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Wojciech ZAŁUSKI, PhD*

PASSION AND RESPONSIBILITY: THE PUZZLE OF ASYMMETRY

To what extent – if at all – acting in passion diminishes the agent's responsibility for his/her deed? Some new aspects of this classical problem have been discovered by experimental psychologists (Pizarro, Uhlmann, Salovey) whose research has revealed a puzzling asymmetry in assigning responsibility for morally bad and morally good actions, performed under the influence of emotions (people tend to regard the blameworthiness of an immoral act as being diminished by the fact that it was performed in passion, but do not regard passion as influencing the praiseworthiness of a moral act). The article discusses the puzzle's explanation proposed by the authors of the experiment (based on the concept of "metadesires") and offers an alternative explanation, drawing on the distinction between passio antecedens and passio consequens, proposed by Thomas Aquinas. The paper also provides some reflections on the normative aspects of the problem of acting under the influence of emotions.

Key words: *Act of passion. – Meta-desires. – Antecedent emotion. – Consequent emotion. – Thomas Aquinas.*

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1. THE PUZZLE OF ASYMMETRY IN ASSIGNING RESPONSIBILITY FOR GOOD AND BAD "PASSIONATE" ACTIONS

To what extent – if at all – does acting in passion diminish the agent's responsibility for his/her deed?[1] Given that the philosophical debate on this problem has been pursued since antiquity, one might think that few novel insights into it can be provided.[2] But this pessimistic expectation has, fortunately, proven to be false. Experimental research in moral psychology has revealed an interesting asymmetry in assigning responsibility for morally bad and morally good actions: the asymmetry consists in that people tend to deem an agent less blameworthy if his/her morally bad action was made under the influence of emotions (passions), but if the agent's action was morally good then the fact that he or she acted under the influence of emotions does not lead to diminishing its moral value (cf. Pizarro, Uhlmann, Salovey 2003; Knobe, Doris 2012). How is this asymmetry to be explained?

The authors of the experiments that revealed the asymmetry argue that the asymmetry "arises because individuals judge agents on the basis of their metadesires (the degree to which the agents embrace or reject the

1 For the sake of terminological clarity, it should be noted that in this paper the terms "passion" and "emotion" are used interchangeably and employed with references to a specific type of mental states, viz. such which combine affection (i.e., a psycho-physiological arousal), the resulting tendency to action, as well as certain beliefs. Thus, the analysis assumes that a passion/emotion is a certain "force" (mental arousal) which "pushes" us to a certain type of action, and this action-tendency may be different from the action prescribed by "reason" (calm reflection). This is a general definition that passes over the issue of whether beliefs play an important role in generating this mental state (as the adherents of the so-called "cognitive theories" of emotions assert), or only a minor role (as the so called "non-cognitive theories" imply). Yet it would not be exact to say that nothing in my analysis depends on how this issue is ultimately resolved. In fact, in my analysis I assume some middle-ground position. On the one hand, I reject an extreme version of the cognitive theories, which implies that since emotions are in fact reducible to beliefs, we have full control over our emotions; this version would eliminate the very notion of "crimes of passion" (or more specifically, would prohibit passion as a mitigating circumstance). On the other hand, I reject the claim that our beliefs have no causal role whatsoever in generating our emotions, and thus we cannot consciously elicit them (as we will see, the opposite assumption is made by Thomas Aquinas in his characterization of "consequent passion" – a notion which plays an important role in my analysis). One may also remark that the above account of passions/emotions is fully consonant with the scholastic definition of *passio* as a movement of the sensitive part of the human soul (the part which receives sense impressions and reacts to them by means of affections, and which, to some extent, can be influenced by the soul's rational part).

2 For an overview of this debate see, e.g., Dressler 1982 or Kahan, Nussbaum 1996.

impulses leading to their actions). Individuals assume that an agent would embrace an uncontrollable positive impulse, and reject an uncontrollable negative impulse" (Pizarro, Uhlmann, Salovey 2003, 267). This explanation in fact consists of two components. The first one is normative (specifically, descriptive-normative): it implies that participants endorse a certain normative theory regarding responsibility for actions performed in passion – the theory according to which the more strongly an agent identifies himself/herself with his/her action performed in passion (i.e., has a metadesire/second-order desire corresponding to his/her first-order desire leading to an action), the greater the degree of his/her responsibility for this action. The explanation of the asymmetrical judgments is obtained by adopting the second – purely descriptive – component, viz. that participants' hypotheses regarding agents' metadesires are optimistic, i.e., they assume that "impulsive negative acts are accompanied by conflicting (positive) second-order desires, but that impulsive positive acts are accompanied by consistent (positive) second order desires" (Pizarro, Uhlmann, Salovey 2003, 270). This is an interesting, but, of course, not the only possible explanation. The authors of the experiment themselves consider two other explanations.

The first one is that "praise may be offered instrumentally, whereas blame may be offered on the basis of just deserts. According to this view, what is important about moral praise is the overall promotion of good deeds via the mechanism of social rewards" (Pizarro, Uhlmann, Salovey 2003, 271). According to the second one, "the lack of difference in praise for voluntary versus involuntary actions may arise because individuals confronted with prosocial acts simply do not expend the cognitive energy necessary to calculate a discount in praise; this would lead to differential patterns of discounting for behaviors for which control is compromised" (Pizarro, Uhlmann, Salovey 2003, 271). However, these two explanations are – as it seems, rightly – rejected by the authors of the experiment, since, as they argue, *they do not account for a decrease in moral praise when participants are informed that the agent does not endorse his/her first-order positive impulses*; the authors also note that "under some conditions, positive acts are scrutinized more carefully than negative acts, because engaging in positive behaviors might be due to a blind following of societal norms or to self-presentational concerns (i.e., trying to appear moral when one is not)" (Pizarro, Uhlmann, Salovey 2003, 271).

It is interesting to note that these two explanations imply that the asymmetry proves to be, as one may call it, *deep*, as it depends on the *moral quality of a "passionate" action* (viz. on whether it is good or bad). By contrast, assuming the explanation proposed by David Pizarro, Eric L. Uhlmann, and Peter Salovey is correct, the asymmetry proves to be, as

one may call it, *superficial*, as it has nothing to do with the moral quality of an action, but simply flows from a specific application (given a certain descriptive presupposition made by the participants) of a certain general normative rule which *is exactly the same for morally bad and morally good actions* (viz. that only the occurrence of a conflicting metadesire diminishes responsibility for a passionate action). Accordingly, if the participants' optimistic belief – the aforementioned presupposition – that people usually have positive metadesires (i.e., identify themselves with their good actions performed in passion but do not identify themselves with their "passionate" bad actions) were shown to them to be false, they would not make an asymmetric judgment (and if they did, it would not be morally justified, given the above rule).

In this paper I would like to propose one more explanation, derived from Thomas Aquinas's account of the responsibility for "passionate" actions. It bears stressing that this account is first of all normative in nature (it is intended to guide our normative judgments of actions performed in passion), but, arguably, it can also be interpreted psychologically (i.e., as explaining the participants' asymmetric judgments). The layout of the further part of this paper is as follows. Section 2 provides Aquinas's account and will apply it to the "asymmetry" problem, and section 3 provides a comparative evaluation of both solutions in their two roles: that of a descriptive explanation of why people manifest asymmetry in their judgments, and that of a normative theory of how people ought to assess responsibility of good and bad actions performed in passion.

2. AQUINAS ON RESPONSIBILITY FOR ACTIONS PERFORMED IN PASSION

In *Summa Theologiae* (I-II, Q. 78, Art. 4) Aquinas defends the standard (dominant) view that the gravity of an immoral action – a sin (*peccatum*), in Aquinas's terminology – is greater when the sin is committed through malice than when it is committed through passion.[3] He points at three subtle

3 The minority view is that acting in the heat of (justified) passion does not decrease the degree of moral or legal responsibility for a morally bad action. As already mentioned in note 1, this view can be motivated, for instance, by a cognitive theory of emotions, implying that emotions are, to a full or substantial extent, under our voluntary or intellectual control (see, e.g., Załuski 2021, 122–127), or by a critical examination of the type of emotions that are behind a crime of passion. As for the latter motivation: for example, Léon Rabinowicz maintained that these crimes do not flow from noble, romantic motives (deep love), as it was commonly

differences between sins committed through passion and those committed through malice, which substantiate ascribing more gravity to the latter. The first one is that "a sin committed through malice [...] belongs more to the will, which is then moved to evil of its own accord, than when a sin is committed through passion, when the will is impelled to sin by something extrinsic, as it were" (ST I-II, Q. 78, Art. 4). The second reason is connected to the fact that "the passion which incites the will to sin, soon passes away, so that man repents of his sin, and soon returns to his good intentions; whereas the habit, through which a man sins, is a permanent quality, so that he who sins through malice, abides longer in his sin (ST I-II, Q. 78, Art. 4)". The third reason is that: he who sins through certain malice is ill-disposed in respect of the end itself, which is the principle in matters of action; and so the defect is more dangerous than in the case of the man who sins through passion, whose purpose tends to a good end, although this purpose is interrupted on account of the passion, for the time being. Now the worst of all defects is defect of principle [...] It is one thing to sin while choosing, and another to sin through choosing. For he that sins through passion, sins while choosing, but not through choosing, because his choosing is not for him the first principle of his sin; for he is induced through the passion, to choose what he would not choose, were it not for the passion (ST I-II, Q. 78, Art. 4).

Yet Aquinas stresses that from the thesis that a sin committed through malice is more grievous than one committed through passion, one should not infer that the latter type of sin cannot be "mortal"[4]; as he writes "that which is contrary to the last end can happen not to be a mortal sin, only

believed in the 19th century, but from low and savage ones, such as "la haine atroce, l'égoisme effréné, l'esprit vil de la vengeance" (Rabinowicz 1931, 150). He claimed that the type of love that is behind crimes of passion is of the lowest kind: it is sexual love (as opposed to affective or platonic), which is egoist, jealous, and possessive. Accordingly, crimes of passion are not crimes of love but sexual crimes. As a result, he postulated the elimination of a category of crimes of passion (as more leniently treated than other crimes) from penal codes. Of course, this is a very controversial – arguably, one-sided – view of crimes of passion.

4 In the Christian moral theology mortal sin is understood as a moral disorder with regard to the last end, the principle of human life (i.e., eternal law); it is much graver (it is in fact a sin in the strict sense) than what is called "venial sin", which is only a defect in the selection of the things referred to the end, not a defect of the order to the last end (cf. ST I-II, Q. 88, Art. 1); in other words, in the case of mortal sin man loves mutable good more than eternal law, and in the case of venial sin, man loves mutable good less than eternal law (cf. ST I-II, Q. 88, Art. 2). This distinction is, of course, defined by means of categories characteristic of classical philosophy; for those who find them antiquated or unconvincing, the distinction can be expressed in more neutral terms (though, at the cost of some simplification – of losing some subtleties), viz. that mortal sin is a much graver type of sin than venial sin, and the difference in their gravity is qualitative rather than quantitative.

when the deliberating reason is unable to come to the rescue, which is the case in sudden movements" (ST I-II, Q. 77, Art. 8); in all other cases of sins of passion, the deliberating reason can "come to the rescue", the result of which is that these sins are – or can be – mortal.

Aquinas further refines his analysis of the sins of passion by making the following remark, which, as we will see in the next section, can be gainfully invoked in the context of analysis of the puzzle of asymmetry:

Sin consists essentially in an act of the free will, which is a faculty of the will and reason; while passion is a movement of the sensitive appetite. Now the sensitive appetite can be related to the free-will, antecedently and consequently: antecedently, according as a passion of the sensitive appetite draws or inclines the reason or will [...]; and consequently, in so far as the movements of the higher power [if they are vehement] redound on to the lower, since it is not possible for the will to be moved to anything intensely, without a passion being aroused in the sensitive appetite. Accordingly if we take passion as preceding the sinful act, it must needs diminish the sin: because the act is a sin in so far as it is voluntary, and under our control. Now a thing is said to be under our control, through the reason and will: and therefore the more the reason and will do anything of their own accord, and not through the impulse of a passion, the more is it voluntary and under our control. In this respect passion diminishes sin, in so far as it diminishes its voluntariness. On the other hand, a consequent passion does not diminish a sin, but increases it; or rather it is a sign of its gravity, in so far, to wit, as it shows the intensity of the will towards the sinful act; and so it is true that the greater the pleasure or the concupiscence with which anyone sins, the greater the sin (ST I-II, Q. 77, Art. 6).

Two quick remarks are necessary here. First, even though Aquinas does not state it in an explicit manner, there is no doubt that *by a "consequent passion" he does not mean merely a passion which comes after the action made*; for a passion to be "consequent" in the relevant sense, it *must be also consonant in its "action-tendency" with the act after which it follows*; this should be clear from Aquinas's (above quoted) statement that, the consequent passion "shows the intensity of the will towards the sinful act." Accordingly, he would not refer this term to, say, feelings of guilt or shame; for even though they temporarily come after the act, they attest the agent's regret of having performed this act; thus, the required consonance between the act and the consequent passion is therefore absent here. Second, Aquinas does not deal in the above quoted passage with the degree of responsibility for morally *good* actions; he applies here the distinction between "antecedent" and "consequent" passions only to sins, i.e., morally bad actions. But there seem to be no obstacles to invoking it also in the broader context – of passionate actions in general, i.e., also in the analysis of the role of *morally good or at*

least morally neutral passions in the evaluation of good deeds. In fact, as we will presently see, Aquinas himself applies this distinction in precisely this context in a different *quaestio* of *Summa Theologiae*. But prior to presenting the Aquinas-inspired solution to the asymmetry problem, it may be advisable to draw a broader context in which his account of the responsibility for actions performed in passion can be located.

The issue of the role of morally good or at least morally neutral passions in the evaluation of good deeds is notoriously contentious. Some thinkers (Kantians) believe that the merit of a good act is diminished if it is propelled by a passion (even a good passion, let alone a bad one). Others (sentimentalists) defend the opposite view: that an agent merits more, as he/she is moved by a more intense (good) passion (e.g., compassion or love). With Aquinas's distinction, we obtain a more complex and nuanced picture, to the effect that the degree of merit to be granted for a morally good and "passionate" action depends on whether the passion is antecedent or consequent:[5] if the passion is antecedent, it diminishes the praiseworthiness of action, because the action is then not fully under the agent's control (he/she is moved by passion rather than by the judgment of reason); but if the passion is consequent, then it increases the action's praiseworthiness. The exact way in which this increase in the actions' moral value occurs depends, according to Aquinas, on whether the consequent passion is consequent "by way of redundance" (*modus redundantiae*), in which case the lower part of the soul automatically follows the higher part, or "by way of choice" (*modus electionis*), in which case the agent chooses to be additionally moved by passion in order to do good more promptly. In both cases the effect is positive (the increase of the action's moral value), though Aquinas describes it somewhat differently; in the former case (passion being consequent "by way of redundance") the passion "indicates greater moral goodness" (*indicat bonitatem moralem majorem*), and in the latter case (passion being consequent "by way of choice"), the passion "increases the goodness of an action" (*addit ad bonitatem actionis*)" (cf. ST I-II, Q. 24, Art. 3). Yet Aquinas does not make it clear in which case the increase is greater (which means that his analysis does not exclude the option that the increase may be equal in both cases).

5 Aquinas analysis proceeds on the (implicitly made) assumption that the passion in question is in itself morally praiseworthy or at least morally neutral, and thereby is not morally blameworthy (e.g., envy or hatred). This assumption is fully convincing: since morally good actions are very rarely (if ever) accompanied by evil emotions (antecedent or consequent), the problem of the role of such emotions in the evaluation of morally good actions can be passed over as purely speculative.

Before turning to the problem of asymmetry as revealed by the experimental research, I would like to stress two more general points. The first one is that, as already mentioned, Aquinas's analysis is first of all normative: it tells us how the evaluation of actions performed in passion *ought to proceed.* The second one is that it implies that there is no deep asymmetry (in the sense explained in Section 1) in assigning responsibility for morally good and morally bad actions done in passion: in both cases there functions the same rule based on the distinction between antecedent and consequent passions. In other words, the role of emotions is exactly the same in the context of the evaluation of morally bad and morally good actions: the crucial variable determining this role (viz. whether the emotion in question is consequent or antecedent) *has nothing to do with the moral quality of the action*. In this respect it is similar not only to the normative theory presupposed in the explanation proposed by Pizarro, Uhlmann and Salovey, but also to the Kantian and the sentimentalist solutions: they all imply that there is no asymmetry in the role that emotions ought to play in the evaluation of morally good and morally bad actions. Of course, the rules they introduce are different from Aquinas's and different from each other (to recall: the Kantian rule says that passions decrease merit or demerit for a, respectively, good and bad action, as they decrease control over the action; the sentimentalist rule says passions increase merit or demerit for a good and bad action, respectively, as the passion by itself adds to or subtracts from the moral value of an action; and the rule assumed by the authors of the experiment asserts that the role of the agent's passion in the evaluation of his/her action depends on the content of his/her metadesires). A theory implying a deep asymmetry would have to require, e.g., that conditions necessary for assigning full moral responsibility for morally bad actions be stricter than those required for assigning responsibility for morally good actions: the former would embrace full self-control, while the latter would allow deviations from full self-control.

The normative significance of Aquinas's distinction between antecedent and consequent passions should be entirely clear by now. However, the distinction can also be interpreted psychologically (i.e., as being in fact used by agents in their evaluation of actions performed in passion), and in this interpretation it can provide an alternative explanation of the puzzle of asymmetry (which, let me recall, consists in that the experiments' participants seem to assume that passion does not make a morally good action less praiseworthy but makes a morally bad action less praiseworthy). This explanation would simply imply that the experiment's participants make the assumption that morally bad actions performed in passion are propelled by *antecedent* passions, and morally good actions performed in passion are propelled by *consequent* passions. It is noteworthy that if this

assumption were correct, the asymmetry discovered by the researchers in the judgments of the experiment's participants would be also morally justified (within Aquinas's normative framework). However, clearly, such an assumption could be wrong, for emotions connected to a morally bad act may be consequent, and emotions connected to a morally good act may be antecedent, in which case the participants' asymmetric judgments would be morally incorrect: the asymmetry should be the reverse one, i.e., a "passionate" bad act should be regarded as more blameworthy, and a "passionate" good act as less praiseworthy (and, obviously, if emotions are of the same type – consequent or antecedent – there should be no asymmetry both in the case of morally good and morally bad actions). It should also be recalled that any asymmetry generated by Aquinas' rule is only superficial in nature, not deep (for, as already mentioned, the rule itself is blind to the moral quality of an action).[6] But is this Aquinas-inspired explanation of the asymmetry, revealed by the experimental research, plausible?

3. CONCLUDING THOUGHTS

As was argued in the preceding section, Aquinas's precious distinction between antecedent and consequent passions provides resources to analyze with much subtlety, first, what participants *may have assumed* when they made the "asymmetric" judgments revealed by the abovementioned experiments, and, second, whether their judgments are morally justified. However, one can reasonably question whether the Aquinas-inspired explanation of the experimental results is in fact plausible. For even though the distinction between antecedent and consequent passions is very simple, it is also a subtle one, which is why it is by no means certain that it is deeply ingrained in our conceptual framework, as it should be if it were to provide

6 Let me note, on the margin, that the deep "emotional asymmetry" may be the one described by Adam Smith: "To show much anxiety about praise, even for praise-worthy actions, is seldom a mark of great wisdom, but generally of some degree of weakness. But, in being anxious to avoid the shadow of blame or reproach, there may be no weakness, but frequently the most praise-worthy prudence. (...) This inconsistency, however, seems to be founded in the unalterable principles of human nature. The all-wise Author of Nature has, in this manner, taught man to respect the sentiments and judgments of his brethren; to be more or *less* pleased when they approve of his conduct, and to be *more* or less hurt when they disapprove of it" (Smith [1759] 2007, 164). However, analysis of this purportedly deep asymmetry – of the fact that we are (at least according to Smith) more concerned with avoiding blame than with obtaining praise – goes beyond the scope of this paper, for it is not directly related to the problem of the evaluation of actions performed in passion.

an explanation of the experimental results. Furthermore, what constitutes a strong argument for the explanation proposed by Pizarro, Uhlmann and Salovey is the fact that "informing participants that an agent rejected his own positive impulses (thus violating the assumption that agents want positive impulses) significantly reduced the praise that agent received" (Pizarro, Uhlmann, Salovey 2003, 271). One could, of course, hypothesize (and test the hypothesis empirically) that if participants were explicitly acquainted with the distinction between consequent and antecedent emotions, and were informed, e.g., that those who committed bad actions experienced consequent emotions, then the participants would not regard their actions as less blameworthy. Yet, overall, it seems that the Aquinas-inspired hypothesis is empirically less plausible than the one proposed by the authors (even if, arguably, more plausible than the hypotheses explicitly rejected by the authors). However, even if Aquinas's theory of responsibility for actions in passion may be not encoded in our conceptual framework as deeply as the idea of "identification" with one's action performed in passion (the idea conceptualized by Pizarro, Uhlmann and Salovey in the terms "metadesires" and "first-order desires"), it does not (substantially) reduce its normative value. Indeed, the theory is very convincing: the simple distinction between antecedent and consequent passions seems to be a crucial variable in the course of the evaluation of the degree of merits and demerits of actions performed in passion. Furthermore, given the simplicity of this distinction, it could easily become a part of our moral conceptual framework.

