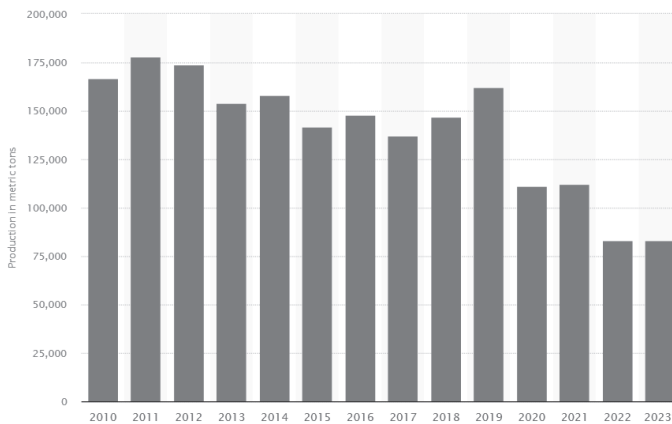
³ Dupont David, Arnout Sander, Jones Peter Tom, Koen Binnemans, "Antimony Recovery from End-of-Life Products and Industrial Process Residues: A Critical Review", *Journal of Sustainable Metallurgy*, No. 2, 2016, 79–103.

⁴ Corby G. Anderson, *Antimony production and commodities: SME mineral processing & extractive metallurgy handbook*, Society for mining, metallurgy, and exploration, Engelwood, 2019.

these industrial sectors for the production of lead-antimony alloy, which is one of the strategic inputs: 1) in the production of batteries for electronic cars,⁵ 2) for the production of lead-antimony plates as part of accumulators,⁶ and 3) for the production of bullet grain as a component of ammunition.⁷

The global production of antimony in 2023 was about 83.000 tons, from years 2011–2023. identified an oscillating trend with a decline in the interval 2019 to 2023. (picture 1). The positive side is that antimony has a great possibility of recycling (especially from batteries and accumulators), which somewhat offsets the decrease in the volume of production at the global level in the last ten years.⁸ The main reason for the reduction of antimony placement on the global market is the goal of China, the global leader, to limit strategic supplies and protect its industry by generating a competitive advantage (especially industries that are highly dependent on antimony as an input such as the electronic car manufacturing sector and ammunition manufacturing).⁹

Figure 1. Mine production of antimony worldwide during the period 2010–2023.



Source: Global antimony production, Statista, <https://www.statista.com/statistics/1241586/global-antimony-production/>, 16. 10. 2024.

⁵ Marta Iglesias-Émbil *et al.*, “Raw material use in a battery electric car—a thermodynamic rarity assessment”, *Resources, Conservation and Recycling*, Vol. 158, 2020, 104820.

⁶ David Dupont *et al.*, *op. cit.*, 79–103.

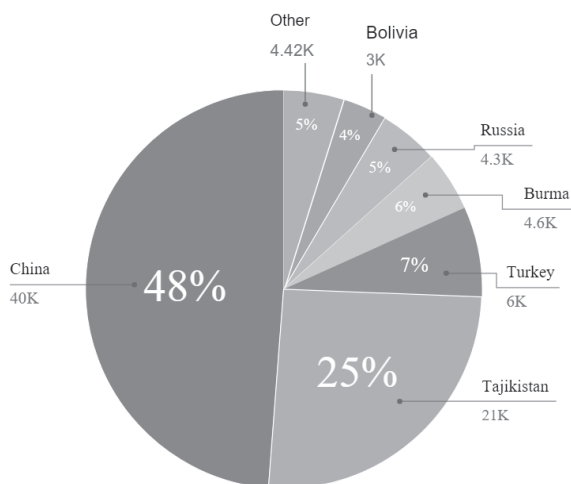
⁷ Espen Mariussen, Ida Vaa Johnsen, Arnljot Einride Strømseng, “Distribution and mobility of lead (Pb), copper (Cu), zinc (Zn), and antimony (Sb) from ammunition residues on shooting ranges for small arms located on mires”, *Environmental Science and Pollution Research*, Nr. 24, 2017, 10182–10196.