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Katja ŠTEMBERGER BRIZANI, LL.M.*

CHANGED CIRCUMSTANCES AND CONCESSION CONTRACTS: SLOVENIAN LAW IN A COMPARATIVE PERSPECTIVE

In Slovenian law concession contracts are subject to both the public law and private law regime of changed circumstances. The former applies only to certain concession contracts, while others are subject to the general rules of the law of obligations. However, these rules are not adapted to features of concession contracts as they only give the affected party the right to request the rescission of the contract, but not its modification, unless otherwise agreed in the contract. This is not in line with the principle of continuity of public service and the protection of the public interest. In addition, the private law regime is not adapted to the concession award procedure, as it allows only reference to changes in circumstances that occur after the contract is concluded, but not after the binding tender is submitted, meaning that the tenderer bears a disproportionately higher burden of the risk than the grantor.

Key words: *Concession Contracts. – Changed Circumstances. – Public Interest. – Public Services. – Slovenian Law*.

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1. INTRODUCTION

As long-term contracts,[1] concession contracts are more often subject to certain economic or social changes affecting their performance (Clouzot 2010, 937). Business practice has recently faced price increases for many products and services, causing difficulties in fulfilling contractual obligations on the terms agreed in the contract. If these changes have been foreseen in advance (e.g. valorisation clause), they are normally subject to the contractual regime, while respecting the mandatory rules of European law (EU) on permissible changes to the concession contract during its term (Mužina 2022; Brown 2008). The doctrine of *rebus sic stantibus*, on the other hand, refers to circumstances that could not have been foreseen or avoided by the parties at the time of the conclusion of the contract, but which make it substantially more difficult to fulfil the contractual obligations (Kranjc 2022, 621).

Given the special characteristics of concession contracts as administrative contracts (Pirnat 2000, 151–152; Štemberger 2023, 336), administrative doctrine (in particular, foreign) has developed a special changed circumstances regime, the so-called 'unforeseeable circumstances', which is a purely administrative law concept (Ahlin 2008, 258; Grilc 2011, 36). It is based on the premise that the object of the concession contract is normally an activity in the public interest, which must be carried out as long as the public interest so dictates. The public interest therefore generally prevails over other contractual interests. This characteristic requires the adaptation of certain fundamental principles of general contract law, designed to protect the private (rather than the public) interest, including the changed circumstances regime.

The special changed circumstances regime can also be found in Slovenian law, but its scope is limited to certain concession contracts only, while the general rules of contract law (Obligations Code, OC)[2] apply to other concession contracts subsidiarily and *mutatis mutandis*. Since the OC

1 Judgement of the Administrative Court of the Republic of Slovenia, No. III U 69/2019-15 of 11 November 2021. Not applicable to contracts of indefinite duration as this excessively restricts competition. Granting 'perpetual' concessions is therefore not allowed. See point 52 of the preamble to Directive 2014/23/EU of the European parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94/1, 28 March 2014, 1–64, hereinafter: Directive 2014/23/EU). See also decision of the Constitutional Court of the Republic of Slovenia, No. U-I-193/19-14 of 6 May 2021, para. 13.

2 *Official Gazette of the Republic of Slovenia* No. 97/07 with further amendments.

regulates contractual relations of a private law nature, the question arises as to the adequacy of the application of such a legal regime to concession contracts.

This article aims to critically analyse the legal regulation of changed circumstances in relation to concession contracts in Slovenian law and (relying on the comparative law experience) to resolve some of the dilemmas that such a regime creates in practice. To achieve this aim, the established methods of legal science were used, in particular the dogmatic, comparative, axiological, and sociological methods. The dogmatic and axiological methods were used to explore and identify the legal problems of the current legal framework and to formulate possible solutions, also using the comparative law method, both in terms of theoretical and legal framework. The research is closely linked to the question of the effectiveness of the current legal framework, and the sociological method was therefore also used, as it is the basis for distinguishing between norms and their implementation in (judicial) practice. The synthesis of the arguments allowed to formulate the conclusions, confirm or disprove the hypothesis, and possibly offer improvements for *de lege ferenda* regulation.

The article seeks to confirm or disprove the following hypothesis:

> H1: The changed circumstances regime, as governed by the Obligations Code, is incompatible with the characteristics of concession contracts.

For a thorough analysis and study of the adequacy of the changed circumstances regime for concession contracts, the following two research questions are also formulated:

> Q1: Can the affected party request a modification of the concession contract due to changed circumstances and under what conditions?

> Q2: What circumstances are covered by the *rebus sic stantibus* clause from a temporal viewpoint (changes occurring after or even before the conclusion of the contract)?

The novelty of the presented study lies in the fact that no scientific articles dealing with the covered issues have been published so far. Previous discussions have focused mainly on the permissible modifications to the concession contract during its term in general (Mužina 2022; Mužina, Rejc 2017) or the changed circumstances of private law contracts, and, in this context, also on public procurement contracts (Kranjc 2022; Skok Klima, Matas 2022), but not on concession contracts. The article has therefore a cognitive value for both science and practice.

2. CHANGED CIRCUMSTANCES IN COMPARATIVE LAW

2.1. French Law

French law distinguishes between three types of circumstances that can affect the performance of a concession contract: measures taken by the grantor, as the public authority that aggravates the position of the co-contractor (*fait du prince*), unpredictable circumstances (*l'imprévision*), and force majeure (Athanasiadou 2017, 199 ff).

The theory of *fait du prince* applies when the concessionaire's contractual position is worsened by a unilateral modification of the contract in the public interest. This is a so-called administrative risk arising from the power of the grantor to interfere with the contractual relationship. In this case, the co-contractor is entitled to full compensation to completely offset the financial impact of the measures. However, to be entitled to compensation, two conditions must (cumulatively) be met: the measure must be taken by a public law entity that is party to the contract; and the measure must directly and specifically affect the other contracting party (Waline 2016, 503).

However, case law has recognised the right of a co-contractor to compensation even when the public law party to the contract has taken the measure in a different capacity than the contracting party, provided that the measure specifically affects the co-contractor.[3] If the measure taken by such an entity does not exclusively affect its co-contractor and is of a general nature, the right to compensation is excluded in principle.[4] Exceptionally, the counterparty will be entitled to compensation if the (general) measure taken affects an essential element of the contract (e.g. the imposition of a tax on raw materials necessary for the performance of the contract).[5]

If the measure is taken by a public law entity that is not a party to the contract, the counterparty is not entitled to compensation. However, if such a measure has created an imbalance that effectively undermines the economic viability of the contract and makes it almost impossible for the counterparty to fulfil its obligations, the counterparty may be compensated under the terms of the theory of unpredictability.[6]

3 Decision of the Council of State of France, Association le relais culturel d'Aix-en-Provence of 18 January 1985.

4 Decision of the Council of State of France, Société Renoveco of 25 May 1993.

5 Decision of the Council of State of France, Compagnie marseillaise de navigation of 20 May 1904.

6 Decision of the Council of State of France, Ville d'Elbeuf of 15 July 1949.

The theory of unpredictable circumstances was developed in the 1916 *Compagnie générale d'éclairage de Bordeaux* case.[7] It is based on the recognition that administrative contracts, and in particular concession contracts, are subject to a greater risk of the occurrence of changes that may affect the performance of the contractual obligations since they are generally long-term contracts (Pietrancosta 2016, 2).

To apply this theory, the following conditions must be cumulatively met: the circumstances must be truly exceptional and unpredictable (e.g. natural disasters, wars, economic circumstances that could not reasonably have been predicted) at the time the parties entered into the contract; the circumstances make the performance of the contract substantially more difficult or substantially worsen the financial situation of the contracting party; the circumstances are wholly alien to the contracting parties; where they are the result of an administrative measure, the theory of *fait du prince* is applied; and the circumstances are temporary in nature – if the circumstances are permanent, the force majeure theory is applied (Waline 2016, 503–505). Force majeure allows a co-contractor to be released – in part or in full – from its contractual obligations without being sanctioned for non-performance (Brown, Bell 1993, 199–200). It therefore differs from unpredictable circumstances in that the performance of the concession contract is completely impossible and not just more difficult (Ruellan, Hugé 2006, 1597–1602).[8]

Despite the occurrence of unpredictable circumstances, the affected party is obligated to continue to perform the concession contract (principle of continuity of the public service) (Clouzot 2010, 937). The contract is therefore maintained in force and the affected party is entitled to reimbursement of the costs incurred by continuing to perform the contract under unpredictable circumstances (so-called non-contractual costs) (Bucher 2011, 197; Efstratiou 1988, 282 ff). However, the affected party is not entitled to full compensation (as in the case of a *fait du prince*), but only compensation to the extent that it is necessary to enable the public service to operate (on average, it covers 90%–95% of the additional costs incurred by the affected party).[9] The purpose of this compensation is not to maintain the same position of the contracting party and to eliminate such contractual risks entirely, but rather to ensure the continuity of the public service. The

7 Decision of the Council of State of France, Compagnie générale d'éclairage de Bordeaux of 30 March 1916.

8 Decision of the Council of State of France, Pichol of 7 June 1939.

9 Decision of the Council of State of France, Société Propétrol of 5 November 1982.

reason for the limitation of the compensation is also that the greater burden on the contractor is not the fault of the grantor as a contracting party, and it is, therefore, logical that it should not bear the entire consequences of circumstances outside the contract (Waline 2016, 505). The amount of the financial compensation is determined by agreement between the parties and, in the event of disagreement, by the court under the rules of non-contractual liability of the administration without fault. The financial compensation is paid only temporarily until the normal economic situation has been restored (Plessix 2016, 1240–1243).

The theory of unpredictability was originally only accepted in public law, but in 2016 it was also introduced in Article 1195 of the Civil Code (*Code Civil*, CC).[10] However, civil law unpredictability differs from public law unpredictability (applicable to administrative contracts) in giving the affected party the right to request the co-contractor to renegotiate the contract while continuing to perform its contractual obligations. If the renegotiation is unsuccessful or is rejected, the parties may agree to terminate the contract at a date and on terms to be determined by them or they may apply to the court by mutual agreement for an adjustment of the contract. If no agreement is reached within a reasonable time, the court may, at the request of one of the parties, modify or terminate the contract on a date and on terms to be determined by the court (Clement 2017, 48).[11]

2.2. German Law

Under Section 60 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, VwVfG),[12] either contracting party may request an adjustment of the content of the administrative contract (including concession contracts) if, since the conclusion of the contract, the circumstances that were decisive for the determination of the content of the contract have changed so significantly that the contracting party cannot reasonably be expected to adhere to the original contract. The prerequisites for the admissibility of a modification are therefore that there has been a material change in circumstances after the contract was concluded and

10 Code Civil, last updated 21 May 2023, available at: *https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032041302* (last visited 1 November 2023).

11 Art. 1195 of the CC.

12 Administrative Procedure Act in the version promulgated on 23 January 2003 (BGBl. I, 102), as last amended by Art. 24, para. 3 of the Act of 25 June 2021 (BGBl. I, 2154).

that the parties could not have taken those circumstances into account when the contract was concluded. Objectively, the circumstances must be of such a nature that, if they had been known at the time the contract was concluded, the parties would not have concluded a contract on the same subject matter. The changes may be factual, such as a change in the price or cost of the services, or legal, such as the adoption of new legislation or a change in case law, as well as a change in administrative practice, in so far as this has a material impact on the performance of the contract, and the (partial) declaration that a law is unconstitutional (Weiß 1999, 78). In addition, the circumstances must be of a substantive nature, i.e. such that the parties cannot be expected to remain in the contract as originally concluded, as this would be contrary to the principle of good faith and proportionality (i.e. unreasonable) (Mahendra 2001, 100–101). A change in circumstances does not automatically lead to an adjustment of the contract but must be agreed between the parties. If no agreement is possible, the affected party may bring an action to enforce the claim. According to the case law, it is an independent claim for adjustment, with the appropriate remedy being an action for performance. If adjustment is not possible or cannot reasonably be expected from the contracting party, the affected party may rescind the contract. Rescission of the contract is therefore the *ultima ratio* (Weiß 1999, 84–90).

Given the general possibility of rescinding the contract, the contracting party is not financially protected in the event of changed circumstances. However, in public contracts, it is usually agreed that the contractor must take out insurance. This insurance obligation achieves the same result in contractual practice as in the French legal system, namely the preservation of financial equilibrium and the continuity of the contract (Athanasiadou 2017, 186).

The VwVfG's provision on the adjustment of the administrative contract due to changed circumstances is basically identical to the provision of Section 313 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB),[13] as both codify the general principle of contract law *rebus sic stantibus*, which is a part of the doctrine of interference with the basis of the transaction (*Wegfall der Geschäftsgrundlage*). In this respect, the German model differs significantly from the French model, which is based on the principle of

13 German Civil Code in the version published on 2 January 2002 (BGBl. I, 42, 2909; 2003 I, 738), as last amended by Art. 2 of the Act of 16 October 2023 (BGBl. 2023 I No. 280).

continuity of the (administrative law) contractual relationship even in the event of unpredictable circumstances (*l'imprévision*) (Gurlit 2000, 556; Kopp and Ramsauer 2015; Fehling 2016).

2.3. Croatian Law

Croatian law also classifies concession contracts as administrative contracts. The latter are governed by the General Administrative Procedure Act (*Zakon o općem upravnom postupku*, GAPA[14]) and supplemented by sectoral laws (for example, the Concession Act, *Zakon o koncesijama,* CA),[15] which apply as *lex specialis.* The GAPA regulates, inter alia, the impact of changed circumstances on the performance of an administrative contract. By this Act, a party whose performance of contractual obligations has become substantially more difficult because of circumstances arising after the conclusion of the contract, and which were not foreseeable at the time of its conclusion, may propose to the other party that the contract be modified in accordance with those circumstances. The parties must therefore agree on such a modification.[16] If the public law entity and the party do not agree on the modification of the contract, or if the public law entity or third parties involved in the contract do not agree to such modification, the public law entity may unilaterally rescind the contract.[17] The Croatian regime therefore differs from the German regime in that the right to rescind the contract on the grounds of changed circumstances does not belong to both parties to the contract, but only to the public law entity, reflecting its superior position, which is typical for administrative contracts. In this respect, the Croatian regime is more similar to French law, as the conditions for modifying an administrative contract (due to changed circumstances) are ultimately determined by the public law entity (Aviani, Đerđa 2011, 482). However, unlike French law, Croatian law does not provide the co-contractor with a right to compensation for damages resulting from the modification or termination of the contract due to changing circumstances, which is also one of the main deficiencies of the current regime (Aviani 2013, 358).

14 *Official Gazette of the Republic of Croatia* No. 47/09 with further amendments.

15 *Official Gazette of the Republic of Croatia* No. 69/17 with further amendments.

16 Art. 152 of the GAPA.

17 Art. 153, para. 1 of the GAPA.

Further restrictions on the modification of the concession contract are laid down in the CA, which transposes the restrictions imposed by Directive 2014/23/EU on the modification of the concession contract during its term. According to the CA, modifications of the concession contract due to unforeseeable circumstances are permissible if they do not change the nature and/or object of the concession contract, and in the case of concessions granted by the grantor to carry out an activity not listed in Annex II of the Act (i.e. as an activity performed based on exclusive rights), and the value of the modifications does not exceed 50% of the value of the original concession.[18]

The changed circumstances regime for administrative contracts differs from the general regime in contract law (Compulsory Relationships Act, *Zakon o obveznim odnosima,* CRA),[19] under which the affected party may request (through the courts) that the contract be modified or rescinded. A contract will not be rescinded if the other party offers or agrees to an equitable modification of the terms of the contract.[20] Either party to the contract (not just the public law entity) can therefore obtain a modification or termination of the contract due to changed circumstances. Due to the special characteristics of administrative contracts, the rules of the CRS on rescission or modification of a contract, as a result of changed circumstances, does not apply to these contracts, but only the specific provisions of the GAPA and the sectoral laws (as *lex specialis*).[21]

2.4. Serbian Law

In Serbian law, concessions are governed by the Law on Public–Private Partnership and Concessions (*Zakon o javno-privatnom partnerstvu i koncesijama,* LPPPC),[22] which also contains certain provisions relating to the post-contractual phase. As regards issues not regulated by this Law, the general rules of contract law, i.e. the Law on Obligation Relations (*Zakon o obligacionim odnosima,* LOR),[23] are applied. The LPPPC regulates the changed circumstances within the framework of the modification of the concession contract. It distinguishes between modifying a contract because of a

18 Art. 62, para. 3 of the CA.

19 *Official Gazette of the Republic of Croatia* No. 35/05 with further amendments.

20 Art. 369 of the CRA.

21 For more on this, see Aviani, Đerđa 2011, 481–484.

22 *Official Gazette of the Republic of Serbia* No. 88/2011 with further amendments.

23 *Official Gazette of the Republic of Serbia* No. 29/78 with further amendments.

regulatory change[24] and modifying the contract for other reasons.[25] The latter reasons are not further defined in the LPPPC, but only limitations on such modification are set out. According to Article 50 of the LPPPC, a concession contract may be modified at the request of the public or private partner, a bank, or another financial institution, but the law does not allow changes to the essential elements of the concession contract, such as its subject matter, duration, and the amount of the concession fee. Such a modification is made in accordance with the provisions of the LPPPC applicable to the procedure for the conclusion of a public contract.[26]

However, if the public or private partner's position deteriorates as a result of a regulatory change after the conclusion of the contract, the concession contract may be modified, notwithstanding the aforementioned restrictions, to the extent necessary to re-establish the position of the public or private partner at the time the contract was concluded, provided that the duration of the contract may in no case exceed the period referred to in Article 18, para. 2 of the LPPPC. This is a special form of changed circumstances (also known in French law) that must be independent of the contracting parties (so-called stabilisation clause). Otherwise, the regulatory change cannot be considered as unforeseeable.[27] The LPPPC further provides that the parties must (also) agree in the public contract on the consequences of an adverse regulatory change on the performance of the contract and on the exclusion of liability of the private partner for non-performance of contractual obligations resulting from force majeure or a regulatory change, while the law does not explicitly mention other changed circumstances. However, it is clear from the statutory provision that these circumstances are defined only explicatively.

If the parties cannot agree on a modification of the contract, as well as in the case of changed circumstances not covered by the LPPPC, the general regime of changed circumstances set out in Article 133 of the LOR is applied.[28] The latter gives the affected party the right to request the rescission of the contract, which must be enforced in court.[29] However, a contract shall not be rescinded if the other party offers or agrees to an equitable variation of the

24 Art. 53 of the LPPPC.

25 Art. 50 of the LPPPC.

26 Art. 50, para. 6 of the LPPPC.

27 For more on this issue, see section 2.1.

28 For the definition of changed circumstances, see Art. 133, para. 1 of the LOR.

29 Art. 133, para. 1 of the LOR.

terms of the contract, i.e. to adapt them to the changed circumstances.[30] A party who has suffered damage as a result of the rescission of the contract due to changed circumstances may claim compensation.[31]

A special regime on changed circumstances, applicable to administrative contracts, is, on the other hand, provided for in the General Administrative Procedure Act (*Zakon o opštem upravnom postupku,* Serbian GAPA[32]). It gives the affected party the right to request a modification of the contract on the grounds of circumstances that have arisen after the conclusion of the contract, but which make the performance of the contractual obligations substantially more difficult. The Authority (as a contracting party)[33] will refuse a request to modify a contract if the legal conditions for modifying the contract are not met or if the modification would cause damage to the public interest that would be greater than the damage likely to be suffered by the affected party (Miljić 2017, 528–533), and may also rescind the contract if the parties cannot agree on a change of circumstances. However, according to the authentic interpretation of Article 22, para. 1 of the Serbian GAPA, which states that an administrative contract may be concluded if a specific law so provides (Milenković 2017),[34] this condition must be interpreted strictly linguistically, meaning that the special law must expressly define (designate) the contract as an administrative contract. Otherwise, the legal regime of the GAPA does not apply to it, even if the contract establishes, modifies, or terminates a legal relationship in an administrative matter. Since the Law on Public–Private Partnership and Concessions (or any other law) does not define a concession contract as an administrative contract, the changed circumstances regime in Article 23 of the GAPA does not apply to these contracts.

2.5. Changed Circumstances in European Contract Law

Changed circumstances are also addressed by key instruments of so-called European private law (Možina 2008), such as the Principles of European Contract Law (PECL) in Article 6:111, Unidroit Principles of International

30 Art. 133, para. 4 of the LOR.

31 Art. 133, para. 5 of the LOR.

32 *Official Gazette of the Republic of Serbia* No. 18/2016 with further amendments.

33 See Art. 22 of the Serbian GAPA.

34 *Official Gazette of the Republic of Serbia* No. 95/2018.

Commercial Contracts 2016 (PICC) in Arts. 6.2.1–6.2.3, Common European Sales Law (CESL) in Article 89, and Draft Common Frame of Reference (DCFR) in Article 1:110.

All these instruments of uniform law lay down the principle of *pacta sunt servanda*, which binds the contracting parties to fulfil their obligations, even if they become more onerous, whether because the cost of performance has increased or because the value of the performance has diminished. Only if the performance of the contract has become substantially more difficult after the conclusion of the contract (and this was not foreseeable at the time the contract was concluded) the changed circumstances (or otherwise named) regime may apply, unless the affected party has (contractually) assumed the risk of changed circumstances. In such cases, the above-mentioned acts impose a duty to renegotiate the contract between the parties, but the affected party remains obligated to fulfil its contractual obligations. If no agreement can be reached, the court may intervene to adapt the contractual relationship to the changed circumstances (taking into account the hypothetical will of the parties) or to terminate it on a date and under conditions it itself determines. However, there is no hierarchy between the modification of a contract and its termination, leaving it to the courts to decide (Drnovšek 2004, 825).