⁸ Susan van den Brink, René Kleijn, Benjamin Sprecher, Nabeel Mancheri, Arnold Tukker, “Resilience in the antimony supply chain”, *Resources, Conservation and Recycling*, Vol. 186, 2022.

⁹ Oxford Analytica, “Chinese supply squeeze to keep antimony prices high”, *Emerald Expert Briefings*, oxaan-db, 2024.

China has been the absolute leader in the global antimony market for decades (Figure 2). Trade policy in this domain, dictates the global relationship between supply and demand, which is directly reflected in the commercial terms of purchase/sale. Europe and the USA are the largest importers of antimony from China, which implies that there is a great influence of China's trade policy in this domain on the supply chain management of European and American industries that use Chinese antimony as an input. The European Union annually imports about 22,200 tons, of which about 17,650 tons are of Chinese origin (40% of the total EU sources of antimony). The USA bases 63% of its antimony imports on sources from China.¹⁰

Figure 2 China as a global leader in antimony production – 2023.



Source: Supply chain impacts China export restrictions, <https://www.exiger.com/perspectives/supply-chain-impacts-china-antimony-export-restrictions/>, 18. 10. 2024.

China's effort to maximally dictate trends in the global antimony market can also be derived from the fact that, according to the results of the World Bank's research for 2021, China is also the largest global importer of this input.¹¹ The most populous country in the world imported 26,153 tons of antimony worth 82,498,960 USD that year. The large volume of production and large imports are the result of the dynamic growth and development of both the battery and accumulator production industry in this country, as well as the production of ammunition as a segment

¹⁰ See Reuters, <https://www.reuters.com/markets/commodities/>, 17. 10. 2024.

¹¹ See World Bank, <https://wits.worldbank.org/trade/comtrade/en/country/ALL/year/2021/261710>, 17. 10. 2024.

of the defense industry (especially medium caliber ammunition). When it comes to the ammunition production industry, it is important to emphasize the fact that China is the second largest arms producer in the world (after the USA),¹² which directly reflects the importance of stimulating the production of ammunition, and therefore antimony as an input for the production of ammunition components.

China has the status of the world's leading producer of lead alloy, and therefore of lead-antimony alloy, the final input for the production of lead wire, which is widely used in the electrical and defense industry. Trends in the lead-antimony (PbSb) segment of the Chinese economy are related to current trends in the field of antimony production and marketing, and this interdependence is directly reflected in the global supply chains of the battery, accumulator, and ammunition manufacturing industries (through the export of antimony and lead-antimony alloy as input to the industries of other countries). In the continuation of the work, the focus is on the interdependence of the supply chain management of the previously listed industrial sectors, with an analysis of the impact of China's current trade and logistics barriers on the said interdependence.

ANTIMONY SUPPLY CHAIN MANAGEMENT AS A DETERMINANT
OF SUPPLY CHAIN MANAGEMENT SUCCESS OF THE BATTERY AND
AMMUNITION PRODUCTION INDUSTRY IN A GLOBAL SCOPE
– CHINA'S LEADERSHIP ROLE

Authors den Brink *et al.* have investigated global antimony supply chains and found that, despite the drop in sales recorded since 2018, more serious disruptions have been halted thanks to the fact that 25% of global antimony supplies are produced through recycling.¹³ They emphasize that recycling is the key so that the reduction of antimony stocks does not have a drastic effect on the management of the supply chain of dependent industries, especially the defense industry because an adequate alternative for this element has not yet been found for the production of flame retardants. Quijue and co-authors came to a similar conclusion, noting that it is important to work on the ecological production and recycling of antimony, which will have a positive effect on the ecology and health of the workers who carry out the antimony smelting operation in dependent industries,¹⁴ like pouring antimony

¹² See China is new second largest weapons producer in world arms, The Epoch Times, <https://www.theepochtimes.com/china/china-now-second-largest-weapons-producer-in-world-arms>, 17. 10. 2024.

¹³ S. van den Brink *et al.*, *op. cit.*

¹⁴ Wu Qiuji, Lv Zhenfu, Cao Jincheng, "Distribution and Supply of Antimony Resources in China and Abroad and Development Status of Antimony Industry Chain", *Multipurpose Utilization of Mineral Resources*, No. 5, Vol. 43, 2022, 77–82.

and lead to produce lead wire which is an input for ammunition grain. The authors emphasize that China dictates the rules of the game on the global antimony market and that without its involvement it is impossible to implement ecological production and recycling. This is confirmed by Wang and co-authors analyzing in detail China's intensive work on improving mining technology, improved production and supply of strategic minerals, including antimony.¹⁵ Li, Xu, and Zhu dealt with antimony supply risk assessment and pointed out that China, USA, and Germany play a key role in regulating supply chains on a global level. They state that China is the regulator of the game as the largest producer, exporter, and importer, and the USA and Germany as major importers and political powers.¹⁶

On August 14, 2024, China took trade and logistics measures to limit global antimony shipments in the name of national security.¹⁷ The Chinese government points out that taking these measures is aimed at protecting the national industry due to the continuous decline in the volume of antimony production in the period 2023–2024. Trade analysts point out that this is one of the reasons, but that this decision was also contributed to by the high customs rates introduced by the EU and the USA for electric cars originating in China (customs rate approximately 38% of the EU and 100% of the USA).¹⁸ The global antimony market was tight even before the introduction of antimony export restrictions due to limited sources of supply outside of China (Figure 2). This concentration of an important production input leads to the fact that any reduction in Chinese exports opens the door to price instability (price jump after China's restrictions shown in Figure 3), disruption in global supply chains, and endangering the timeliness of procurement and production of all industrial sectors that use antimony as an input. Russia (5%), Turkey (7%), and Tajikistan (24%) produce antimony (Figure 2), but without the production and placement of China, they cover a negligible part of the global demand for this input. All of the above indicates a major challenge faced by the management of the supply chain of companies that use antimony as an input in the production process, both from the aspect of timeliness of production and delivery of the final product and from the aspect of generating cost efficiency of the procurement and production process.

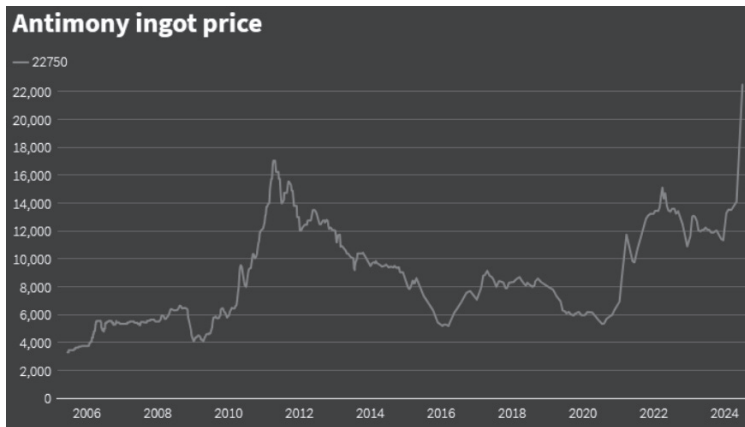
¹⁵ Wang Yunming *et al.*, “Guidance and review: Advancing mining technology for enhanced production and supply of strategic minerals in China”, *Green and Smart Mining Engineering*, 2024.

¹⁶ Li Junhui, Deyi Xu, Yongguang Zhu, “Global antimony supply risk assessment through the industry chain”, *Frontiers in Energy Research*, Vol. 10, 2022, 1007260.

¹⁷ See What is antimony and why is China curbing its exports, Reuters, <https://www.reuters.com/markets/commodities/what-is-antimony-why-is-china-curbing-its-exports-2024-08-16/>, 17. 10. 2024.

¹⁸ See “CN-EU-US tariffs on electric cars”, *AEB magazine*, <https://www.aeb.com/en/magazine/articles/CN-EU-US-tariffs-on-electric-cars>, 17. 10. 2024.