3. CHANGED CIRCUMSTANCES IN SLOVENIAN LAW

3.1. General Regime of Changed Circumstances in Contract Law

The *pacta sunt servanda* principle binds the parties to perform the contract as agreed. However, since circumstances may arise after the conclusion of the contract making it more difficult for one party to fulfil its obligations or making it impossible to achieve the purpose of the contract, the rules of the law of obligations (Obligations Code) give the party whose obligations have been made more difficult – or the party that, because of the changed circumstances, is unable to fulfil the purpose of the contract – the possibility of requesting the rescission of the contract. This applies only if circumstances have changed to such an extent that the contract is manifestly no longer in line with the parties' expectations, and it would generally be unfair to keep it in force as it is.[35] Only changes that occur after the conclusion of the contract are relevant. The assessment of the timing of the change is objective, as it is

35 Art. 112, para. 1 of the OC.

relevant when the events occurred, but not when the parties became aware of the change. However, it is not be possible to request the rescission of a contract if the party referring to the changed circumstances should have considered such circumstances when the contract was concluded, could have avoided them, or could have averted the consequences thereof. In addition, the party requesting the rescission of the contract may not refer to changed circumstances that arose after the deadline stipulated for the performance of such party's obligations.[36] The parties may also contractually waive any reference to specific changed circumstances in advance, unless this is in violation of the principle of conscientiousness and fairness.[37]

A party must bring an action in court to rescind the contract due to changed circumstances and cannot rescind the contract by a unilateral declaration of will.[38] A party also cannot assert the changed circumstances only by objecting in the litigation.[39] However, a contract will not be rescinded if the other party offers or agrees to have the relevant contract conditions justly amended,[40] but the law does not impose an obligation to (re-)negotiate the content of the contract (Možina 2020, 142). According to case law, the party invoking the changed circumstances has therefore only the right to request the rescission of the (entire) contract and not its modification, while the possibility to offer or agree to an equitable modification of the relevant contractual terms is only given to the counterparty who wants to keep the contract in force. The affected party may therefore propose to the other party that the contract be modified but may not request (enforce) that the contract be modified without the other party's consent.[41] Nevertheless,

36 Art. 112, paras. 2–3 of the OC.

37 Art. 115 of the OC.

38 See the following judgements of the Higher Court in Ljubljana: No. I Cpg 803/2013 of 7 January 2015; No. I Cpg 599/2011 of 18 January 2012; No. II Cp 152/2009 of 6 May 2009; and judgement and decision of the Higher Court in Ljubljana, No. I Cpg 468/2018 of 5 December 2018. See also the following decisions of the Supreme Court of the Republic of Slovenia: No. II Ips 735/2007 of 11 December 2008; No. II Ips 1034/2007 of 11 December 2008; No. II Ips 94/2008 of 26 May 2011; No. III Ips 140/2015 of 19 May 2017; and No. III Ips 36/2012 of 25 September 2012.

39 Judgement of the Higher Court in Ljubljana, No. I Cp 1105/2017 of 4 October 2017. See also judgement of the Supreme Court of the Republic of Slovenia, No. III Ips 17/2012 of 12 September 2012.

40 Art. 112, para. 4 of the OC.

41 Decision of the Higher Court in Ljubljana, No. I Cp 1487/2010 of 8 September 2010; judgement of the Higher Court in Ljubljana, No. Cpg 775/96 of 16 April 1998; judgement of the Higher Court in Ljubljana, No. II Cp 1820/2014 of 18 May 2015; judgement and decision of the Higher Court in Koper, No. Cp 568/93 of 8

claims for the modification of a contract are quite common in case law, likely due to the title of Chapter IV of the OC, which refers to 'rescission or modification of the contract due to changed circumstances', but also to the provisions of the General Conditions of Sale of Goods[42] which provide for such a claim. However, relying on a linguistic interpretation of the first paragraph of Article 112, which refers only to the rescission of the contract, the case law rejects such claims (Drnovšek 2016).

Case law, on the other hand, recognises claims for the modification of a contract if the adaptation of the contract to the changed circumstances has been agreed in the contract, since the changed circumstances clause[43] is dispositive in nature and, as such, subject to the freedom of the contracting parties to regulate it. In such cases, the operative part of a judgement has the character of a reformation (novation) of the contract.[44] However, even in this case, the modification of the contract must be asserted by (counter-)action and not only by objection in the litigation.[45]

Part of the theory points out that such a regulation is inconsistent with the principle of *favor negotii*, according to which a contract should be preserved as far as possible. Even the hypothetical intention of the parties, particularly in the case of continuing contracts, may point in the direction of contract adaptation rather than rescission. According to this position, the modification of a contract in the current regime should be allowed by referring to the basic objective of the institution, other fundamental principles (e.g. the principle of good faith and fair dealing, the principle of preservation of the contract), and certain other cases where the OC allows for the equitable modification of contracts (Možina 2020).

If a court rescinds a contract due to changed circumstances, at the request of the other party it will instruct the party that requested the rescission to reimburse the other party for an appropriate part of the damage incurred on the grounds of the rescission of the contract.[46] According to the theoretical view, damages cover only the negative contractual interest, not

September 1993; and judgement of the Higher Court in Celje, No. Cpg 58/2015 of 3 June 2015. See also judgement of the Supreme Court of the Republic of Slovenia, No. II Ips 163/2012 of 17 January 2013.

42 *Official Gazette of the Republic of Slovenia* No. 15-179/1954.

43 Art. 112 of the OC.

44 Judgement of the Supreme Court of the Republic of Slovenia, No. II Ips 153/2011 of 15 September 2011.

45 Judgement of the Higher Court of Ljubljana, No. II Cp 3000/2011 of 29 February 2011.

46 Art. 112, para. 5 of the OC.

the lost profits (Možina 2006, 372). Otherwise, the effects of the termination of the contract would be nullified, as the liability for damages would be the same as in the case of a breach of contract for non-performance (Juhart 2020, 473).

3.2. Special Changed Circumstances Regime for Concession Contracts

3.2.1. Concession Contracts Covered by Directive 2014/23/EU

Directive 2014/23/EU deals with changed ('unforeseeable') circumstances in the context of the modification of a concession contract during its term. If circumstances that cannot have been foreseen by the diligent contracting authority or contracting entity arise after the conclusion of the contract, the contract may be modified without a new concession award proceeding. However, such modification may not change the general nature of the concession and in the case of concessions awarded by contracting authority (to pursue an activity other than those referred to in Annex II to Directive 2014/23/EU), the change may not exceed 50% of the value of the original concession.[47] These rules have been transposed into the Certain Concession Contract Act (CCCA)[48] and apply to concessions that correspond to services concessions or works concessions within the meaning of Article 2, paras. 2–3 of the CCCA,[49] on the further condition that the concessions threshold value is equal to or higher than the threshold value referred to in Article 8, para. 1 of the Directive 2014/23/EU, and that there are no legal exceptions to the application of the Act (Štemberger 2022, 48–52).

However, such a modification of the contract may only be made by agreement of the parties and not by unilateral decision of a co-contractor. If the parties have not reached an agreement on the modification of the

47 Art. 43 of the Directive 2014/23/EU.

48 *Official Gazette of the Republic of Slovenia* No. 9/19 with further amendments.

49 The CCCA defines concession as a written contract for pecuniary interest by which one or more grantors entrust the execution of works ('concession of works') or the provision or management of services ('concession of services') to one or more economic operators, where the remuneration consists solely of the right to use the works or services which are the subject of the contract, or this right together with a payment, and the operational risk in the performance of the concession is transferred to the concessionaire.

concession contract due to unforeseeable circumstances, the concessionaire may request the rescission of the contract by analogy with the application of the rules of the OC on changed circumstances (Kranjc 2022, 621).

The CCCA does not therefore introduce a new institution but only sets (stricter) conditions under which the parties can invoke unforeseeable circumstances and modify the contract without a new concession award proceeding. The reason for the restrictions on modifying the contract during its term is to ensure that the procedure is competitive and that all tenderers are treated equally. If the grantor and the concessionaire were to be able to modify the contract without restriction after the concession award procedure has been completed, the whole purpose of the procedure would be defeated (Mužina 2022). This means that the concept of 'unforeseeable' circumstances has the same meaning as the concept of 'changed circumstances' in general contract law.

3.2.2. Regulation in Sectoral Laws

The special changed circumstances regime in relation to concession contracts (under the erroneous name of 'force majeure') can be found in Article. 50 of the Services of General Economic Interest Act (SGEIA),[50] which regulates the duties and rights of the concessionaire. In contract law *force majeure* means the impossibility of performance, whereas in the case of circumstances under Article 50 of the SGEIA, the performance of the contract is still possible, but in circumstances that no longer correspond to the expectations of the contracting parties. The theory therefore argues that Article 50 of the SGEIA must be interpreted in the context of unforeseeable circumstances (*l'imprévision*), which is a purely administrative law concept (Ahlin 2008, 258; Pirnat 2003, 1613).

According to this Article, the concessionaire must perform the concessioned economic public service within its objective possibilities – even in the event of unforeseeable circumstances caused by force majeure – but cannot request the rescission of the contract or its modification. In this respect, part of the theory strictly defends the view that the concessionaire has practically no possibility to rescind the contract, while others take the position that this legal requirement is not absolute, as it is linked to the (non-)existence of its objective possibilities. This means that all internal and subjective circumstances of the concessionaire's operation are excluded, but not what is external and beyond the concessionaire's sphere of control. The

50 *Official Gazette of the Republic of Slovenia* No. 32/93 with further amendments.

term 'objective possibilities' therefore represents a legal standard whose content and impact on the concessionaire's obligation to act in unpredictable circumstances must be determined on a case-by-case basis. If the objective situation is such that the concessionaire's operation is not possible, the concessionaire has the right to request the rescission of the contract under the rules of the OC, but there is no illegality in its act or omission and therefore no breach of contract and consequently no liability for damages. This brings the regime closer to French law, where, in the event of the existence of certain unforeseeable circumstances, the concessionaire may request a court decision to rescind the contract. French case law emphasises that the unforeseeable (or changed) circumstances regime can only be applied in the case of temporary circumstances. If these circumstances lead to a permanent financial imbalance, the concession contract must be rescinded since the fundamental condition for the public service concession, i.e. the possibility of making a profit, is no longer present (Mužina 2004, 617).

The performance of the concession contract in unforeseeable circumstances entitles the concessionaire to financial equilibrium ('compensation' within the meaning of the SGEIA[51]). This includes compensation for the costs incurred in the performance of the concessionary public service in such circumstances, or the right to compensation for the special effort or difficulty required to fulfil the contractual obligations (reimbursement of additional costs), reminiscent of the doctrine of *l'imprévision*. The right to compensation for the performance of a concession contract in unforeseeable circumstances is a form of state liability for damages without wrongful conduct (other compensation schemes).[52]

The theory suggests that the third paragraph of Article 71 of the Public-Private Partnership Act (PPPA),[53] could be also considered as a kind of changed circumstance (within the meaning of Article 112 of the OC). This Article refers to other measures by the authorities, which prevent the concessionaire from carrying out the relationship, as a reason for the extension of the relationship. Such a modification of the contract (i.e. an extension of its duration to enable the concessionaire to fulfil the purpose of the contract), rather than its rescission, is undoubtedly an expression of the principle of *favori negotii*. However, the PPPA does not comprehensively regulate it (Ahlin 2008, 269).

51 Art. 50, para. 2 of the SGEIA.

52 For more on the forms of state liability for damages, see Možina 2003.

53 *Official Gazette of the Republic of Slovenia* No. 127/06. The PPPA regulates the procedure for establishing concessional public-private partnerships (works concessions and services concessions) and applies subsidiarily in relation to other (sectoral) laws.

A specific regulation of changed circumstances can also be found in Article 47h of the Social Assistance Act (SAA),[54] which regulates concessions for the provision of public services in the field of social welfare. The latter establishes the concessionaire's obligation to perform the public service subject to the concession and to comply with the obligations under the concession contract, regardless of the changed circumstances. In the event of changed circumstances that make it significantly more difficult for the concessionaire to fulfil its obligations to such an extent that, despite the special nature of the concession contract, it would be unfair to shift the contractual risks solely to the concessionaire, it has the right to request the grantor to modify the contract (unless the concessionaire has taken the circumstances into account at the time of conclusion of the contract, or if it would have been able avoid or overcome them).

As the scope of the above Acts is limited, the general changed circumstances regime applies to other concession contracts, unless otherwise agreed in the contract.

4. COMPATIBILITY OF THE GENERAL REGIME OF CHANGED CIRCUMSTANCES WITH CONCESSION CONTRACTS

Contract rescission on the grounds of changed circumstances is not in accordance with the specific characteristics of concession contracts, which are based on the principle of the pursuit of the public interest and the continuous performance of the public service (also recognised in EU law). The latter obligation also derives from the PPPA, which stipulates that the concession (public service) must be carried out continuously and uninterrupted, and from the specific nature of public service activities, which involve the provision of basic necessities of life (e.g. drinking water supply, garbage collection). In principle, this obligation falls primarily on the private partner, but Article 18, para. 3 of the PPPA emphasises that the public partner is not relieved of its responsibility for the continuous, uninterrupted, and equitable performance of the project by the transfer of the concession to the private partner; the parties' relations with third parties are therefore not affected by a different agreement between the parties. Liability in connection with the performance of an activity of general interest is also provided for in Article 163 of the OC, according to which a person who performs a public utility or other similar activity of general interest is liable for damages if, without good

54 *Official Gazette of the Republic of Slovenia* No. 3/07 with further amendments.

reason, it ceases to perform or irregularly performs its services. The general regime of changed circumstances[55] is therefore conceptually inconsistent with these obligations since the rescission of the concession contract leads to the fact that a service that had been performed in the public interest is no longer being carried out *vis-à-vis* the users or recipients of the public service or goods. It should be noted that public law does provide for certain mechanisms aimed at the continuous provision of public service, such as the designation of a temporary successor to the concession,[56] the temporary award of a concession without a public call for tenders,[57] the provision of the concession under the existing concessionaire until the award of a new concession.[58] However, these mechanisms are not linked to the occurrence of changed circumstances, but rather to the revocation of the concession. They therefore do not resolve the dilemma of the (continued) performance of the concession contract after its rescission.

Moreover, the rescission of a concession contract is not always in the public interest, as it leads to the interruption of the performance of projects that have already started and to a repetition of the procedure for the selection of the co-contractor and the conclusion of the contract. The procedure for concluding a new concession contract usually takes a significant amount of time, which means that the project will not be implemented in the interim period between the expiry of the first concession contract and the conclusion of the new contract. This results in increased costs for the public sector and delays in the implementation of the public interest project. The general changed circumstances regime is also not applicable to certain events that are otherwise considered as changed circumstances in private law contracts, since they do not fall within the sphere of one or other of the parties (e.g. changes in regulations, actions by public authorities). In the case of administrative contracts (and concession contracts), the theory of *fait du prince* must be applied to these actions (Pirnat 2003, 1613). In addition, the rescission of the contract is not the aim of the institution *per se*, but rather the equitable distribution of the benefits and losses associated with the change of circumstances and the relief of the debtor's liability for non-performance. Equitable distribution restores the contractual fairness

55 Art. 112 of the OC.

56 Art. 44.i, para. 2 of the Health Services Act (*Official Gazette of the Republic of Slovenia* No. 23/05 with further amendments).

57 Art. 68 of the Veterinary Practice Act (*Official Gazette of the Republic of Slovenia* No. 33/01 with further amendments).

58 Art. 47.m of the SAA.

that has been destroyed by the change of circumstances (Finkenauer 2019). This is also required by the fundamental principle of contract law – *favor negotii*, which also applies to concession contracts.

The rules of the law of obligations, according to which the affected party may rely only on changed circumstances that have arisen since the conclusion of the contract, are not adapted to the specificities of the concession award procedure. These contracts feature generally longer periods between the tendering phase and the contract conclusion phase, in particular, due to the legal remedies available to unsuccessful tenderers. Since the tender is binding and cannot be modified in the process of concluding the concession contract, the application of the provisions of the law of obligations leads to the conclusion that any changes in circumstances during the period of the tendering phase and the conclusion of the concession contract are borne by the tenderer (concessionaire). In addition, a feature of concession contracts is that the parties do not negotiate the content of the contract, but the tenderer must accept the contractual content as defined by the grantor (adhesion contract) (Schilling 1996, 190–191). This means that it cannot reach a different agreement on the point in time from which changes in circumstances can be invoked (e.g. from the moment of the submission of the binding tender onwards). Therefore, the tenderer (future concessionaire) bears a disproportionately higher burden of the risk of changed circumstances than the grantor, although it cannot be held responsible for any delays in the process of selecting the most successful tender. Such regulation is inconsistent with the principle of conscientiousness and fairness[59] and the principle of equal value of performance.[60]

Based on the above, it is possible to conclude that the general regime of changed circumstances in the Obligations Code is not adapted to the characteristics of concession contracts. The initial hypothesis must therefore be confirmed, and some changes must be accepted *de lege ferenda*.

5. PROPOSALS DE LEGE FERENDA

Such an inadequate legal framework opens the door to the application of contractual provisions that are the result of the agreement of the contracting parties or their intention at the time of the conclusion of the contract and the power of the individual contracting party, mainly the grantor, which *de*

59 Art. 5 of the OC.

60 Art. 8 of the OC.

facto unilaterally determines the content of the contract (the concessionaire can only agree or not agree to it – a so-called adhesion contract). As changed circumstances are not always adequately addressed in contractual practice, and not properly distinguished from force majeure and unilateral measures taken by the grantor in the public interest, the specific changed circumstances regime should be adopted at least for concession contracts, if not for all (especially long-term) contracts in general.[61]

If the expectations of the contracting parties can still be achieved despite the changed circumstances, albeit through an adaptation of the contract, the affected party should be able to claim a modification of the (concession) contract. Only if such a modification is not possible or permissible (due to the limitations imposed by Directive 2014/23/EU) should the affected party have the option of seeking rescission of the contract. The Slovenian legislator should therefore follow the example of German law, rather than French law where the concessionaire is obligated (without the possibility of requesting a modification of the contract) to continue to fulfil its contractual obligations despite unforeseeable circumstances. Such a regime is not only more in line with the principle of *favor negotii*, but also more fairly balances the public interest (the principle of continuity of the public service) and the interests of the concessionaire as a party to the contract. Moreover, such a regime is already established in contractual practice[62] and certain specific laws (SAA), which indicates that the legislator has identified the inappropriateness of treating concession contracts under the general rules of contract law due to their specific (administrative) legal nature. Furthermore, the principle of renegotiation of contractual terms is also established in contemporary (unified) models of European contract law, indicating that the purpose of the institution of changed circumstances is not (only) to relieve the debtor from liability for non-performance of the contract (which is – or at least seems to be – the purpose of the regulation in Slovenian general contract law) but to pursue the principle of *favor negotii* and to restore the contractual balance (Kessedjian 2005, 422–423).

In this respect, it is not sufficient to merely change the case law in favour of recognising a claim for a contract modification on the basis of the existing statutory regime in general contract law (with a broader interpretation of the provisions of Article 112 ff. *intra legem*), but the changed circumstances regime for administrative contracts (and therefore also for concession contracts)

61 For more on this, see Možina 2020.

62 See, for example, JN006113/2022, JN000133/2020, JN004976/2021 and JN005255/2020 on Public procurement portal, available at: *https://www.enarocanje.si* (last visited 1 November 2023).

should also be regulated at the legislative level. This approach (which provides for a separate legal regime for administrative contracts) is also widely accepted in comparative law (including French, Croatian, German, and Serbian law) and ensures legal certainty and predictability of the law, although sometimes such a regime does not differ substantially from the general regime of contract law (e.g. the regime of changed circumstances in German law).

However, this does not mean that the general regime of changed circumstances cannot be applied to concession contracts at all. The provisions of Article 112 on the 'concept of changed circumstances' – i.e. the application of the criteria for the qualification of changed circumstances (but not its consequences), the 'duty to inform the other party of the intention to assert the entitlements arising from the changed circumstances',[63] the provisions on 'circumstances relevant for the decision of the court'[64] and the 'waiver of reference to certain changed circumstances'[65] – can also be applied to concession contracts *mutatis mutandis*. Regarding the latter provision, it should be noted that such a waiver should not be extensively accepted given the specific legal nature of concession contracts, where there is a distinctly unequal position of the contracting parties, which may give rise to doubts as to whether such an agreement is in accordance with the principle of conscientiousness and fairness (Mužina 2004, 618).

Due to the specific (long) procedure for concluding concession contracts, which includes an open call for tenders, the submission of binding tenders, the selection procedure, and the conclusion of a contract with the selected tenderer, the tenderer (concessionaire) should be able to claim changes in the circumstances that occurred (after) the submission of the binding tender, and not only after the conclusion of the contract. A different view could lead to a disruption of the contractual equilibrium that existed at the time of the submission of the binding offer and, due to changed circumstances after that moment, (might) no longer exist at the time of the conclusion of the contract.

6. CONCLUSION

Concession contracts are – because of their specific legal nature – often subject to a different legal regime than private law contracts, including the changed circumstances regime. In these contracts, unlike private law

63 Art. 113 of the OC.

64 Art. 114 of the OC.

65 Art. 115 of the OC.

contracts, the public interest is the primary consideration, and usually outweighs the interests of the co-contractor. To protect the public interest, French law has developed the doctrine of 'unforeseeability', according to which the concessionaire is obligated to fulfil its contractual obligations despite the occurrence of unforeseeable circumstances but is entitled to reimbursement of the costs incurred. In German and Croatian law, on the other hand, the occurrence of changed circumstances can lead to a change in the contract, thereby protecting the principle of continuity of the contract and preserving financial equilibrium.

Although Slovenian law on concession contracts (and administrative contracts) is largely influenced by French law, the consequences of the occurrence of changed circumstances for concession contracts are not regulated comprehensively in Slovenian legislation, but only in certain sectoral regulations. Other contracts are subject to the general rules of civil law, which give the affected party the right to request the rescission of the contract on the grounds of changed circumstances, and to the contractual agreement between the parties. A similar regime is also known in Serbian law. However, this is not adapted to the specific characteristics of concession contracts as administrative contracts (protection of public interest, continuous performance of the public service, and special concession award procedure), as also confirmed by contractual practice. Therefore, the changed circumstances regime for these contracts should be regulated separately and differently, following the example of German law.

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*US DRAFT MERGER GUIDELINES: MANIFESTO OF IMPROVEMENTS OR STEP BACK?***

This paper critically evaluates the draft version of the US Merger Guidelines from 2023 (D23), which departs from the consumer welfare standard, sparking intense debates within the academic, professional, and business communities. D23, released by the US Department of Justice and the Federal Trade Commission, introduces a shift toward a more structuralist approach in horizontal merger assessment. The paper examines the diverse perspectives of D23, with some perceiving it as a populist move sidelining economic rationale and others viewing it as an attempt to base decisions on factual grounds and enhance antitrust activism. The discussion emphasises the importance of precision in defining relevant markets within D23, a crucial element in merger assessment. This analysis sheds light on the evolving landscape of merger policy, prompting critical inquiries into the future trajectory of competition law.

Key words: *Merger guidelines*. – *Structuralism*. – *Concentration*. – *Relevant market*. – *Hypothetical monopolist*.

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To abandon economic theory is to abandon the possibility of a rational antitrust law.

Robert H. Bork (1978, 117)

1. INTRODUCTION

This paper focuses on US Merger Guidelines – a sophisticated intersection of the law and the economics of competition. It is worth noting that Robert H. Bork was a lawyer by profession and is considered one of the contributors of intellectual DNA to the Chicago School of Antitrust, despite spending most of his academic career at Yale University. The foundations of this school of antitrust policy have been shaken seriously in the age of rising populism. The words of Robert Bork at the beginning warn about what can happen to antitrust if the vision of it becomes one-sided.

On 19 July 2023, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) released a draft version of the Merger Guidelines (D23, for simplicity)[1] for public review and comment. It is worth noting that the draft version of the guidelines covers horizontal mergers (concentrations), as was previously the case, but can also apply to non-horizontal mergers (vertical and potentially conglomerate ones). While control of vertical concentrations is regulated by separate guidelines (at least until D23 is adopted), conglomerate concentrations traditionally have not attracted the attention of American antitrust authorities. This negligent attitude could be subject to radical change when D23 becomes an official document.

Notably, the draft version of the upcoming guidelines represents a significantly different approach to merger control from the 2010 guidelines. This is most likely the reason why, at the time of writing this text, there is an extremely intense, almost epic, discussion among policy stakeholders about whether the proposed Merger Guidelines is a step forward or a step backwards, to the 1968 roots, in various aspects and as a whole.[2]

1 The draft version of 2023 Guidelines is available at *www.justice.gov/atr/d9/2023-draft-merger-guidelines* (last visited 20 October 2023). Additionally, all previous versions of the guidelines are available on the same webpage.

2 For critical reviews of the draft version of the Guidelines, see the Stigler Center's website ProMarket (*https://www.promarket.org*, last visited 25 October 2023), with contributions by notable figures such as Herbert Hovenkamp, Steven Salop, Fiona Scott Morton, Dennis Carlton, Eleanor Fox, and Carl Shapiro. Eric A. Posner and John Kwoka notably defend the approach outlined in D23, which is unsurprising considering their involvement in its creation.

The first published guidelines in the field were the US Merger Guidelines from 1968. They underwent significant revisions in 1982, 1992 and 2010, and minor amendments in 1984 and 1997. If the 2023 document is adopted, it will mark the seventh iteration in this multi-decade series. It is a fact that each new version of the guidelines has always been a manifestation of accumulated knowledge and experience in the enforcement of antitrust law by the US agencies responsible for merger policy (DOJ and FTC). According to Farrell and Shapiro (2021) '[e]ach iteration of the merger guidelines has reflected the economic thinking of the day ... also has made a substantial impact on merger enforcement and the development of antitrust law.' In other words, every new iteration of the guidelines signifies a more profound understanding of merger policy issues, pinpointing gaps between enforcement practices and the economic logic of the guidelines and antitrust's willingness to adopt innovations that address these gaps.

Consequently, Carlton (2010) observes that 'it is desirable to update and improve the Guidelines to reflect developments in merger analysis over recent years as well as changes in the types of issues that the agencies face in reviewing mergers.' Indeed, the new versions of the guidelines are more the result of evolutionary rather than revolutionary changes. Even after the changes, they must remain a helpful tool for agencies to explain their intentions and actions to the business community, their consultants, relevant courts, and the general public, i.e., all stakeholders of this policy.

The attempt of D23 to unify the approach to all forms of concentrations in one-sided and multi-sided markets is subject to debate, but it is beyond the scope of this work. Therefore, this paper's discussion will focus only on the changes that directly concern horizontal mergers of sellers in traditional (one-sided) markets.

The attention of the general public (not just the American one) is fixed on the process of drafting these guidelines, their content, and the potential consequences of their implementation. Once adopted, these guidelines will represent the official stance of US antitrust agencies towards corporate mergers, whether horizontal or non-horizontal. This has been covered through 13 guidelines that cover the distinctive market environments in which mergers can occur.

Whether D23 justifies the expectations rightly placed on it is a matter of significant contention, as evident from the reviews and comments provided by the most prominent thinkers in this field after the draft was made available for public review and commentary. On the one hand, some words go so far as to characterise D23 as a manifestation of the Biden administration's populist approach to almost everything, including antitrust. They see it as

an expulsion of economic rationale from this area of law, portraying it as a tool for combating Big Tech companies that use acquisitions to consolidate their market and consequently political power.[3] On the other hand, there are comments positioning D23 as an attempt to push the guidelines into the framework of law where conclusions are based on facts, as is the case in other areas of law. Proponents of this view argue that it will enable greater activism in merger policy. Even small mergers will be blocked if planned in significantly concentrated markets, since it is believed they carry the 'risk' to substantially lessen competition. One of the key arguments in this second group of opinions is that the United States has been affected by increasing concentration levels in some crucial markets. This is a trend that antitrust policy evidently cannot prevent based on the consumer welfare standard.[4] Apparently, consumers are not the only ones this policy should protect from the market power consolidation resulting from mergers and acquisitions.

One of the significant changes revolves around what appears to be a shift in the goal of merger policy and how agencies aim to achieve it. This fundamental shift has, in fact, served as the basis for all adjustments to D23 compared to the 2010 guidelines. These adjustments are subject to criticism, thus providing the reason for the discussion in this paper.

In brief, the substantial lessening of competition is assessed through the lens of economic efficiencies (allocative, productive, and dynamic) caused by mergers and how they impact consumer welfare. For example, an increase in prices, accompanied by a rise in willingness to pay due to innovations, may be reason to approve a merger that can unlock such innovations.

In D23, it is evident that the consumer welfare standard is being abandoned, while the risk of substantial lessening of competition can arise due to the predicted impact of mergers on the metrics of market concentration. Such metrics used to be just a preliminary indication in assessing the merger effects, i.e., one of the reasons to challenge the proposed merger. Conversely,

3 Ilić (2022) provides a profound discussion on the rise of populism in antitrust policy, directed by the New Brandeis movement in antitrust and the departure from the Chicago School, based on the consumer welfare standard. A critical review of the "Klobuchar Bill" is central to this discussion. It is worth noting that this legislation immediately preceded the draft version of the Merger Guidelines.

4 Shapiro (2018) refutes the relevance of such claims for competition law. First, most of these empirical pieces of evidence are not based on the relevant metric of market concentration. Second, in most cases, the concentration level remains below the threshold that triggers antitrust policy concerns. Finally, the first and the second points become irrelevant if the increase in concentration over time is not observed in relevant markets but at the level of entire sectors of the US economy, as it is irrelevant from an antitrust perspective.

in D23, the 'risk' indicated by concentration metrics seems equivalent to the 'certainty' that a merger will substantially lessen competition and should be blocked. Reasoning based on market shares might be more likely to block a merger than expected economic efficiencies would be able to enable it.

Criticism of D23 does not only come from the academic community and antitrust practitioners. The wave of reactions in the business community can be described as timely and significant. For example, the draft guidelines prompted five global pharmaceutical giants (AbbVie, Amgen, Gilead, Merck, and Novartis) to join forces with 26 other leading companies from the pharmaceutical sector to form a 'coalition' to oppose the proposed changes in the guidelines. In short, the pharmaceutical sector's resistance primarily revolves around the rise of the structuralist approach and neglect of the importance of the driving force of this industry – innovations (CPI, 2023).

Moreover, since structuralism has likely made a comeback, it is worth considering the role of the relevant market in D23. If the metric based on market shares is back in focus, it is undeniable that these shares must be relevant, which means they come from a precisely defined antitrust market.

The rest of the paper is organised based on the premises mentioned above. In addition to the introductory section, the three main sections shape the primary discussion. The first section explores the range of structuralist reasoning in D23. The second section examines D23's approach to the definition of the relevant market, while the third brings concluding remarks caused by the discussion presented in the paper. The Appendix at the end of the paper serves to lock the elements of the microeconomic analysis underlying the structuralist paradigm.

2. A TURN TOWARDS STRUCTURALISM

The draft version of the 2023 Guidelines seemingly abounds with structuralist reasoning. This is notably evident in essential guidelines concerning horizontal concentrations, particularly guidelines G1–G3 and G8, representing the firmest positions within the draft version. These guidelines undeniably echo traditional structuralist perspectives.

- (G1) Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.
- (G2) Mergers Should Not Eliminate Substantial Competition between Firms.

- (G3) Mergers Should Not Increase the Risk of Coordination.
- (G8) Mergers Should Not Further a Trend Toward Concentration.

It should be noted that the crucial guidelines affecting horizontal mergers begin ominously with 'Merger Should Not...'. It also states, '[t]hese guidelines are not mutually exclusive... the Agencies may limit their analysis to any one Guideline or subset of Guidelines'. In other words, mergers incompatible with any guideline could be blocked, as this 'may' result in a substantial lessening of competition or cause the 'risk' of substantial lessening of competition. The frequency of the word 'risk' appearing in D23 in the context of a substantial lessening of competition is notable, which is not the case in the 2010 guidelines. This may indicate a more stringent stance by agencies towards mergers and acquisitions. 'Risk' is less than 'certainty', but enough to block a merger. How much risk is needed to block horizontal mergers? The answer seems to be based on structuralist reasoning, where it is not necessary to challenge the merger based on its perceived effects.

D23 does not address the assessment of unilateral effects, although it was central in the 2010 guidelines. The shift towards a structuralist approach seems evident. In G1, this position is overly apparent. Significant mergers in highly concentrated markets are not permitted, even though such significant mergers could be relatively small. Clearly, we have to conduct a detailed examination of G1 and other listed guidelines. Before that, let us illuminate the logic behind this seemingly abandoned approach in antitrust.

2.1. The Logic Behind Structuralism

The roots of structuralism or the SCP (Structure-Conduct-Performance) approach are associated with the work of Edward S. Mason (Mason 1939; Mason 1949) and his colleagues at Harvard University. This research significantly changed industrial organisation, incorporating premises from microeconomic analysis. One of the standard definitions of the SCP approach is '[i]n the SCP paradigm, an industry's *performance* [P]—its success in producing benefits for consumers—depends on the *conduct* [C] or behavior of sellers and buyers, which depends on the structure [S] of the market' (Carlton, Perloff 2015, 270).

A limited number of cross-sectional studies confirmed this causality, especially those related to the work of Joe Bain (Mason's student) in the 1940s and 1950s.[5] It is notable that Bain conducted his research not within the boundaries of antitrust markets but within entire industries. However, competition law is only applicable within the relevant antitrust market.

Therefore, S affects C, and C causes P. Assuming that the relations are transitive, C can be omitted from the chain, allowing causality to be directly established between S and P. This is often done, especially to enforce competition law. The structure is defined by basic market conditions – available technology and product demand. The number and size of market participants can further simplify this structural representation. This simplification, based on market shares and concentration metrics, operationalises the SCP approach in competition law.

It appears that the behaviour of market participants, as materialised in the Nash equilibrium in quantity games, perfectly represents the application of the structuralist approach. Cowling and Waterson (1976) give the example of a general oligopoly model with homogeneous products and quantity competition among *N* oligopolists that establish a connection between market structure metrics and the average market power in the oligopoly market (*L*) [*L* represent a weighted sum of Lerner's indexes of all *N* oligopolists],

$$L = \frac{H}{|\varepsilon|}(1+\mu)\,. \tag{1}$$

Based on the previous expression, for a given μ representing conjectural variations that define the type of quantity game,[6] it can be noted that *L* is positively correlated with the value of the Herfindahl–Hirschman index (*H*). In contrast, it is negatively correlated with the price elasticity of market demand. Additionally, if constant marginal costs are assumed for all oligopolists, expression (1) would be equivalent to

$$\frac{\Pi + F}{R} = \frac{H}{|\varepsilon|}(1+\mu), \tag{2}$$

where *Π*, *F*, and *R* are aggregate measures representing profit, fixed costs, and revenue, respectively. From a static perspective, for a given μ, average market power and aggregate producer surplus are positively correlated

5 See Bain (1959), which presents the most significant findings from cross-sectional analyses of various sectors of the US economy.

6 The exact meaning of the parameter μ is explained in the Appendix at the end of the paper.

with H and negatively correlated with $|\varepsilon|$, aligning with the logic behind the structuralist paradigm and the messages conveyed by D23. This gives the chain of Structuralist reasoning in antitrust

Increasing market concentration → enhanced average market power → increasing likelihood of its utilisation → substantial lessening of competition.

In other words, a higher concentration is undesirable from an antitrust perspective, which is the position unequivocally advocated by D23, establishing a direct link between market concentration and the substantial lessening of competition (particularly highlighted in guideline G1). Starting from the premise that the American antitrust policy traditionally follows a consumer welfare standard, which glorifies both static and dynamic economic efficiencies, it becomes apparent that an increase in market concentration is detrimental to welfare, particularly consumer welfare.[7]

The relationship between market welfare (W), i.e., the difference between gross consumer surplus and production costs, and market concentration (H) can be inverse, assuming Cournot competition among N symmetric oligopolists with constant average costs. In this case, increasing the number of oligopolists enhances welfare, and vice versa. However, this is highly rigid scenario.

Therefore, let us take it a step further, as in the seminal works of Farrell and Shapiro (1990a, 1990b). Suppose $\mu = 0$, in line with Cournot competition (see Appendix), the workhorse of antitrust policy. Under the reasonable assumption that horizontal mergers lead to changes in the output vector of all individual firms' production, a merger results in a positive shift in total welfare ($dW>0$) if

$$\frac{dX}{X} + \frac{1}{2}\frac{dH}{H} > 0. \tag{3}$$

In the described context, the condition is met if the relative changes in aggregate output (dX/X) and market concentration (dH/H) have the same sign.[8] In other words, for any relative change of aggregate production (X), there is a higher likelihood that welfare will increase if concentration increases due to a merger. This might sound counterintuitive from the standpoint of the structuralist philosophy supported by expressions

7 The emphasis on dynamic efficiencies, rooted in producer surplus and innovation, moves the consumer welfare standard closer to a static conception of welfare. See Bishop, Walker (2002, 25–27).

8 The Appendix contains derivation of equations 1, 2, and 3.

(1) and (2). In Cournot equilibrium, larger firms are more efficient than smaller ones, meaning larger firms have relatively lower marginal costs. Based on this fact, if part of the production of a fixed aggregate output *X* shifts from smaller to larger firms, welfare will increase simultaneously with market concentration. In other words, a merger of two differently efficient firms (smaller and larger) will increase market concentration as well as welfare in the oligopolistic market. Farrell and Shapiro (1990a) stated, '[g]iven the complex relationship between concentration, output, and welfare, a careful analysis of the welfare effects of mergers is badly needed'. This perspective does not align with the per se approach in considering the relation between market concentration and market performance.

Nevertheless, Mason (1939, 63), as the pioneer of structuralism, warns, '[i]n a society in which size is popularly considered a menace, the large firm must consider carefully the probable reception of its price and production policies by public opinion and political agencies'. Does D23 consider firm size to be a menace?

2.2. Structuralist Words in the Draft Guidelines

The link between structure (market concentration) and performance can be observed in expressions (1) and (2). The lesson is that big is necessarily bad; therefore, high concentration will lead to a substantial lessening of competition. Thus, 'many researchers, after finding a link between high profits ... and high concentration ratios, infer improperly that high concentration rates are bad because they "cause" high profits' (Perloff, Karp and Golan 2007, 33). It is considered that high profits can indicate the exercise of market power or even the presence of collusive behaviour. In contrast, expression (3), based on the same non-cooperative conduct as (1) and (2), contradicts this structuralist reasoning.

It is also essential to consider at least two key factors affecting previous conclusions. First, equations (1) and (2) represent equilibrium relationships that hold simultaneously in the described oligopolistic market. It turns out that simultaneously, S influences P, but P also affects S. This mutual interdependence is not a causal relationship based on structuralist reasoning; instead, it is a theoretical construct necessary to derive the closed-form solution to the oligopolistic game. At the same time, structuralism implies 'causality', a concept empirically examined by Joe Bain. Indeed, the idea strongly suggested by equations (1) and (2) can form the basis for empirical testing of the causality between market concentration

and the average profitability of the oligopoly market.[9] This approach offers a way for empirically establishing the link between structure and performance, making the knowledge of C unnecessary. However, if structural variables are not exogenous in an empirical model, it might be, for instance, that high concentration causes high profits, but conversely, long-term entry barriers cause both high concentration and high profits. In such circumstances, concluding that market performance can be based on any market concentration metric would be erroneous. Finally, the findings of such empirical research are not relevant for the antitrust standpoint if they do not use data specific to a precisely defined relevant market.

Moreover, by excluding C from the SCP framework, some argue directly that high profits in highly concentrated markets indicate collusive behaviour. Building on the insights from Stigler (1964), some go even a step further, contending that *H* can be derived from general arguments on the probability of successful collusion. Accordingly, the Herfindahl–Hirschman index, standing on its own, can function as an indicator predicting the likelihood of collusive behaviour. As we have seen, this may not be a general case if we delve into the nature of oligopoly conduct. Dominant players (those with colossal market shares) could be more efficient than smaller ones, who might exit the market primarily due to pro-competitive, Darwinian arguments. However, 'difficulty rests on one fundamental fact: we do not have a generally acceptable theory of oligopoly' (Stigler, 1966). Even nowadays, Stigler's words seem relevant since *H* pretends to be overused in antitrust.

Secondly, most behaviours in oligopolistic markets, even those selling homogeneous (undifferentiated) products, are not quantity-based. For instance, in the case of price competition models or differentiated products, the relationship indicated by equations (1) and (2) would not hold. Moreover, it should be noted that equation (3) contradicts the standard structuralist viewpoint, even though it is derived from the special case of quantity games.

D23 does not establish a connection between structure and performance but rather directly between structure and substantial lessening of competition. Ultimately, the focus of D23 is not on market power and its potential exercise leading to substantial lessening of competition. For instance, the term market power appears 35 times in various contexts in the 2010 guidelines, while it only appears five times in the draft version. The statute term "substantial lessening of competition" appears 118 times in the

9 We refer to Perloff, Karp and Golan (2007, 27–28) and Davis and Garcés (2010, 292–295) for the issues regarding the empirical testing of the causation between structure and performance.

draft guidelines, while only 6 times in the 2010 guidelines. Structure directly influences the agencies' decisions, thus bypassing conduct and performance. To some extent, this aligns with the statute tone embodied in Section 7 of the Clayton Act.

Suppose the structure can directly indicate a substantial lessening of competition without considering the market power. In that case, a crucial question arises: how does D23 perceive competition in the first place? If the standard shifts away from consumer welfare and the associated considerations of market power and economic efficiencies, competition seems to most resemble rivalry (refer to guideline G2). The task of antitrust policy then becomes to preserve this rivalry, i.e., to maintain the established market structure, even when significant dynamic efficiencies are expected due to its change.

Until D23, US antitrust was widely believed to follow the consumer welfare standard primarily associated with the Chicago School of Antitrust, a philosophy that undoubtedly extended beyond US borders.[10] Bork (1978, 7) argues '[a] consideration of the virtues appropriate to law *as* law demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare.'

Over time, it became clear that the Substantial Lessening of Competition (SLC) test, derived from Section 7 of the Clayton Act (1914), aims to predict whether a merger will diminish or enhance consumer welfare. Generally, any merger that leads to a positive shift in consumer welfare (which may involve cheaper, higher quality, and more innovative products) is not considered harmful from this point of view.