Figure 3 Antimony ingots price during the period 2006–2024.



Source: Reuters, Antimony prices gear up for new records on China export curbs, <https://www.reuters.com/markets/commodities/antimony-prices-gear-up-new-records-china-export-curbs-2024-08-15/>, 18. 10. 2024.

China's trade and logistics barriers in the domain of antimony affected battery and accumulator companies less than ammunition companies because this segment of the industry is largely involved in the recycling of old batteries and accumulators, which facilitates the path to new inputs. What is problematic for supply chain management in this segment of the economy is the fact that the recycling process is long and relying exclusively on this source of supply makes it impossible to generate the timeliness of production as a determinant of the success of supply chain management, while at the same time generating the goal of cost efficiency (observing the current price of antimony on the global level). Therefore, this segment of production can't survive only based on recycling, but it nevertheless significantly facilitates the procurement of inputs at cost-acceptable conditions (compared to the price of Sb ingots on the market – Figure 3). Many companies from this segment of the economy, both in Europe and the USA, took advantage of the possibility of recycling antimony and combining it with lead alloy to offer PbSb alloys as input to companies from the defense industry domain, which would generate additional earnings. Many companies have directed the money earned in this way towards the investment of improving recycling to, in addition to securing their production, also earn additional money from the placement of the PbSb alloy defense industry. The business practices of these companies confirmed the conclusions made by Quijue and co-authors that recycling is the key to combating the challenge of unequal distribution of antimony resources globally under the baton of China's trade policy.

The supply chain management of ammunition companies has faced a greater challenge than the industrial sector of battery and accumulator production. In the defense industry, more precisely the production of ammunition as a segment of this industry, there is no possibility of recycling the PbSb alloy that is used as an input for the production of ammunition grains. Before the introduction of China's restrictions, the companies involved in the production of ammunition based their grain production on the procurement of lead ingots and antimony ingots, and then in their lead mills, they made a PbSb alloy where the % of antimony varied depending on the type of ammunition caliber whose grain was produced. Procurement of this category of strategic material is approached in a planned manner, and procurement managers in these companies faced a major challenge in August of this year after being informed by suppliers that delivery plans for September and October would not be met due to China's restrictions and a shortage of antimony in ports around the world (parallel the effect of trade and logistics barriers). To overcome the problem and ensure the timely procurement of quality raw materials with the aim of not jeopardizing the efficiency and effectiveness of the supply chain management in this industrial sector, a direct procurement plan for PbSb alloy was created based on a precise analysis of production and shipping plans by caliber. Success in this domain is generated for procurement plans until the end of the year thanks to 1) recycling of batteries and accumulators carried out by companies from this domain, after which they form a PbSb alloy (% antimony varies according to customer requirements) and 2) antimony reserves at individual retailers and 3) to the gradual penetration of antimony originating from India, Bolivia, and Tajikistan. However, options 1 and 2 are more affordable compared to option 3 because the prices of antimony originating from other parts of the world are also determined by China's trade moves as the leader in the global market. Analysts point out that recycling significantly eased the impact on the management of the supply chain of the dedicated industry, but that the long-term consequences, if China's measures last longer than half a year, will be unfathomable, especially in generating cost efficiency from the goal of supply chain management. An example is the USA ammunition production industry (the leader at the global level), which overcomes this problem thanks to the recycling of lead-acid batteries and the import of antimony from India and Bolivia, with stocks of about 1.100 tons from an earlier period.¹⁹ The US government is aware of the long-term effects of China's trade and logistics restrictions on the production of both military and commercial ammunition, which is why it is actively working on:²⁰

¹⁹ See China's Antimony Export Restrictions: The Impact on U.S. National Security, <https://www.csis.org/analysis/chinas-antimony-export-restrictions-impact-us-national-security>, 19. 10. 2024.

²⁰ The same as 22.