Therefore, even a merger that creates or strengthens a dominant position (and consequently increases market concentration) can be approved if it is determined to bring about precious dynamic efficiencies. If a post-merger price increase results from innovation, i.e., increased willingness to pay for an innovative product, the consumer welfare standard will be satisfied, as will the SLC test (as seen in the 2010 guidelines). The phrase 'from hedgehog to fox' was used by Shapiro (2010) to describe the orientation of the 2010 guidelines towards assessing the effects of concentrations (unilateral and coordinative effects) rather than relying on market shares. Reflecting on this phrase, Valletti and Zenger (2021) observe, '[w]hereas the hedgehog knows one big idea (market shares), the fox knows many different ideas: the variety of economic tools that are tailored to different market environments

10 Regarding the goal of competition law in the European context, refer to Bishop and Walker (2002, 25–27).

as described in the Guidelines'. Is D23 a hedgehog or a fox? The answer critically depends on to what extent the final decision in merger cases can be based on market shares.

In the explanation of Guideline G1 (Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets), it states

> 'A merger causes undue concentration and triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly when it would result in a highly concentrated market and produce an increase in the HHI of more than 100 points. The Agencies also may examine the market share of the merged firm: a merger that significantly increases concentration and creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration.'

The term 'highly concentrated market' refers to a market where *H*, the Herfindahl–Hirschman Index (HHI), exceeds 1,800 after the merger. A significant increase in concentration implies an increase in *H* (delta) greater than 100. This means that a merger can be prohibited solely on structural considerations, without effects-based analysis, nor considering economic efficiencies or other factors that might positively impact competition, when we have

- post-merger H greater than 1,800 AND delta greater than 100

OR

- merged Firm's Market Share greater than 30% AND delta greater than 100.

Compared to the 2010 guidelines, the threshold for a highly concentrated market has been lowered from 2,500 to 1,800. Despite considering other factors, this change indicates a more restrictive stance of the draft guidelines towards horizontal mergers. Several hypothetical examples in Table 1 demonstrate the restrictiveness of the thresholds set in G1.

Table 1. Alternative distributions of market shares.

Distribution	**A**	**B**	**C**	**D**	**E**
Market share (%)	70 14 10 6	40 40 10 10	30 25 15 10 5 firms with 4% market share	51 49 firms with 1% market share	10 firms with 10% market share
Pre-merger *H*	5,232	3,400	1,930	2,650	1,000
Delta*	(**120**; **1,960**)	(**200**; **3,200**)	(32; **1,500**)	(2; **102**)	**200**
Post-merger *H**	(5,352; 7,192)	(3,600; 6,600)	(1,962; 3,430)	(2,652; 2,752)	1,200
Merged Firm's Market Share (%)*	(16; 84)	(20; 80)	(8; 55)	(2; 52)	20

* The values provided represent minimum or maximum possible thresholds (min, max) based on hypothetical two-firm mergers.

It turns out that a 'delta' greater than 100 is a necessary but not sufficient condition for triggering the structuralist mechanism to block mergers. Moreover, it would be 'sufficient' if such a merger results in a high concentration zone or the participants' share exceeds 30% of the relevant market.[11] Based on this straightforward rule, all mergers involving two firms are allowed within distribution E. Conversely, no combinations would be permitted in distributions A and B. It is worth noting that oligopoly structures C and D contain so-called competitive fringe (firms with insignificant market shares of 4% and 1%, respectively). However, their mergers with leading market players would not be allowed. The top three market players in distribution C cannot merge, not even with the fringe firms. Also, in distribution D, the dominant company is blocked from acquiring participants with a 1% market share. According to G1, the risk of substantial lessening of competition is caused unequivocally by increased

11 The standard Guidelines logic still holds: the newly merged entity's market share is determined by adding the merging parties' market shares.

market concentration. As stated in D23 '[i]n highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition.'

Guideline G2 (Mergers Should Not Eliminate Substantial Competition between Firms) should not be based on market shares but on the significance of the competition among the merging parties. Nevertheless, let us carefully read the following passage from D23.

> 'Focusing on the competition between the merging parties can reveal that a merger between competitors may substantially lessen competition even where market shares are difficult to measure or where market shares understate the competitive significance of the merging parties to one another.'

Unlike G1, which can be considered a standalone guideline, G2 is subordinate to G1. If a merger does not pass G1, there is no need to consider G2. However, if it passes the structuralist filter set in G1, it does not necessarily mean it will pass G2. When is G2 applied? As it turns out, 'where market shares are difficult to measure or where market shares understate the competitive significance'. Two points in the previous sentence deserve close attention. First, if the relevant market is well-defined, calculating market shares is a matter of routine. Therefore, it would probably be more accurate to say 'where it is impossible to precisely define the relevant market' instead of 'where market shares are difficult to measure'. In any case, in situations where obtained market shares are not a precise metric of how the market pie is distributed, G1 cannot be applied either. However, a question arises: how can we have a reliable merger assessment in cases where the market shares of relevant players cannot be calculated? Unlike the first observation, the second, as we will see, is not so trivial. Secondly, the part that states 'where market shares understate the competitive significance' is the crucial idea of the G2 guideline. It turns out that G2 serves as a corrective factor for G1, at least for those cases that pass through the structuralist filter set by G1, such as, hypothetical mergers within distribution E (Table 1) that satisfy G1.

Guideline G3 (Mergers Should Not Increase the Risk of Coordination) pertains to the assessment of the risk of coordinated merger effects. At its core, the consideration of coordinated effects is based on the simple economic logic that it is easier for fewer market players than more to form cartel agreements. Or, as stated by Stigler (1964), it is a fact that collusion is impossible in the case of many firms. Also, similar-sized firms can more easily reach agreements than when significant asymmetry exists. Logic coincides with the metric of market concentration. For this reason, one of the critical factors in evaluating the satisfaction of G3 is stated as '[m]arkets

that are highly concentrated after a merger that significantly increases concentration ... are presumptively susceptible to coordination'. Therefore, all mergers within distributions A and B, besides being per se blocked under G1, could also be subject to the prohibition under G3. However, G3 goes a step further by stating

> 'Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market with an HHI above 1,000, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.'

Even mergers within distribution E (Table 1) could be suspect regarding coordinated behaviour. It overwhelmingly appears that G3 represents an additional structuralist sieve placed beneath G1.

Finally, Guideline G8 (Mergers Should Not Further a Trend Toward Concentration) points out the harmful nature of mergers occurring in markets with a pronounced trend of increasing concentration. For instance, if concentration measured by the Herfindahl–Hirschman Index shows a rise over time, approaching the threshold of 1,800, any merger that contributes to an increase in concentration by more than 200 can be considered to substantially lessen competition, even if it aligns with Guideline G1. Therefore, D23 states, '[t]he effect of a merger may be substantially to lessen competition or to tend to create a monopoly if it contributes to a trend toward concentration'. This notably resembles a stricter version of the guidelines, relative to those from 1968, which stated, '[t]he Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration'. The need for closer scrutiny of a merger and the label suggesting that a merger substantially lessens competition carry significantly different implications. The first implies the rule of reason approach, while the following means per se prohibition. Indeed, G8 seeks to establish circumstances under which horizontal mergers would lead to a substantial lessening of competition, even in situations where post-merger H is below 1,800.

While G1 is explicitly a structuralist guideline, G2, G3, and G8, in addition to structuralist instructions, contain other criteria for merger prohibitions. Generally, if a horizontal merger is prohibited based on G1, the other three guidelines do not need to be considered. However, the reverse does not hold: if a merger passes the structuralist scrutiny posed by G1, it does not mean it automatically satisfies G2, G3, or G8.

If agencies become consistent in applying the structuralist filter, pressure on the definition of the relevant market will be significant. In an arbitrarily defined market, the structuralist filter becomes a potent tool in the hands of antitrust agencies. Therefore, the draft guidelines approach to defining the relevant market is also worth considering.

3. THE ROLE OF RELEVANT MARKET DEFINITION

Before the 2010 guidelines, the definition of the relevant market was established as an indispensable part of the merger assessment procedure, actually its first step. The 2010 guidelines make a significant deviation in that regard. Notably, they allowed for cases where the relevant market did not need to be specified, if the assessment of the merger effects could be conducted directly. Numerous criticisms were directed at such a radical shift. Gregory Werden's (2013) commentary on Louis Kaplow's paper, 'Why (Ever) Define Markets?' (Kaplow, 2010), illustrates the controversy surrounding the role of market definition in horizontal merger assessment. In brief, defining the relevant market gives structure and content to this policy. At least for the time being, this is the only way the business community, courts, lawyers, and other stakeholders can understand the logic and consequences of this policy. Posner (2001, 147) emphasises the importance of defining the relevant market by saying

> 'The importance that antitrust law attaches to defining a market is another consequence of the law's failure to have developed an approach at once genuinely economic and operational to the problem of monopoly. If we knew what would happen if a group of sellers raised their prices—if we knew how rapidly the price increase would be undone by the response of other sellers—it would be redundant to ask whether the group constituted an economically meaningful market.'

Indeed, at least where the definition of the relevant market is necessary, the 2010 guidelines remained faithful to the 'philosophy' established by the hypothetical monopolist test. This test measures how much demand substitution is needed for product B to be included with product A in the exact market definition, or territory X to the adjacent territory Y, since demand substitution, in itself, lacks the wisdom to specify the boundaries of the relevant market.

On the other hand, according to D23, defining the relevant market should at least implicitly be imperative in cases of horizontal mergers, considering the described structuralist foundation behind the guidelines. In other words, it would be expected that this structuralist nature places considerable importance on defining the relevant market in a way that minimises arbitrariness. It turns out that following the criteria imposed by the hypothetical monopolist test is crucial. Typically, this leads to the narrowest market worth monopolising. Therefore, if conclusions are drawn based on the structuralist filter, precision in defining the relevant market is implied. As Devlin (2021, 76) state

> 'Concentration in a well-defined antitrust market is relevant. But it is relevant only because it serves as an imperfect proxy for causal factors like diversion ratios and consumer preferences.'

How does D23 envisage the definition of the relevant market? It turns out, quite expectedly, that a step towards defining the relevant market is necessary (contrary to the 2010 guidelines). Still, there is no uniformity in the criteria to carry out that task. Therefore, Werden (2023) sees the attempt to define the relevant market in D23 as akin to the gerrymandering phenomenon. In other words, the market can be determined using different tools from case to case, since the abundance of criteria embedded in D23 allows for this. So far, the hypothetical monopolist test has been crucial for the definition. In contrast, D23 implies

> 'The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to demonstrate the validity of a candidate relevant antitrust market.'

Any 'tool' can be used to define the relevant market, which significantly simplifies the job for agencies when handling cases. However, it creates an insurmountable problem: without a single criterion, it seems reasonable to ask what will happen if unsatisfied merging parties complain about market definition. Whose standard of reasoning will the competent court consider? Note that the traditional orientation of US courts is toward the hypothetical monopolist test. What 'alternative' tools does D23 envisage?

The first 'tool' in D23 is defined as follows:

– 'Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to

> identify the line of commerce and section of the country affected by a merger, even if the precise metes and bounds of the market are not specified.'

This 'tool' coincides with Guideline G2, defining the market based on the substantial intensity of competition among the merging parties. Players feeling competitive pressure should indeed be part of the same relevant market. However, it is not only the merging parties that define the market. Applying such a tool would not pose a problem in determining the relevant product market in a homogeneous product market. However, if companies A and B – which produce goods of the same names that are not perfect substitutes – merge, product C, which is a closer substitute for product A than product B is for A, could be left out of the definition. This neglects the so-called *circle principle* from the 2010 guidelines, when defining the relevant market. Ignoring product C leads to an unreasonably narrower market.

Indeed, it seems redundant to define the relevant market when merging parties face substantial competition. Such a merger 'should not' happen under G2 if competition between merging parties is substantial, even without precisely defining the relevant market. Finally, to be considered an accurate tool, it has to provide an answer to how intense the competition must be for products or territories to be part of the same definition. D23 does not provide an answer to this question.

The second 'tool' in D23 is as follows

- 'Direct evidence of the exercise of market power can demonstrate a relevant market in which that power exists.'

Although market power is not a central focus in D23, it does appear within the context of tools for market definition. Unlike the first tool, this one appears vague, seemingly taken from the context of a hypothetical monopolist test, which it is not explicitly based on. The question arises: whose market power is being considered? Is it solely the merging parties' market power, or does this assessment encompass a broader set of participants constituting the relevant market? If applied within the context of a hypothetical monopolist, the use of this tool would be apparent. In contrast, without the framework of the hypothetical monopolist, this tool cannot address how much market power is sufficient to consider the market boundaries well-defined in terms of product and geographic scope. D23 does not provide a clear answer to this question.

The third 'tool' derived from the *Brown Shoe* case[12] states

– 'A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Various practical indicia may identify a relevant market in different settings.'

In this setup, this tool represents only a 'practical indicia' checklist that may suggest that certain products could be part of the same relevant market. These indicators are often referred to as the Brown Shoe factors. In practice, although not mentioned in the 2010 guidelines, agencies use them as complements to the hypothetical monopolist test, to support the definition of the relevant market. Since any of these indicators can serve as conclusive in D23, this tool becomes overly arbitrary, mainly if applied as a substitute for the hypothetical monopolist test. This checklist is not capable of addressing critical questions in defining market boundaries. How many indicators must justify the set boundaries, and what minimum intensity must they have to reasonably ensure that the market is not broadly or narrowly defined? Once again, D23 does not answer these questions; it simply states '[v]arious practical indicia may identify a relevant market in different settings'.

In general, the common characteristic of all three mentioned tools is that they do not indicate a criterion based on which the boundaries of the relevant market are set. Consequently, D23 does not comply with principles such as the *circle principle* and the *smallest market principle*. The latter suggests choosing the narrowest available definition that satisfies the criterion. The absence of the smallest market principle seems to push policy enforcement towards broad market definitions, which contradicts the earlier mentioned tendency of the first tool to establish the narrowest possible market around the merging entities. Only the correct application of the hypothetical monopolist test incorporates both criteria. By applying the first three tools, market boundaries can be defined in any way – 'gerrymandering redux' or 'magic market delineation', as Werden (2023) points out in his policy brief.

The fourth tool is well-known and the only one that can be labelled without quotation marks. Let us pay attention to how D23 defines it.

12 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

– 'This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price.'

As stated in Werden (2023), it turns out that the hypothetical monopolist test achieved its generalisation. Specifically, it is not limited to the price version of the test, as has always been the case, considering that the test is derived from monopoly theory. Instead, the hypothetical monopolist is allowed, as a possibility, to worsen parameters other than price, such as quality, service, capacity investment, choice of product variety or features, and innovative effort. Thus, the famous SSNIP (Small but Significant and Non-transitory Increase in Price) test becomes just a special case of the more general SSNIPT test (SSNIP + T = worsening Terms along any dimension of competition, including price). What does this generalisation achieve? It turns out, it spoils the concise logic of the hypothetical monopolist test. According to Werden (2023) '[t]his generalization achieves nothing and is impractical'. D23 does not address how the hypothetical monopolist test runs in the case of the T shift; instead, it craftily inputs the price version of the test wherever there is a lack of practical explanation of how hypothetical monopolists behave. In D23 section Magnitude of the SSNIPT, it appears that T can be approached in various ways, depending on the specificities of the case under analysis. In fact, only SSNIP offers a sufficiently operational solution for conducting the test.

Regardless of which strategic variable is dominant, the source of market power is exclusively linked to the ability to set prices above marginal costs. Suppose two-sided markets; even in such extreme cases as the zero price on one side of the market, there must be another product on the other with a positive price, thus financing that zero price and creating significant market power. Also, suppose the exercise of market power involves a change in quality at an unchanged price; in that case, such a shift can have an equivalent change in price for the given quality. The hypothetical monopolist test does not require generalisation, as done in D23, but rather an adaptation of the price version of the test to the specificities of particular markets. Generalisation only drops the criterion that the test establishes.

4. CONCLUDING REMARKS

The United States is the cradle of antitrust policy. Important innovations in competition protection that the US adopts usually spill over to all other respectable jurisdictions, with some delay. The impact of US Merger

Guidelines is expected to be discussed worldwide, giving this topic an almost universal character. At least until the 2010 guidelines, changes in merger policy occurred evolutionarily rather than revolutionarily. In July 2023, the FTC and DOJ released a draft version of the Merger Guidelines (D23) for public review and commentary.

On various grounds, this paper expresses concerns that D23 represents a step backwards concerning horizontal merger control, compared to the previous official guidelines. The argumentation focuses on the fundamental pillars supporting such doubt – the return to structuralism and arbitrary definition of the relevant market. Additionally, this paper did not delve into the justification of linking horizontal and non-horizontal merger guidelines under one roof, nor did it address the content of the sections of D23 covering non-horizontal concentrations. This does not mean that the suggested policies governing non-horizontal concentrations perform flawlessly; they just fall outside the scope of this work.

D23 places particular emphasis on a well-established category within European competition law: the concept of a dominant market position, as outlined in Guideline 7 (Mergers Should Not Entrench or Extend a Dominant Position). Notably, the term 'dominant position' is mentioned as many as 32 times in D23, while it did not exist in the 2010 guidelines. Additionally, it can be observed that the concern of US agencies over conglomerate mergers is revived. Conglomerate mergers can transfer significant market power from one relevant market, where it exists, to another relevant market, where it did not exist before the merger. This is especially notable in circumstances involving complementary products. Substantial market power and a dominant market position go hand in hand. Its appearance in D23 seems logical if the guidelines aim to prevent harmful conglomerate mergers. Hence, the concept of dominant position opens the possibility to target those acquisitions that are 'neither strictly horizontal nor vertical', especially those conducted by Big Tech companies.

It turns out that the main shift in D23 is towards the structuralist approach, which the guidelines skilfully avoided in recent decades. The size of a company, measured by its market share, is one of the factors of the company's market power, and as such, it becomes a decisive factor in determining whether a merger can be deemed harmful. For instance, mergers in highly concentrated markets, exceeding a modest delta of 100, are considered to substantially lessen competition. In the 2010 guidelines, market structure indicators could be regarded, at best, as a preliminary indication of the potential effects of horizontal mergers but by no means a fundamental criterion for decision-making. Additionally, D23 does not discuss market power and its role in creating unilateral effects. That is why

economic efficiencies seem unimportant in the decision-making process, as does the consumer welfare standard. Thus, the SLC test can be solely based on the market concentration metrics.

Structuralism itself does not offer flexibility. Structuralist filters, especially the ones that Guideline 1 promotes, are rather rigid from the business community's perspective, which is rightfully concerned about the potential implementation of D23 in the US economy.

Turning back to structuralism, or to the 'hedgehog' that knows one big thing (market share), may pose significant problems. In addition to being simple to apply, it is also very inflexible. A delta of 101 is not the same as a delta of 99. The problem is further compounded by the flexibility surprisingly offered in defining the relevant market – exactly where it should not be found. If we base our decisions on market shares, these shares should be relevant.

If the draft Guidelines come into effect, it is expected that the main interest of the policy stakeholders will revolve around market definition. While the mere application of per se structural rules, although often wrong, is at least simple to understand, the definition of the relevant market is left to a wide range of alternative criteria, adding to legal uncertainty. The hypothetical monopolist is just an alternative tool. In its generalised form, it becomes arbitrary in setting the boundaries of the relevant market, like all other 'tools' provided by D23.

Applying the structuralist approach to horizontal mergers with a flexible definition of the relevant market significantly facilitates agencies' work in expanding the set of mergers that create 'undue risk that the merger may substantially lessen competition' (D23), potentially increasing the restrictiveness of this policy. Trade-offs are unavoidable. The cost is a significant increase in the likelihood of Type I errors, which this policy has traditionally been most concerned about.

APPENDIX

The purpose of this Appendix is show the derivation of expressions (1), (2), and (3) related to the discussion in section 2.1. The model of quantity competition in the market for homogeneous products is shared by these three expressions.

Cowling and Waterson (1976) start from a general oligopoly model with homogeneous products and quantity competition. Section 2.1 shows that the oligopoly consists of *N* firms, each producing output X_i where *i* = 1, 2, ..., *N*, so the total output in the industry is $X = X_1 + X_2 + ...+ X_N$. The inverse market demand function can be written as $p = p(X)$ and is twice differentiable, continuous, and positive in the domain where it is defined, ensuring that $p'(X) < 0$ always holds. Firms can have different efficiencies, so the variable costs of the firm *i* are denoted as $c_i(X_i)$, while F_i represents the fixed costs. Marginal costs are derived from this cost structure and are non-decreasing in X_i, up to the firm's capacity. Therefore, the profit function for firm *i* can be written as

$$\Pi_i = p(X)X_i - c_i(X_i) - F_i. \tag{A.1}$$

The first-order condition for profit maximisation is

$$p + X_i\, p'(X)\frac{dX}{dX_i} - c_i'(X_i) = 0, \tag{A.2}$$

where

$$\frac{dX}{dX_i} = 1 + \frac{d\sum_{j\neq i} X_j}{dX_i} = 1 + \lambda_i, \text{ and } -1 \leq \lambda_i \leq \frac{X - X_i}{X_i}, \tag{A.3}$$

so the first-order condition can be rewritten as

$$p + X_i p'(X)(1 + \lambda_i) - c_i'(X_i) = 0\ . \tag{A.4}$$

The nature of quantity competition changes depending on the value of the parameter λ_i (conjectural variations) for each individual firm. The number of modalities in quantity interactions becomes infinite. Following Varian (1984, 102–103), we will focus on specific values within the mentioned range, indicating well-known models of quantity competition. If $\lambda_i = -1$ it implies competitive behaviour for firm *i*, which assumes that its output cannot affect the market price. It equates the market price it observes with its marginal cost when making its equilibrium decision. At the other end of the spectrum, for $\lambda_i = (X - X_i)/X_i$, collusive behaviour is at play, as expression (A.4) reduces to the condition for a perfect cartel equilibrium. Finally, for $\lambda_i = 0$, we have classic Cournot behaviour. In this case, each firm myopically believes that other firms will not change their output decisions, and a change of 1 unit in its output will lead to a 1-unit change in the total industry output.

Nevertheless, keeping the previous discussion in mind, by multiplying equation (A.4) with X_i, summing up such expressions for all *N* firms, and with further rearranging, (A.4) becomes

$$\sum pX_i + \sum \frac{X_i^2}{X^2} p'(X)(1+\lambda_i)X^2 - \sum c_i'(X_i)X_i = 0. \tag{A.5}$$

By dividing (A.5) with *pX*, where

$$\mu = \frac{\sum_{i=1}^{N} \lambda_i X_i^2}{\sum_{i=1}^{N} X_i^2} \tag{A.6}$$

we obtain

$$\frac{pX - \sum c_i'(X_i)X_i}{pX} = -\sum \left(\frac{X_i}{X}\right)^2 \frac{p'(X)X^2}{pX}(1+\mu). \tag{A.7}$$

The left-hand side of equation (A.7) represents the weighted sum of the price-cost margins of all *N* firms or the weighted average of their Lerner indexes. The firms' market shares are used as weights. In a sense, this measures the average market power in the given oligopoly structure. The right-hand side of equation (A.7) can be reformulated based on the expression for the Herfindahl–Hirschman Index (*H*) and the price elasticity coefficient of market demand (ε). Thus, we get

$$\sum s_i L_i = L = \frac{H}{|\varepsilon|}(1+\mu), \tag{A.8}$$

or, by assuming constant marginal costs across all firms and equating them to the average variable costs, (A.7) can be written as

$$\frac{\Pi + F}{R} = \frac{H}{|\varepsilon|}(1+\mu). \tag{A.9}$$

On the other hand, the path to expression (3) can be constructed as in Farrell and Shapiro (1990a, 1990b), considering the change in total welfare in the relevant market resulting from the merger. Unlike the previous general discussion, the focus will be on the Cournot behaviour of market participants, implying that $\lambda_i = 0$ for all *i* = 1, 2, ..., *N*, which means that $\mu = 0$. Under the reasonable assumption that the merger leads to changes in the vector of individual firms' outputs, and these changes for firm *i* can be represented as dX_i, the change in total welfare in the relevant market can be expressed as

$$dW = \sum_{i=1}^{N} \left[p - c_i'(X_i) \right] dX_i . \quad \text{(A.10)}$$

Based on expression (A.4) and assuming that $\lambda_i = 0$, it turns out that in equilibrium we have $p - c_i'(X_i) = X_i p'(X)$. Therefore, (A.10) can be written as

$$dW = - p'(X) \sum_{i=1}^{N} X_i \, dX_i . \quad \text{(A.11)}$$

For sufficiently small changes in output, dX_i, and with the definition of *H*, it is possible to approximate the sum on the right-hand side of the previous equation as

$$\sum_{i=1}^{N} X_i dX_i = \int X_i \, dX_i = \frac{1}{2} d\left(\sum_{i=1}^{N} X_i^2 \right)$$
$$= \frac{1}{2} d(X^2 H) = XH \, dX + \frac{1}{2} X^2 dH . \quad \text{(A.12)}$$

Thus, it turns out that

$$dW = - p'(X) X^2 H \left(\frac{dX}{X} + \frac{1}{2} \frac{dH}{H} \right). \quad \text{(A.13)}$$

Given that $p'(X) < 0$, while *X* and *H* are positive numbers by definition, it follows that $dW > 0$ if and only if

$$\frac{dX}{X} + \frac{1}{2} \frac{dH}{H} > 0 . \quad \text{(A.14)}$$

This completes the derivation of equations (1), (2), and (3), which are equivalent to expressions (A.8), (A.9), and (A.14), respectively.

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CORPORATE GOVERNANCE IN SERBIAN FAMILY-OWNED COMPANIES: IDLE OPPORTUNITIES

This paper aims to contribute to legal research on family-owned companies, focusing on Serbian law. This company type is the focus of Part Two of the Serbian Corporate Governance Code, which contains various specific corporate governance mechanisms, such as succession plans, family general meetings, family councils, and family protocols and recommendations aiming to achieve responsibility, transparency, continuity, efficiency, and fair treatment of all shareholders.

The paper presents existing possibilities and explores whether a specific Serbian corporate governance regime dedicated to family-owned companies can be accommodated into a general company law regime. This paper aims to further promote the use of specific mechanisms designed for family-owned companies, paying particular attention to the importance of drafting family protocols. These protocols can regulate not only typical corporate governance issues but are also suitable to include the family-owned company's vision and mission as a sustainable, balanced, and long-term viable business organization.

Key words: *Corporate governance. – Family-owned companies. – Family protocol. – Family general meetings. – Serbian Corporate Governance Code.*

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1. INTRODUCTION

Even though the issue of specific corporate governance for family-owned companies has already been widely explored in contemporary comparative company law, Serbian theory, as well as practitioners, usually remain silent on the subject. This is particularly surprising, bearing in mind that in Serbian law there are various opportunities to introduce specific corporate governance mechanisms to family-owned companies. Among them, the most important is Serbian Corporate Governance Code (CGC), in which the whole second part is dedicated exclusively to this company type.[1] A number of principles and recommendations are developed and defined particularly for family-owned companies. The Serbian CGC advocates for the introduction and inclusion of mechanisms that are suitable for the specific needs of this type of companies, pointing to family protocols, family general meetings, and family councils. All of these are still not very common in Serbian business practice, since their usage is exceptional, while expertise among practitioners remains at a rudimental level, being thus far limited or undeveloped.[2]

It will be explained that the most common closely held form of business organization in Serbian law by far is the limited liability company. This form is also typical for establishing and conducting a family business (after the sole proprietor, which is not in the focus of this research). The same is the case in comparative law. The organization of a family business can also be structured in the form of a joint-stock company, including a public company, while using its advantages to offer securities on the regulated markets. Nevertheless, in Serbia this is still not the case. This is due to the fact that after the privatization of socially owned enterprises to joint-stock companies, in the past three decades only a limited number of them became family owned. Also, in recent years very few joint-stock companies were established, and many among them even converted to limited liability companies.

Being the most commonly used form for the organization of a family business, a limited liability company offers many important advantages over the other company forms. The company's (family) members have many

1 Kodeks korporativnog upravljanja [Corporate Governance Code, CGC], *Official Gazette of the RS* 99/2012. (English translation available at *https://www.ebrd.com/documents/ogc/serbia.pdf,* last visited 26 October 2023)

2 There are, nevertheless, some exceptions. See, for example, Family Business Advisory Consultants, *https://www.porodicnekompanije.com/porodicni-protokoli* (last visited 25 September 2023); or Adizes Southeast Europe – Centre for promotion of family companies, *https://adizes.eu/biznis-transfer/* (last visited 25 September 2023).

possibilities in organising the company's affairs, its structure, and internal issues, due to the vast party autonomy, particularly characteristic of this closely held form of company. Therefore, apart from specific principles and recommendations developed for family-owned companies in the Serbian Corporate Governance Code, general provisions of company law may provide a solid background in order to accommodate the CGC principles and recommendations, and to further promote their establishment and functioning. However, even though Serbian law offers many opportunities for tailor-made corporate governance in family-owned companies, many of them remain thus far unexploited.

Family ownership in companies does not have a long tradition in Serbia, becoming common only after the introduction of the market economy during the 1990's. According to unofficial data, the majority of Serbian family-owned companies are less than 20 years old, while 34.5 per cent are less than 10 years old. According to information from the Chamber of Commerce and Industry of Serbia, the majority of family-owned companies are first-generation companies, only 11.9 per cent of them are in the second generation of a family, while only 3 per cent have been acquired by a family.[3] It is still rare to plan succession in family firms, while problems relevant for family firms in the second, third, or next generations are problems Serbian companies will become increasingly aware of in the near future. Therefore, many problems family-owned companies face will become evident only in the years to come.

It is the aim of this paper to shed more light on various opportunities offered by existing corporate governance provisions in Serbian law. They can be introduced in family-owned companies, making them more efficient and productive and less prone to conflicts, while helping them to survive through the years. After a short presentation of the advantages and disadvantages of this type of business, the paper will provide an overview of the Serbian corporate governance provisions aimed at family-owned companies, focusing on the recommendations to introduce various mechanisms, including a succession plan, family protocol, family general meeting, family council, and communication and conflict management. We will discuss how these mechanisms can provide better corporate governance, on the one hand, and

3 This data, claimed to be sourced from the Serbian Chamber of Commerce cannot be confirmed by any official source, and therefore should be used provisionally. Still, it cannot be far from the truth, in particular considering the fact that the majority (if not all) family businesses could have been established only after the introduction of the market economy in the 1990s or were acquired by families after the privatizations during the same period. See the statistics referred to in the results of the Project of European Business Association (n.d.).

fit into the general regime of corporate governance and law, on the other. We will also reflect on the difficulties that might arise in their practical implementation. This is particularly the case with family protocols, which must find a proper place in the hierarchy of legal acts applicable to the family-owned company. Therefore, the proper designation of their contents and of the legal nature of their provisions can lead to their appropriate use.

The legal research in this field is, unlike abundant research in management and economic studies, still insufficient even in comparative law. According to our knowledge, no theoretical legal study on this topic exists in Serbian company law. This paper is, therefore, only a starting point or introduction, with the purpose of promoting further legal research in the field.

2. FIRST GLANCE AT THE SERBIAN COMPANY LAW AND CORPORATE GOVERNANCE OF FAMILY-OWNED COMPANIES

The primary law to deal with corporations and partnerships in the Republic of Serbia is the Law on Commercial Companies. The first law to introduce a modern company law regime in Serbia was enacted in 2004.[4] The 2004 Law followed the needs of practice by introducing, among others, general forms of limited liability companies and offered at the time advanced corporate governance for them. This law was replaced in 2011 by the new Law on Commercial Companies (LCC 2011).[5] The 2011 LCC was expected to improve certain inconsistent or unpractical solutions, but aimed to keep the basic concept and most important characteristics of previous provisions, including modernization.[6] Even though modern in approach, and following all trends

4 Zakon o privrednim društvima [Law on Commercial Companies, LCC], *Official Gazette of the RS* 125/2004.

5 Zakon o privrednim društvima [Law on Commercial Companies, LCC], *Official Gazette of the RS* 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021. (English translation available at *https://www.paragraf.rs/propisi/companies-act-of-serbia.html* (last visited 26 October 2023)

6 Serbian laws, especially in this area, have a notable tendency to change often. This is understandable bearing in mind the major reasons for these changes. First, many provisions and norms typical for a market economy were introduced after almost fifty years of their exclusion from Serbian law, with the introduction of the market economy. It is understandable that many of them are still new, and that business practice, theory and case law are still attempting to accommodate certain company law instruments and fit them into the legal system. Second, developments in this area were significant in company laws in many countries and within the EU and were sometimes too eagerly followed in Serbian company law by way of harmonization and legal transplantation. These developments particularly include

of contemporary corporate governance in comparative law, following the adoption of these acts Serbian company law did not distinguish a separate category (type) of a family-owned company, but followed the traditional path by recognising four general business organization forms with legal personality: joint-stock company, limited liability company, partnership, and limited partnership. It also distinguished public companies in defining special rules (the majority of which is mandatory in nature) applied only to this company type, while for all the other closely held companies vast party autonomy. Even though partnership and limited partnership are also available forms to serve for organization of a family-owned business, their specific features – particularly joint and several liability of partners – make them unattractive in business practice.[7]

A similar path was followed in the issues of corporate governance. The Chamber of Commerce and Industry of Serbia adopted the Serbian Corporate Governance Code (CGC) first in 2006 and more recently in 2012. Intended for all companies of capital – companies with limited liability of its members – it is applied on a voluntary basis with the aim of improving the corporate governance systems of those companies.[8] The rules contained in this Code supplement the legal framework prescribed by the law, and are usually applied to issues where provisions are of either a dispositive (permissive) nature, or where there are no provisions at all, if party autonomy is allowed.

While the Law on Commercial Companies promotes the introduction and application of corporate governance codes on the 'comply or explain' basis, especially for public companies, their voluntary but recommended implementation applies to all other companies.[9] However, the low level of Serbian corporate governance tradition involving joint-stock companies, as well as in closely held companies, still points out to further promotion and wider application of these principles of good business practice (Vasiljević 2013, 30). The same is especially the case in limited liability companies, where adoption and application of these principles is almost non-existent. This is also the case with Part Two of the Code which is particularly aimed

modernization and introduction of new technologies, development of financial markets, etc. They also include modernization efforts in corporate governance, including board structures, increased transparency, and further simplification of capital requirements for closed companies. On the Serbian Company Law in general see particularly Vasiljević, Jevremović Petrović 2022, 147 ff.

7 For this reason they will be left out from this research.

8 According to the CGC they are especially recommended to limited liability companies, members of the Chamber of Commerce and Industry of Serbia. CGC, Introduction.

9 LCC 2011, Art. 368.

at family-owned companies. Even though only the second part of the Code is specific to this company type, other parts of the Code, especially Part I Chapter I, aimed at all limited liability companies, and other special chapters, if applicable (Chapter II: Big Corporations and Public Joint-Stock Companies, and Chapter III: Additional Recommendations for Public Joint-Stock Companies), are also encouraged for family-owned companies, on a case by case basis and their independent assessment.[10]

Even though many provisions of the Law on Commercial Companies can be emphasised to promote family-owned businesses or could be of particular use to them, in further sections we will focus only on those specific mechanisms developed in the Corporate Governance Code for family-owned companies. Therefore, numerous provisions of company law that could be analysed from the perspective of family-owned companies (including specifics on the establishment, organization and choice of form, particular rights or duties of shareholders, transfer of parts or shares, conflict management, and specific financing of these companies) remain outside the scope of this paper.[11]

3. DISPERSION AND TYPICAL FORMS OF FAMILY-OWNED COMPANIES IN SERBIA

It is estimated that 80 to 95 per cent of all business in the US are family owned or family controlled (Alderson 2015, 140). In Europe, they are estimated to represent around 60 to 80 per cent of all companies.[12] There is not much statistical data on the number of Serbian family-owned companies.

10 CGC, Introduction.

11 An excellent example of provisions of general company law that is of interest to family-owned businesses, relates to establishing and maintaining control of the company. Namely, there has been much discussion on introducing loyalty parts or shares in these types of companies. In jurisdictions where it is allowed, loyalty parts or shares leave the possibility for family shareholders to maintain control of the company, even though they can go public and seek external funding. On the positive effects of the introduction of loyalty shares in Italian public family-owned companies see Bajo *et al*. 2020. In contrast, on the many restraints of external financing through capital markets for family-owned businesses, due to loss of control, see Schammo 2015, 152.

12 In the Final Report of the Expert Group on Family Businesses, produced for the European Commission, it was estimated that family businesses account for 60 per cent of all European companies (European Commission 2009), while the European Family Businesses organization estimated them to represent 65 to 80 per cent of all European companies.

The general trend of many continental European countries, where closely held companies with concentrated ownership are predominant, is typical for Serbia as well.

Many closely held companies are established in the form of limited liability companies, while there are few closely held companies in the form of partnerships and especially limited partnerships (if at all for latter). While not numerous, joint-stock companies play an important role in the economy, even though most of them were created following the privatization of socially owned enterprises during the 1990s and few were created afterwards. Even among them, the significant trend of conversion from a joint stock company to a limited liability companies must be pointed out.[13]

Some of the former socially owned enterprises followed an insider privatization scheme, whereby companies were privatised to current and former employees by free distribution of shares. Others were excluded from this general approach and became subject to 'special privatization programs' carried out by the government. In those cases, many companies were sold to major investors, with a chance of concentration of ownership and establishment of privately (family) owned companies. Finally, some of them still have the state as a controlling shareholder, while in a few of them ownership is widely dispersed among the population. Therefore, the majority of large (joint-stock) companies have concentrated ownership, but the number attributed to family-owned companies cannot be significant, especially compared to the prevalence of limited liability companies in practice.

It is for this reason that a general regime of corporate governance will be further explored for all types of companies with limited liability. However, a particular focus will be on the limited liability company form and the scope and limits of party autonomy in its corporate governance.

13 According to official data from the Business Registers Agency (2023), on 4 October 2023, there were 136,326 registered commercial companies. According to the official data from the Central Securities Depository and Clearing House, there is data for 917 joint-stock companies, while in the register of financial instruments there are 923 issuers of shares (which is reserved only for joint-stock companies). According to the Central Securities Depository and Clearing House (2023) statistical overview of ownership structure of registered companies, legal persons are predominant (84 per cent), while ownership by natural persons who own less than 5 per cent accounts for 13 per cent, while natural persons who own above 5 per cent account for only 1 per cent.

4. DEFINITION OF A FAMILY-OWNED COMPANY

Finding the exact definition of a family-owned company is not a simple task, because they come in variety of business forms and can be of different sizes (Uffmann 2015, 2443). The typical definition of a family-owned company is the one based on the *control of the company by family members*. Family control can be achieved through major shareholdings but is usually combined with control through direct management or board position(s) of family members. In order to investigate which performs better, Miller *et al*. (2007) introduced distinction according to the *number of family members included in the family business*. Namely, they distinguished single-member companies – where a single member was usually the founder of the company and categorised it as a *lone-member firm* – from those with several family members – *true family firms*, which included companies with several family members over time (Miller *et al*. 2007, 831). Even if not of high importance for economic research, single member companies can be of particular importance to succession issues and are included in legal research, providing additional corporate governance mechanisms in family-owned companies.

In addition to these, many other important features of family-owned business are used as criteria to identify them. The European Family Businesses Organization, as well as the European Commission use variety of these other, auxiliary criteria in defining family businesses, including establishment, decision-making, share capital holding, involvement of family generations in the company, and representation in the management of the company.[14] Still, the definition should be relaxed by specific circumstances, including the time frame, and the fact that companies can be fluid between family and non-family ownership.[15]

14 According to a definition of the European Family Businesses organization (n.d.), as well as the European Commission (2009, 4), a firm is a family businesses if: 'the majority of decision-making rights are in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of the firm, or in the possession of their spouses, parents, child or children's direct heirs; the majority of decision-making rights are indirect or direct; at least one representative of the family or kin is formally involved in the governance of the firm. Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25 per cent of the decision-making rights mandated by their share capital'.

15 In the same line: European Commission 2009, 9.

Serbian law defines the family-owned company in the Corporate Governance Code as 'a company in which the majority of voting rights belong to the family controlling the company, including the company founder intending to transfer the company to his/her descendants and make the company operation sustainable down through the generations of this family'.[16] Also, succession is defined as 'the transfer of management and ownership in a family-owned business, or of the control over a family-owned business, from one generation to another'.[17]

The complex wording of the term 'family-owned company' is a first feature of this definition. Also, this complicated definition provides a list of various requirements for a 'family-owned company'. Among them, the most important ones are voting rights and control, as well as (the intention of) transferring the company to descendants. Nevertheless, succession includes the transfer of not only ownership of the business, but also management, while retaining (and separating) the control criteria.

The interpretation of this provision must be the most benevolent one, given the voluntary implementation of the Code's recommendations and principles by companies that meet the family-owned company criteria. Thus, understanding of the offered criteria must be that they are put *alternatively* – they are applicable if any of them is fulfilled. Therefore, a family-owned company can be the one where family members have the majority of voting rights and/or control in the company. Also, a family-owned company can be one with only one founder when he intends to transfer the company to descendants, or to make it sustainable down through generations of the same family. Finally, issues covered by succession can be related to ownership, management, or control over a family-owned business.

5. CORPORATE GOVERNANCE IN FAMILY-OWNED COMPANIES

In one of the first studies to cover family firms and family behaviour within these organizations, Tagiuri and Davies (1996, 199) developed the renowned '3-Circle' model of family business, showing how family firms incorporate three essential elements: family, business, and ownership. Shortly afterwards, various management and empirical research on this issue emerged. Anderson and Reeb's (2003, 1303) empirical study of large US public firms at the end of last century demonstrated that family

16 CGC, Glossary.

17 *Ibid*.

ownership was an effective structure of business organization: family firms performed better than other, non-family firms. Also, when family members served as CEOs, performance was better than with outside CEOs (Anderson, Reeb 2003, 1303). This finding opposed previous prevailing findings in the US literature, where it was argued that controlling shareholders used public firms in order to pursue private goals and extract private benefits while they underperformed (Anderson, Reeb 2003, 1301–1302).

Similar results were shown in large European companies (Andres 2008, 431–445). In his analysis of German family-owned listed companies in the early 2000s, Andres (2008, 431–445) concluded that all benefits regarding better firm performance in family firms, particularly compared to other blockholders, were correlated with the involvement of family members in the company's management or supervisory boards.