- 1) research and investments in the improvement of recycling technologies
- 2) finding: a) alternative sources of antimony (intensive negotiations with Tajikistan are underway to develop a long-term partnership in this domain) and b) alternative elements that would replace antimony in grains of certain calibers.
- 3) investments in antimony refinery projects on other continents - current investment in the Australian project – The Hillgrove site in Australia is the 10th-largest antimony project in the world.

The ammunition production industry in Europe is facing identical consequences, with the USA as the leader in the field of this production having stronger negotiating power in the development of potential partnerships that would somewhat overcome the problem of disruption in the supply chain. At the same time, the USA has greater opportunities for recycling lead acid batteries due to the greater volume of production of the same throughout North America (in Europe, a small percentage of production is located in Spain, France, Germany, and Italy).²¹ All of the above will affect the creation of a new competitive advantage of the USA ammunition production industry against the same sector of the economy in Europe.

The consulting agency Expire has analyzed in detail China's current trade and logistics barriers in the domain of antimony and their consequences for the supply chain management of various industrial sectors. He points out that all companies that have faced a supply chain disruption should thoroughly assess their vulnerability and work intensively on creating resilience. At the same time, the importance of establishing efficient and effective risk management for establishing efficient and effective supply chain management is emphasized. Experts from this consulting firm highlighted key steps to mitigate risks and manage challenges exemplified by China's antimony export controls:²²

1) *Understand concentration risk* – Companies should assess how much they rely on China in the domain of all antimony-like raw materials, with a clear mapping of the supply chain process. The goal, in addition to minimizing the risks caused by antimony restrictions, is to prepare for new potential risks in the domain of the supply chain of other inputs of Chinese origin.

2) *Mitigate the risk of counterfeiting* – Minimize the risk of entering PbSb alloy of poor quality while establishing and maintaining cooperation with proven and reliable suppliers. Only by building correct partnership relations will suppliers continuously work to ensure the supply of PbSb alloy of proven quality and safety.

²¹ See Lead Acid Battery – Market Size and Scope, <https://www.marketresearchintellect.com/product/global-lead-acid-battery-energy-storage-system-bess-market/>, 19. 10. 2024.

²² See Expect Supply Chain Impacts from China's Antimony Export Restrictions, <https://www.exiger.com/perspectives/supply-chain-impacts-china-antimony-export-restrictions>, 18. 10. 2024.

3) *Rank affected products by criticality* – Company managers must rank inputs based on antimony in terms of importance for generating the key goal of supply chain management – timely delivery of quality products under favorable commercial conditions to satisfied customers. At the same time, state governments should focus on ensuring the uninterrupted supply of industrial sectors that are important for economic growth and development and national security (focus on the defense industry).

4) *Illuminate the entire value chain* – Managers must analyze all potential chances and opportunities in the domain of the supply chain (beyond the current sources of supply). By parallel application of risk management and SWOT analysis, it is possible to crystallize how to maximize opportunities/internal strengths and minimize risks/internal weaknesses while generating the goal of 1) finding alternative suppliers of antimony, 2) geographical diversification, and 3) finding alternative materials that will be used as inputs in the production process replace antimony.

5) *Engage in strategic sourcing* as a proactive approach to identify and secure alternative sources of supply, stockpile critical materials, and investigate material replacement.

FUTURE TRENDS IN THE GLOBAL ANTIMONY MARKET AND ITS EFFECTS ON THE SUPPLY CHAIN MANAGEMENT OF DEPENDENT INDUSTRIES

Many analysts deal with the projection of future trends in the relation between supply and demand for antimony globally. The results of their analysis are as follows:

1) It is expected that the value of the market will continuously grow in the period 2024–2036 (approximately from USD 243.56 million to USD 374.82 million), while China's trade policy in this domain will dictate the parameters of value growth: price and quantities.²³

2) In the following years, the defense industry will maintain the status of the largest user of Sb alloy as an input in the production process (the chemical industry and the battery production industry follow).²⁴

3) Growth in the value of the global ammunition market is expected, but this growth will be significantly lower compared to the growth of the antimony market

²³ See Antimony Market Size, Share & Industry Analysis, By Application (Flame Retardants, Chemicals & Alloys, Lead Acid Batteries, Ceramics & Glass, and Others) and Regional Forecast, 2024–2032, <https://www.fortunebusinessinsights.com/antimony-market-104295>, 19. 10. 2024.

²⁴ The same as 25.

(growth rate projection 1.89% for the period 2024–2034), which will somewhat reduce the risk of growth in the need for antimony as input in the production process.²⁵

4) At the same time, the growth of investments in the improvement of recycling technology, both antimony and lead-antimony alloy, is expected, which will provide a significant reserve source of supply to all dependent industries around the world (especially the defense industry). For years, China and the USA have strategically approached planning investments in smelting and chemical extraction technologies for extracting antimony from complex materials, while minimizing negative effects on the environment.²⁶

It can be concluded that the current trends in the global antimony market will be maintained in the next ten years (according to the previously listed projections), which implies that the success factors of the management of the supply chain of industries that use Sb or PbSb alloy as input will remain unchanged: 1) establishing efficient and effective risk management, 2) intensive work on building reliable partnership relations with suppliers of antimony and lead-antimony alloy, 3) continuous work on finding alternative sources of supply, 4) investments in recycling PbSb alloy and 5) investments in research and development activities aimed towards finding alternative inputs that will replace antimony in the production process.

CONCLUSION

China has the status of the absolute leader in the global antimony market and in the years to come, it will hold the baton in determining the supply and demand relationship for this input at the global level. Industries that use antimony and lead-antimony alloy as inputs in the production process are currently facing the great challenge of successfully overcoming the risks posed by disruptions in the global supply chains of these raw materials, which, according to analysts' forecasts, will last the entire next decade. The establishment of efficient and effective management of the supply chain of the battery and accumulator manufacturing and ammunition manufacturing industries, as the main users of PbSb alloy in the production process, will in the following years be determined by: 1) establishing efficient and effective risk management, 2) intensive work on building reliable partnership relations with suppliers of antimony and lead-antimony alloy, 3) continuous work on finding alternative sources of supply, 4) investments in recycling PbSb alloy and 5) investments in research

²⁵ See Global Ammunition Market 2024–2034, <https://www.giiresearch.com/report/avd1508613-global-ammunition-market.html>, 19. 10. 2024.

²⁶ See Recycled Antimony Market Size, Review: Share Projections for 2024–2031, <https://www.linkedin.com/pulse/recycled-antimony-market-size-review-share-projections-whmbf/>, 19. 10. 2024.

and development activities aimed towards finding alternative inputs that will replace antimony in the production process. The previously listed factors are the basis for the survival and success of companies belonging to these industrial sectors, both in the European market and in the US market.

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Prvi partizan a. d. Užice

KINESKE LOGISTIČKE I TRGOVINSKE BARIJERE KAO DETERMINANTA AKTUELNIH POREMEĆAJA U GLOBALNIM LANCIMA SNABDEVANJA ANTIMONOM

Rezime

Kina, lider u globalnom snabdevanju antimonom, diktira tržišne uslove za prodaju/nabavku ove sirovine na svim kontinentima. Aktuelne trgovinske i logističke barijere koje je najmnogoljudnija zemlja sveta uvela u ovoj oblasti dovele su do deficita ove sirovine, što utiče na lance snabdevanja namenske industrije i industrije proizvodnje baterija. Cena atimona je dostigla rekordan istorijski nivo, što otežava uspostavljanje efikasnog i efektivnog menadžmenta lanca snabdevanja u ovim industrijskim sektorima sa aspekta troškovne efikasnosti. S obzirom na to da je namenska industrija pokretačka snaga rasta i razvoja svetske privrede, može se zaključiti da će dugoročne posledice dugotrajnosti barijera biti nesagledive po BDP mnogih zemalja u svetu.

Ključne reči: Kina, trgovinske i logističke barijere, menadžment lanca snabdevanja antimonom, menadžment lanca snabdevanja namenske industrije, menadžment lanca snabdevanja industrije proizvodnje baterija

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