At the time of the first publication of empirical research in the field and until recently, legal writings on the topic were sparse. Nevertheless, this is changing, while legal research is constantly emerging, especially in the past decade, and is complementary with the trend of putting more focus on small and medium enterprises. The focus of legal analyses is on specific corporate governance issues of family-owned companies (Fleischer 2018, 11–20; Fleischer, Recalde, Spindler 2021, 1–302; González-Cruz *et al*. 2021, 3139–3165; Braut Filipović 2021, 9–28), even though other issues, including adequate funding, remain significant.

What makes corporate governance in family-owned companies distinct? According to economic and management research in the field, in family-owned companies family members are usually focused on 'their' company and do not diversify their investment portfolio, which is usually closely connected to their family wealth, making them more engaged (Anderson, Reeb 2003, 1304; Andres 2008, 433). Therefore, the change of (family) members is much less common here than in other types of companies, transferability of parts and shares is usually subject to stricter provisions, while control of the company (in terms of ownership, as well as management) is one of the most important features of this company type.[18] The specific interests of family-owned companies also include stability and long-term investment, company growth, technological innovation, and sustainability. They often have particularly close connections with employees, as well as

18 In this context, the term 'control' is used within its widest possible meaning. It includes not only control through ownership and other criteria prescribed in LCC, 2011, Art. 62, para. 5, but also other control mechanisms, including informal control.

with other stakeholders, suppliers, and customers. Family members commit themselves to the company and are personally more involved in its success, they promote loyalty, cohesion, and cooperation.[19]

Still, family-owned companies face various limits, including specific conflicts, different scopes of application of provisions on duties towards the company, and even more pronounced minority oppression issues. Family-owned companies usually have poor and underdeveloped corporate governance, without much influence of independent, internal control within the company bodies. Finally, they are limited in regard to survival.[20] Also, specific problems are related to the financing of these companies, because equity finance and fear of losing control usually make these companies not suitable for external financing, particularly on the capital markets (European Commission 2009, 13–14). Therefore, they are usually financed through private (family) equity, while external funding is predominantly provided by bank loans (Allotti, Bianchi, Thomadakis 2021, 7). Therefore, typical funding of family-owned business, as a small or medium enterprise, remains limited and more expensive than more efficient sources of funding, affecting potential for survival and growth.[21]

6. SERBIAN CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS FOR FAMILY-OWNED COMPANIES

Serbian Corporate Governance Code set its goal 'to provide family-owned companies with support and guidelines on their path of transformation from a small family corner store into a company that is a serious regional player'.[22] Nevertheless, its contents are not limited solely to the growth of the family-owned company, nor does it deal with company funding, but

19 On the stewardship theory and positive altruism effects in interaction between family relationships with family firm performance, see in particular Eddleston, Kellermanns 2007, 550–551.

20 Tagiuri and Davies (1996, 200) reported that family-owned companies survive to the second generation of family owners in only 30 per cent of cases, while their average lifespan is 24 years.

21 On the inclusion of the family-owned companies as typical SMEs in capital markets and the challenges they have in this regard, see Jevremović Petrović 2022, 197–200.

22 Introduction to Part Two CGC: Additional Principles and Recommendations for Family Corporations.

rather encompasses various mechanisms aimed at corporate governance improvement, conflict management resolution, and especially the ability of the company to survive to the next generation(s).

According to the CGC, family-owned companies are guided by three main organizational requirements: the skill to recruit and retain the best people for the family business, the capacity to develop a culture of trust and transparency, as well as the capability to define a logical and organizational structure.[23] Therefore, the CGC underlines that various mechanisms of corporate governance – including responsibility, transparency, continuity, efficiency, and fair treatment of all family and non-family shareholders – must be ensured.[24] Still, one must not forget that it is not only up to family members to recognise the necessity to adopt specific corporate governance tools and mechanisms for their business. Namely, the national legislator and government in general have the important task of making progress and further promoting already adopted acts, programs, and strategies. The European Commission (2009, 18) insists that in family-owned companies entrepreneurship training, as well as management-specific skills, should be encouraged by national governments and strategies. Also, it is important that general provisions of company law, financing, labour law, inheritance and tax law create a climate in which family firms can thrive.

The Serbian Corporate Governance Code developed five general principles, with additional recommendations.[25] As will be shown, their content does not fall only within the scope of company law, or law in general, but is also related to management, organization, economy, and even psychology matters. They include: 1. planning of the transfer of governance (management) of the company to following generations; 2. establishment of a family general meeting; 3. establishment of a family council; 4. adoption of a family protocol; and 5. introduction of methods of communication and conflict resolution. We will briefly review these principles and recommendations and point out how one should accommodate them to general provisions of company law, leaving aside other branches of law that are beyond the scope of this paper.

23 CGC, Introduction to Part Two.

24 *Ibid*.

25 CGC, Part Two.

6.1. Continuity and Succession in Family-Owned Companies

Succession is one of the most important issues for a family-owned company's viability and life cycle. It is very common for family members to think about succession issues too late or not at all, impairing the existence and future prosperity of the company. According to the Serbian Corporate Governance Code, the first principle for family-owned companies insists on *careful and timely planning of the transfer of governance (management) of the company from one generation to another*. Therefore, there are several important aspects of succession that have to be taken into consideration if this principle is to be adopted: the first is succession (or more generally transfer) of parts or shares in family-owned companies, and second is the continuity of family management of the company, and the issue of employment or other engagement of family members from more than one generation.

The Serbian CGC is not focused solely (nor even foremost) on the legal context and regime of the succession of parts and shares, and continuity in management. It does not contain a particular legal mechanism on how succession or continuity should be achieved but leaves these issues to the general regime of company law (and other legal branches). Nevertheless, the limitations and scope of these general provisions should be taken into consideration when following the CGC recommendations.

Serbian law generally allows for the succession of parts or shares of a company, even though this regime depends greatly on the form of the company. Certain restrictions regarding succession make such transfer of parts overly difficult or even impossible in certain company (or business) forms (Vukotić 2018, 167, 175–178, 185–186, 189).[26] Still, even with various company law restrictions, depending on the legal form, a majority of them remain permissive in nature and can be contracted around, in accordance with the needs of family members. This is especially the case in limited liability and joint-stock companies, where succession of parts or shares is generally allowed.[27]

Succession, as defined in the CGC, should also encompass other forms of succession of parts or shares in family-owned companies, including modalities of transfer of parts or shares from one family member to other

26 LCC 2011, Art. 119 which was in part amended in 2018, and strongly criticized by certain authors regarding the (later amended) provision of compensation (Jovanović 2012).

27 LCC 2011, Arts. 172 and 261.

member(s) of the family during their life, with or without compensation. Also, transfer of parts or shares in order to provide family succession should also be possible through various dispositions of property with similar effects in inheritance law (such is testamentary disposition), use of private endowments, investment funds, or various life insurance modalities of property disposal.[28] Nevertheless, even though contractual disposition and transfer of property during life of a family member could be carried out in order to provide family succession, succession contracts, including disposition of property after the death of a family member, are not allowed in Serbian law (Đurđević 2015, 246), and should be kept in mind in succession planning.[29]

To emphasise the importance of succession planning, the CGC developed a number of recommendations. They specify the necessity to develop a *succession plan in the company, as well as an emergency succession plan* (in the event of unpredicted situation when it is important to act with short notice). *The plan of succession must regulate not only company law related issues* – such as the transfer of shares, selection of family members for key management positions etc. – *but must also consider other important implications of this succession*, in terms of substantive and procedural aspects in the field of finance, inheritance and tax law.

An issue of great consequence in regard to succession plans, from a company law perspective, is related to its legal nature. Namely, the CGC recommends that *a succession plan should be a part of the family protocol* (which will be discussed in detail below). Nevertheless, it should be emphasised here that if a succession plan is contained in a contract or in a similar legal transaction, it can have only a general civil (contract) law effect.[30] Only when and if a succession plan is defined as a part of the articles of incorporation (or statute, in the case of a joint-stock company) it can have

28 See, for example, certain forms of capital investment plans through life insurance, including 'tontine insurance', Zakon o osiguranju [Law on Insurance], *Official Gazette of the RS*, 139/2014, and 44/2021, Art. 8, para. 1 under 6. On various alternative investment funds see in particular Zakon o alternativnim investicionim fondovima [Law on Alternative Investment Funds], *Official Gazette of the RS*, Art. 2 para. 1 under 3, 5 and 6. Dudás recommends the introduction of fiduciary transfer and management of property (Dudás 2014, 223–224), which could be applicable in this case.

29 Zakon o nasleđivanju [Law on Inheritance], *Official Gazette of the RS*, 46/95, 101/2003, and 6/2015, Art. 179.

30 It can be also signed by two or more members of the company – as a members' (shareholders') agreement, with an *inter partes* effect between those members who signed the contract (see LCC 2011, Art. 15).

important company law and statutory/institutional effects (as accepted in Serbian legal theory, see Jevremović Petrović 2019, 26–27; Vasiljević, Jevremović Petrović, Lepetić 2020, 47; Jovanović, Radović, Radović 2021, 110).[31] This is important because a succession plan may be validly argued against company, as well as all present and future members of the company, only if it is part of the articles of incorporation (or statute, in the case of a joint-stock company).

The second aspect of continuity in family-owned companies is related to a succession plan, which should also *include criteria for the selection of candidates among family members for management positions*, considering market requirements, applicable in the same way as to non-family professionals. *The same should also apply to management contracts with a family member*, who should be in the same position as those who are not family members.

In this aspect, the CGC resorts not only (nor exclusively) to regulate issues of succession, but rather focuses on continuity in management and employment by family members. These mechanisms serve the purpose of improving professionalism in the management of the company and should stimulate family members to meet professional and personal characteristics required in the labour market. Unlike previous issues concerning the succession of parts or shares, which are related to the position of company members or shareholders and can be dealt with by articles of incorporation, planning for management positions and employment usually stays outside of its scope. Namely, many other issues of management planning remain outside the substantive scope of this act and are limited by provisions on the competences of the company's bodies. Particular rights of members, including the right or obligation to perform work or services, could be provided by the articles of incorporation, with the abovementioned effects, which is also the case regarding the criteria for selection of the company's body members, etc.[32]

Finally, the CGC recommendations suggest that *the succession plan should include the employment policy of the family-owned company* which would provide better corporate governance in family-managed companies. This recommendation is intended to improve the employment policy of the family-owned company, by making it as objective as possible. Furthermore,

31 LCC 2011, Art. 11. On the possibility of the succession plan with company-specific rules on share succession being part of the incorporation document, see Marjanski, Dudás 2021, 123.

32 For limited liability company see LCC 2011, Art. 141 para. 1 under 8, 152, 200, and 224.

employment, as well as policies regarding management recruitment, is additionally important to family members in order to prevent internal (family) conflicts. As a final remark, we would like to emphasise the conclusions in this regard made by the European Commission (2009, 17), which claims that family-owned companies are usually associated with prejudice in the labour market. Therefore, the employment policy is important not only to improve corporate governance within the company but also has important side effects: attracting lower, as well as higher positioned non-family employees. Still, problems related to prejudices against family-owned companies in the labour market must be improved not only from within the company – thorough various family-owned company employment policies, but also through public campaigns and other public influence (European Commission 2009, 17).

6.2. Family General Meetings

Family firms exhibit specific dynamics in management, organization, and supervision decision-making. Family members, as controlling shareholders, can be in a specific conflict of interest situation, among themselves as well as with others. We will discuss internal conflicts within the family in detail below. When it comes to others, family members can have conflicting interests with 'their' company, which are particularly prominent in regard to minority non-family shareholders, employees, or other typical 'outsiders'.

Also, family members effecting active control – by holding the CEO position, being board members or performing other managerial tasks and duties – can face even more conflict-of-interest situations, because in this case there is no typical separation of ownership and control.[33] Even if not performing managerial duties, controlling shareholders can make managers less independent and influence their decision-making to pursue the family members' interests. Some authors argue that family members holding active control can undermine the company's performance by excluding more competent, professional managers, while also not being accountable, in comparison with professionals or outsiders (Anderson, Reeb 2003, 1306–1307). In this context, strict adherence to the best corporate governance practice, including equal treatment of members and shareholders, information rights and disclosure, efficient management organization, introduction of

33 On the typical conflict-of-interest issues and separation of ownership and control see classics in this topic: Kraakman *et al.* 2017, 29 ff; Easterbrook, Fischel 1982, 700 ff.

professional and/or independent board members when not required by imperative requirements, additional mechanisms of internal control within company, protection of minority rights, etc., remains prominent and can be perceived as being equally important as in other companies, particularly those with controlling shareholders.[34]

On the other hand, family members of the family-owned companies distinguish themselves in many positive features from other company's members. They are more willing to promote the firm's success and its reputation, they relate to the company on a long-term basis; also, they can more easily identify with the company's interests (Anderson, Reeb 2003, 1306–1307). Finally, family members are not only and prevalently motivated by adequate immediate or short-term compensation and firm performance benefits. This is why family-owned companies often promote long-term, sustainable goals which are not only profit oriented (López-Pérez *et al.* 2018, 3–4). These advantages can be more important than the possible inefficiency, lack of knowledge, expertise, and professionalism of family members in management positions. For this reason, it is important how corporate governance mechanisms further promote positive features of family-owned companies.

In order to tackle these problems, the second principle in Part Two of the Serbian Corporate Governance Code for family-owned companies introduces the *family general meeting as an advisory body of the family-owned company, with the aim of bringing together all family members to discuss business-related and other family issues* related to their company. Its purpose of *fostering unity among family members, facilitating exchange of knowledge and familiarization of all family members with the company's affairs, while keeping family issues apart from the company*, is particularly important in the second and subsequent generations. According to the recommendations, all issues pertaining to the establishment of this body, decision-making, purpose, meetings, agenda, etc. should be stipulated in the family protocol (as will be discussed below). Therefore, the most important goal of the establishment of the family general meeting should be to prevent or diminish internal family conflicts related to company's management and business conduct, while promoting best corporate governance practices. It should serve to make a more prominent distinction between the family and its interests on the one side, and the company and its own, separate interests, on the other side. This is emphasised by the recommendation to *keep family issues apart from the company*.

34 In this regard, see other CGC principles and recommendations, in Part One, which can be applied in this context.

In order to separate the family from the company, *family general meeting should bring together only family members*. Among them, management professionals recommend introduction of particular 'generational meetings' (Alderson 2015, 151), bringing together the second, third etc. family generations together. This is a particularly suitable mechanism involving those family members who are not at the same time members of the company but are involved in another way – as managers or, more often, employees of the company – with those staying outside the company but with important informal influence over its functioning.

The first general remark from the perspective of general provisions of company law in this context is emphasis on the fact that there is no equivalence between the terms 'family general meeting' and 'general meeting of members or shareholders'. Therefore, a family general meeting can be an informal gathering of family members, outside the companies' bodies. Also, it can be introduced as an informal (but nonetheless, according to the CGC recommendation) *advisory body* in the structure of a limited liability or joint-stock company. Its features, including composition and competences, can be determined in the articles of incorporation (or statute for the joint-stock company). Nevertheless, if so, its competences cannot be in contravention with the prescribed organization structure, duties, and competences of the company's bodies, which to a great extent are of the imperative nature in a joint-stock company, but with vast party autonomy in relation to almost all internal issues between the company and its members, as well as among members themselves in limited liability company.[35]

This far-reaching party autonomy allows a limited liability company to be adapted to the individual needs of its members and has important consequences on its internal organization. It can also accommodate various modalities of family general meetings into the internal organization of the company. Because of this flexibility, this form can be more attractive to family members than a joint-stock company, making it more adaptable to family needs. This is especially the case of family-owned companies where all shareholdings are in the hands of a family. Nevertheless, the separation of the competences with this family meeting from a general meeting of members or shareholders is the first step in the best corporate governance practice. It is even more important when there are not only family, but also

35 LCC 2011, Art. 140, 246–247.

non-family members in the company, when the company's interests and their protection must be imperative guidelines for best corporate governance practice in family-owned companies.[36]

6.3. Family Council

The establishment of the family council, provided in the case *when the family general meeting becomes too large*, is envisaged as the third principle for family-owned companies.[37] Its main task is to simplify communication between the company and the family, specifically management structures (board of directors, supervisory board, and executive directors) with the family general meeting. This should be done when the family general meeting becomes too large (for example more than 30 members) for the purpose of effective communication with the management of the company. They can be particularly useful in second, third and other generations of the same family.[38] The main task of the family council is to connect family members with the management of the company, not replace the management or other formal body in the company (Braut Filipović 2021, 11). Also, it reduces costs of other intermediaries in the company, and keep affairs 'within the family'.

Even though the Serbian Corporate Governance Code particularly emphasises that *family members may not give instructions to executive directors except through these formal governance bodies*, special care must be taken in order not to contravene the mandatory provisions on the competences and duties of company bodies.[39] It is particularly true for the joint stock company where explicit provisions regulate communication between shareholders (general meeting of shareholders and various rights of shareholders, such are rights related to the convocation of the general meeting, information rights, etc.) and management and supervisory bodies, as well as permit transfer of competences between bodies.[40]

36 Many provisions dealing with the conflict of interest in general company law can be of importance here. Apart from composition and competences of the companies' bodies (as discussed above) it refers, above all, to duties owed to the company (LCC 2011, Art. 61–80).

37 CGC, Part II, Principle 3.

38 See data in various European countries on the involvement of family councils in Alderson 2015, 150.

39 CGC, Part Two, Principle 3, Recommendation 5.

40 With similar conclusions for Croatian law, see Braut Filipović 2021, 17–18.

Less strict provisions exist for limited liability companies, allowing various possibilities regarding competences and even delegation of powers from the general meeting to other bodies, and *vice versa*, according to party autonomy.[41] That provides more space for the family bodies to be involved more closely in the management of their company, according to their specific needs. Party autonomy could be used in various mechanisms by arranging that the internal affairs of the company, through the family council, can deal with problems related to shared control, unanimity, or high level of agreement in decision-making. Family councils could also be useful in facilitating various restrictions on the disposal of company's shares by promoting communication with current, prospective, and non-family members of the company in the event that they are numerous. The family council could also impact specific types of diversified company's management and control and could introduce advisory bodies to include and accommodate family members and their interests.

Members of family councils are family members, elected by the family general meeting, while the most important provisions on the composition, meetings, agenda etc. should be defined in the family protocol. *Other family bodies may be also introduced, depending on the family size and complexity of the company, to review, manage and decide on certain delegated issues*. Specifically mentioned are so-called *family offices*, usually in charge of investment services and activities for family members and their (family) assets. Nevertheless, this also should be done within the party autonomy in different forms of the family-owned companies.

Besides communication between a family and the company's management, the other important *task of a family council is to approve the family protocol, as well as other decisions on company and family assets*. Here, the family council serves as the main communication, as well as informal dispute management body, and is of particular use in numerous families that have several generations involved in the family-owned business.

41 Art. 141 para. 2 LCC 2011 explicitly introduces the permissive nature of provisions on companies' bodies competences. It provides that '[i]f the memorandum of association does not contain provisions on competences of the company's bodies, the company's bodies have competences provided by this Act'.

6.4. Family Protocol

Even though *adoption of family protocols* is introduced as the fourth principle for family-owned companies, it is the most important feature of specific (Serbian) corporate governance for family-owned companies.[42] All other corporate governance mechanisms from the Code (including succession plan, family general meeting and family council) are (or can be) stipulated within family protocol, which can include numerous tasks and features.[43] Family protocols, as defined by the CGC, are based on a specific regulatory technique, so-called regulatory instructions. This regulatory technique allows the possibility of adoption of a document, in this case the family protocol, but without proposing how and with what legal instrument this should be done, or defining its legal nature, due to the diversity and specific needs of each family-owned company.[44]

Empirical studies have shown that family business with family protocol can improve their performance.[45] Their advantage is that they can reduce the opportunism of family members and create a regulatory framework in advance, while promoting professionalism, a feeling of justice between family members, and bringing other advantages to the company's purpose, vision, and performance (González-Cruz *et al*. 2021, 3134). According to Serbian Corporate Governance Code *family protocols should define family objectives and values*. This is the perfect document to include various family values, the vision and mission of the company. It should promote the family-owned company as a sustainable, balanced, and long-term business organization. If family protocols provide the vision and mission of the company – this

42 Even though rare, they are included in the provisions of some national company laws under various names (family charter, family constitution, family code). Spanish law introduced them by Real Decreto 171/2007, Art. 2 para. 1; German law introduced family protocols by Governance Code for Family Businesses (GKFU) in 2004; Italian law uses this contract as an exception to the usually prohibited inheritance contracts, while Belgian law recognizes some provisions on these contracts within the Corporate Governance Code for non-listed companies. For details, see Fleischer 2018, 13–15.

43 For similar conclusions about the importance of family protocols over other mechanisms see Arteaga, Menéndez-Requejo 2017, 5.

44 A similar approach was followed in Germany, within its Corporate Governance Code for Family Business. For those provisions see Fleischer 2018, 12. Also, on the advantages and disadvantages of this approach see Uffmann 2015, 246.

45 This study was conducted using a sample of 530 Spanish family businesses during 2003–2013, of which 265 received financial aid to introduce family protocol, over the period of 2 years following the implementation of a family protocol (Arteaga, Menéndez-Requejo 2017, 1–2).

should be considered by the management when deciding on the company's strategy. This is particularly the case when deciding on the 'best interests of the company'. Also, *family protocols define the most important mechanisms of family governance and corporate governance and their mutual relation*. It is advised that the definition of the competences and decision-making areas assigned to the family should be carefully prepared in the family protocols, so that it does not become a limiting factor for the company and its governance.

Finally, an important feature of the CGC recommendation for the family protocols is that it is *advisable* for them *to be legally binding*. This is, in our opinion, the most delicate feature of the family protocol and needs elaboration. Namely, one of the most important issues about family protocol must be whether and under what conditions it can be drafted as to have a legally binding nature (and in particular company law binding nature). Also, other general company law issues are of relevance here: what is the relation of this document to other company acts, particularly articles of incorporation and statutes. Finally, should family protocols be drafted as shareholders' (or members') agreements or as acts of another legal nature. The answers to all these questions require much more detailed research than this paper permits. Still, we will underline some important preliminary thoughts on some of these issues.

First, family protocols must be drafted specifically for each family-owned company and according to family needs. The 'one size fits all' principle is not suitable for application in this case. Particular care must be taken when adopting family protocols with a legally binding nature. They must be in accordance with all company's acts, especially articles of incorporation and statutes.[46] It must be underlined here that model articles of incorporation are not suitable for family-owned companies, especially if they are to include family protocols.[47]

In order to have a legally binding effect for the company and other members, family protocols must be concluded between all members of the company and included in the articles of incorporation (statutes), in accordance with their substantive and formal requirements.[48] It is only in

46 On these issues see also above fns. 29–30.

47 For more on this issue, see Jevremović Petrović 2019, 168–170.

48 LCC 2011, Art. 11. The Law on Commercial Companies gives the founders an opportunity to autonomously regulate numerous matters related to their organization, management, relations between the owner and his/her company, therefore creating a source of law applicable to specific and not general matters. This is especially so for closely held companies, while public companies are under stricter regime of legislative control through imperative provisions and even

this case that a family protocol becomes 'resistant' to succession and change in the family and membership status. In all other cases, the agreement (or other legal transactions, like unilateral testamentary disposal of parts or shares) would have limited (or no) effects on the company and its (present and future) members.

A negative feature of including family protocol provisions in the articles of incorporation and statute is their obligatory disclosure, which would not be suitable for all family-owned companies.[49] In this case, if disclosure is to be avoided, more suitable arrangements could be achieved by preparing and signing a contract between members of the company (including shareholders' agreements).[50] Although generally allowed in Serbian law, they have significant limitations.[51] Even though they could be kept confidential, these agreements will bind only those (family) members of the company who are also signatories to these agreements.[52] If a company is owned by family members only, this would be one of the preferable and most practical approaches to regulating their internal affairs. Still, it is prone to difficulties if there is no equivalence between family and company members. Also, even if family and company members are the same, this situation can be changed due to growing families, or in time – by families changing over generations. These issues, therefore, remain the most important deficits of family protocols being drafted as shareholders' agreements. Similar conclusions can be made – including the limited scope of rights and duties and in particular effects on the company and its members – if they are based on other civil law contracts or other legal transactions between family members.

supervision by public law bodies in certain cases. On the contents of the articles of incorporation in limited liability company, which is the most suitable form for individualisation, see LCC 2011, Art. 141. While articles of incorporation of all forms of closely held companies allow for greater party autonomy, it is much more limited in the statutes of a joint-stock companies, due to numerous imperative legal requirements regulating this company's form. See LCC 2011, Art. 246.

49 On mandatory disclosure see LCC 2011, Art. 11, para. 8.

50 LCC 2011, Art. 15.

51 LCC 2011, Art. 269, 359. On voting agreements in Serbian law and recommendations for improvement, which can be of particular importance in regard to 'connected persons' in family-owned company, see Lepetić 2019, 239–245. For more on these issues see also Vasiljević, Jevremović Petrović 2022, 352–353.

52 For similar conclusions on family protocols being part of members/shareholders' agreements in German law, see Fleischer 2018, 12.

Finally, family protocols can be of a non-legally binding nature. Even though they can promote in this case better corporate governance, principles, values and manage communication or conflict management, they are limited in their effect.

6.5. Communication and Conflict Resolution in Family-Owned Company

Family members overlap with the owners of the company, but quite often also with its management and employees. Because of their intertwined roles, they can also easily bring family issues to their business affairs and management of the company (Tagiuri, Davies 1996, 202). The potential of conflicts can be related to their private (family) affairs (interpersonal conflicts), but often is related to the company itself. When it comes to personal issues, Alderson (2015, 141) distinguishes between siblings' rivalry, non-working family members, divorce, interpersonal conflicts, incompetent family employees, and multi-generational succession issues as the most prominent conflicts within family-owned companies. Their specific problem is that family members are not only emotionally attached to each other and are in a (life-)long relationships, but also that they usually try to resolve their problems internally (Alderson 2015, 141). This makes conflict management and resolution not only more difficult but also very sensitive and confidential.

Family member conflicts can be related not only to different positions of family members within the company (employee, management, and shareholder), but can also be particularly problematic when they are between non-employed shareholders and companies managed by owners and can even include conflicts regarding the company's goals (Alderson 2015, 144). They can also lead to so-called 'principal–"super principal" conflicts', including conflicts between family owners and other family members not directly involved with the company in terms of ownership, management, and employment (Arteaga, Menéndez-Requejo 2017, 5). For this reason, communication and conflict resolution must be addressed with special care in family-owned companies.

The Serbian Corporate Governance Code for family-owned companies finally introduces the principle of *necessity to establish methods of communication and conflict resolution in the family*. Recommendations underline the *importance of a good communication for family-owned*

companies and insist on the complementarity of the formal as well as informal communication. *The definition of other channels of communication between the family and the public are also recommended*.

Even though the issue of internal conflicts is often considered the most vulnerable feature (or a cardinal problem, according to Fleischer 2014, 29) of family-owned companies, Serbian law does not offer many recommendations on their resolution. It offers regulatory instruction to regulate the matter, without suggesting how this should be done. This is slightly disappointing and should be particularly addressed in practice.

Even though many valuable conflict resolution mechanisms can be found in general provisions of Serbian company law, specifically for a limited liability company, they are usually not efficient enough or are not appropriate to individual family needs. This is why they should always be part of the articles of incorporation, members' (shareholders') agreements, or family protocols. The family protocol can above all promote or include shareholders' (or members') agreements in its part related to ownership conflicts (Arteaga, Menéndez-Requejo 2017, 5). They can be of particular importance to ownership disposal and can include put and call options, rights of first refusal, tag-along and drag-along rights, lockout clauses, buyout agreements, and others (Arteaga, Menéndez-Requejo 2017, 5). One of the proposals, specific to management conflicts, suggests the introduction of 'co-CEOs' or the revolving position of family members in previously prescribed appointment terms (Alderson 2015, 152). This could be of particular importance in conflicts of family members with management positions, but is even more prominent in generational conflicts of multiple family members, and could also be transposed to issues of family council representation, family general meetings chairpersons, etc.

It should be underlined once again that family conflicts are sensitive in nature and tend to be resolved internally and without too much interference of third parties. This is why articles of incorporation, members' (shareholders') agreements, and family protocols should include mediation and other informal ad-hoc dispute resolution mechanisms.

Currently, existing recommendations in regard to conflict management do not provide adequate instruction on the various possibilities of mediation and other alternative dispute resolution mechanisms. It is, therefore, advisable that other recommendations on specific mechanisms of conflict resolution in sensitive family-owned companies disputes should be developed and included in the CGC provisions. Until then, the existing mechanisms, including arbitration and mediation, should be publicly promoted as particularly suitable for family-owned company disputes.

7. CONCLUSION

There are many features of Serbian company law that befit family-owned companies. The majority of provisions applicable to limited liability companies make them well-suited for this type of business: the internal structure of the limited liability company makes it a good form for a family business with adaptability in terms of size, organization, and possibility of adjustment to family needs. Furthermore, the vast party autonomy in contracting between members and the company allows 'tailor-made' approach, which can satisfy the specific characteristics of each family. Serbian company law also offers another form of a joint-stock company, which, even though less flexible in its structure and organization, can satisfy the requirements and needs of more developed businesses, aspiring to growth through public funding and the benefits of capital markets.

Departing from these general provisions and in order to further promote and support corporate governance in family-owned companies, the Republic of Serbia introduced in the Corporate Governance Code several principles and recommendations with particular focus on family-owned companies. The intention is to make these companies more efficient and productive and less prone to conflicts, while helping them to survive over time.

The CGC principles and recommendations include planning the transfer of corporate governance over generations through a succession plan and an emergency succession plan. Also, they call for the establishment of various advisory bodies in companies where family members get together to discuss family issues related to their family, as well as the company's affairs. Depending on the size of the family, business, and its organization, this gathering can include family general meetings, or if a family is more complex, family councils.

The most important principles of corporate governance for family-owned companies recommend the adoption of a family protocol signed by all the family members. It is preferable that it is legally binding, so that it could provide legal certainty and have legal effects towards the company and other present and future members. Together with the best corporate governance practices, this could be the cornerstone of family businesses over generations.

Even though the Serbian Corporate Governance Code recommends the introduction of methods of internal and external communication and conflict resolution, various specific mechanisms must be promoted in this process. These involve specific instructions for communication and conflict management to be included in the company's acts, as well as other family

agreements (shareholders' or members' agreements and family protocols). They should mandate that once conflicts are inevitable, it is preferable that they are resolved through mediation and other informal ad-hoc dispute resolution mechanisms.

We conclude by acknowledging various opportunities in specific corporate governance mechanisms for family-owned companies in Serbian law. Serbian theory, as well as practitioners, so far remains mostly silent on the subject. Various advantages of preventive general and specific corporate governance are unknown and, therefore, unused by many family-owned businesses. Also, many of them seem to be ignorant of the problems that may arise in the future. For this reason, it is imperative that more knowledge on the various opportunities offered by existing corporate governance regime become more widespread. However, it is not solely up to families and family-owned businesses to recognise the necessity of adopting specific corporate governance tools and mechanisms – it is also a task for a national legislator (and government in general) to make advances related to already adopted acts, programs, and strategies. The involvement of all stakeholders in this issue will make family-owned companies more efficient and productive, and less prone to conflicts, while helping them to survive over the years.

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ARBITRATION IN SMART CONTRACTS DISPUTES – A LOOK INTO THE FUTURE

The paper explores the growing integration of blockchain technology in the legal field, specifically focusing on the emergence of smart contracts with their automated execution of contractual obligations. Technology experts believe that the use of smart contracts contributes to the eradication of disputes. However, the author challenges this claim while analyzing the disputes that may arise in this area, including classic contract law disputes and new issues specific to smart contracts. The paper focuses on whether arbitration is the optimal forum for resolving these disputes. The relationship between traditional and blockchain arbitration is explored, examining disputes that would be resolved using established methods and those suitable for the newly created mechanism. The interests of traditional arbitration do not coincide with those of blockchain arbitration. Both should cooperate and take advantage of each other. The author asserts that the flexibility and adaptability of arbitration will be its dominant advantage in addressing these disputes.

Key words: *Smart contracts*. – *Blockchain technology*. – *International arbitration*. – *Blockchain arbitration*. – *Alternative dispute resolution.*

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1. INTRODUCTION

For most lawyers, even globally, the subject matter of this paper pertains to the realm of science fiction. Encoded, self-executing contracts, often praised as "smart", which lead to disputes capable of being resolved privately rather than relying on national courts, appear far-fetched. Nevertheless, the current reality not only challenges but also contradicts such skepticism.

The reality that this is not a 22nd century topic is apparent from the fact that smart contracts are already revolutionizing business in various sectors of the economy. Forecasts indicate that specific industries will undergo substantial transformation due to the ongoing implementation of smart contracts, which is evident in certain segments that are already experiencing these changes.[1] These contracts are based on the so-called blockchain technology, i.e., distributed ledger technology, which is considered to be one of the greatest discoveries after the Internet (Werbach 2018, 489) and will change the business world in the coming decades (Tapscott, Tapscott 2016). Blockchain technology became relevant as a result of the shaken trust in classical financial institutions after the financial crisis of 2008 and the desire to move from centralized institutions to a decentralized cryptocurrency market. However, this technology[2] has far broader applications than solely cryptocurrencies[3], with one notable use being the basis for smart contracts. According to some authors (Lefèvre, Delwaide 2019, 226), its true potential does not primarily lie within cryptocurrencies, the more prominent aspect, but rather in the domain of smart contracts.

One of the primary touted advantages of smart contracts is their ability to eliminate reasons for disputes by ensuring certainty in contract execution, with claims that they may render dispute resolution mechanisms unnecessary. In our paper, we aim to demonstrate that such assertions do not align with reality. We plan to achieve this by first providing a brief introduction of smart contracts[4] and subsequently analyzing both the

1 One of the best examples of an industry that will be significantly changed by the development of smart contracts is the insurance industry, where new products and services are introduced, but where smart contracts can also serve to facilitate the detection of fraud, as well as to reduce costs for existing services of insurance companies. See Đurović 2020, 312.

2 On the legal framework of blockchain and DLT technology, see Cvetković 2020, 134–137.

3 Cryptocurrencies are just a segment of digital assets.

4 Especially considering that it is a new institute in domestic and foreign theory and practice.

traditional contractual disputes likely to persist in the future and the novel disputes unique to smart contracts. Considering the distinctive features of smart contracts and the disputes they may generate in the future, we intend to examine whether arbitration, known for its private dispute resolution features, serves as the optimal forum for their resolution. This examination will involve evaluating the relationship between traditional (classical) and blockchain arbitration, and determining the types of disputes suitable for previously known dispute resolution mechanisms and those better resolved through the newly developed ones. The conclusions are that today blockchain arbitration is suitable only for low-value and low-complexity disputes, due to the different presented factors. Accordingly, traditional arbitration is here to stay. Nevertheless, there is a need for arbitration to show one of its greatest advantages – flexibility, in order to be(come) the primary forum for resolving this category of disputes.

2. SMART CONTRACTS – OPENING NEW HORIZONS

When presenting the institute of smart contracts, it is necessary to understand the technology on which they rest, the basis of their functioning. Distributed ledger technology is a digital record of transactions that is replicated, validated, and updated simultaneously across a network of participants, whether they are known, pseudonymous, or completely anonymous (Athanassiou 2018, 105). Distributed ledgers store information related to the exchange of various values, including but not limited to cryptocurrencies, tangible assets, and intellectual property. All of this operates without the necessity for a central authority as the accuracy of information is ensured by multiple copies of the distributed ledger held by all participants (Lefèvre, Delwaide 2019, 255), creating an immutable record. Distributed ledgers are often based on blockchain technology, so the two terms are regularly used interchangeably. Data is organized into blocks and stored on these chains, which, once verified through network consensus, are permanently appended to the chain and interlinked with previous blocks (Lefèvre, Delwaide 2019, 226). The principal strengths of blockchain technology lie in its decentralization and immutability – nothing relies on a singular authority, and there is minimal risk of alterations or manipulations within the chain.

Smart contracts, initially introduced by computer scientist Nick Szabo at the close of the last century, were defined as "a computerized transaction protocol that executes the terms of the contract." Szabo illustrated their essence by comparing them to a vending machine for snacks and drinks

(Szabo 2018). When a customer chooses a product and inserts the required payment into the machine, it initiates the fulfillment of the request by dispensing the desired item. A contract is concluded between the buyer and the "machine" by selecting the product and entering the requested amount (the price is known in advance, and the product becomes known by selecting the buyer, which fulfills the elements of the sales contract).[5] The buyer, by taking these actions, effectively accepts the offer and fulfills their part of the contractual obligation. Subsequently, the machine is tasked with executing its part of the contract, namely, dispensing the requested item. Once the money is inserted, no further human intervention is necessary for the contract's execution. The machine, hence, *independently* and *automatically* executes the contractual obligation, demonstrating precisely the core concept of smart contracts. In this light, Szabo refers to these machines as "the primitive ancestors of smart contracts".

A smart contract can be defined as a computer code[6] that was created to automatically perform contractual obligations after the occurrence of a certain event or as an agreement between the parties whose execution is automated through a computer program.[7] Recently, Serbia has joined in the circle of countries that have legally regulated the legal aspects of digital assets.[8] The importance of the Law on Digital Assets[9] is also reflected in the fact that Serbian law gained a pioneering definition of a smart contract. Smart contract is defined as a computer program or a computerized protocol based on the distributed ledger technology (DLT) or similar technologies, which is partly or wholly performed by software and which automatically executes, controls or documents legally relevant events and actions according to the terms of a contract already concluded, whereby the contract may be

5 See Serbian Law on Obligations, [Zakon o obligacionim odnosima], *Official Gazette of the SFRY,* Nos. 29/78, 39/85, 45/89 – Decision of the Constitutional Court and 57/89*, Official Gazette of the FRY,* No. 31/93*, Official Gazette of SCG,* No. 1/2003 – Constitutional Chart and *Official Gazette of the RS,* No. 18/2020, Arts. 458–466.

6 This is about turning contractual provisions into code, as one aspect of law algorithmization. For more about this phenomenon, as well as about the so-called *LegalTech*, see Cvetković 2023, 316–326.

7 Definitions derived from Durovic, Janssen 2019, 4.

8 At the time of enacting the Law on Digital Assets, Serbia was among the few countries to did so. Not long ago, countries often referred to as offshore jurisdictions, such as the British Virgin Islands, also enacted regulations on the digital assets market. This led some crypto companies to move to other jurisdictions without regulation.

9 Law on Digital Assets, [Zakon o digitalnoj imovini], *Official Gazette of the RS,* No 153/2020.

concluded electronically by such program or protocol.[10] However, different types of these more or less "smart" contracts have been developed: i) a traditional (paper) contract with automatic execution through computer code, ii) a hybrid contract,[11] and iii) a contract drawn up exclusively in computer code.[12]

The first two types necessitate the formation of a conventional (paper) contract, prompting some authors to label them as smart *legal* contracts.[13] In contrast, the third type embodies the true essence of a smart contract, existing entirely in code, without a separate written document. Smart contracts function based on the if-then principle, operating in binary logic. The latter type is currently limited to simpler transactions with automatic payment capabilities. These transactions encompass straightforward consumer interactions (such as payment to the seller upon receipt of package), compensation for insured passengers for flight delays or cancellations, cryptocurrency or digital token transactions (where the entire transaction takes place in the digital world). In these specific domains, smart contracts significantly enhance efficiency by reducing administrative costs, eliminating the necessity for physical documentation, and bypassing external verification and intermediaries (Wiegandt 2022, 679). It is acknowledged that, presently, smart contracts might not be the optimal solution for very complex commercial transactions wherein contractual rights and obligations rely on abstract concepts such good faith, reasonable efforts, or due care in long-term business commitments (Wiegandt 2022, 679). However, the author suggests that this limitation primarily concerns the third type of smart contracts, which are entirely expressed through computer code. In contrast, hybrid contracts possess the capability to incorporate binary rights and obligations via code, while also accommodating abstract concepts and contractual provisions such as governing law and dispute resolution clauses in a traditional contract.

10 Law on Digital Assets, Art. 2, para. 1, it. 39.

11 Law Commission (2021, 6) defines a hybrid smart legal contract as a contractual agreement where certain obligations are articulated in natural language, while others are encoded within a computer program. The execution of some or all contractual obligations is automated through the underlying code. There is also a possibility that the terms of a hybrid contract are primarily written in code with a few natural language terms.

12 For more details on the forms of smart contracts, see *Ibid*.

13 The English term *Ricardian contract* is also often used.

Regarding all the questions arising from smart contracts solely expressed in code – such as jurisdiction, applicable law, interpretation and liability, the primary issue is whether parties can autonomously express their intentions to create a legally binding contract solely through code. We accept the opinion that one of the fundamental principles under most contract laws is the freedom of choice,[14] which allows parties to select any form for their contractual relationship. This principle contributes to making smart contracts legally enforceable.[15] Moreover, it is stated that there is no need to change existing contract law to tailor it to smart contracts.[16] Existing principles and doctrines are sufficiently flexible to also be applied to smart contracts.

3. FUTURE DISPUTES RELATING TO SMART CONTRACTS

It is frequently suggested that the primary advantage of smart contracts lies in their ability to eliminate reasons for disputes by ensuring the certain execution of contractual obligations. The premise is that if execution is independent of human factors, the need for litigation diminishes. However, the question arises: is this actually the case?

Smart contracts not only introduce new legal issues but also fail to eliminate traditional disputes inherent in contract law. Similar to other forms of contracts, parties may seek a nullity of a smart contract due to lack of consent or duress, or if the contract execution violates public policy (Lefèvre, Delwaide 2019, 232). The Serbian Law on Obligations allows parties the freedom to arrange their contractual relations as they please, within the confines of compulsory legislation, public policy and good faith,[17] similarly applicable when expressing agreements through a smart contract.

14 For Serbian law see Law on Obligations, Art. 10 and Art 67, para. 1. For English law see Durovic, Lech 2019, 76.

15 Durovic and Lech (2019, 92–93) state that under current English law, commercial transactions conducted through smart contracts should be enforceable by the courts if they meet the existing criteria for contract enforcement. It appears that no alterations to English law are necessary to ensure the enforceability of smart contracts. Smart contracts should be seen as an extension of the freedom to contract, where they serve as a tool for fulfilling promises made under a contract. For types of contracts that necessitate a written form for enforceability, smart contracts entirely based on computer code can meet the statutory "in writing" requirement.

16 For considerations under US law, see Raskin 2017, 306, 321–329.

17 Serbian Law on Obligations, Art. 10.

Additionally, parties can invoke traditional contract law principles, such as the impossibility of performance, for instance, when trade is prohibited due to imposed sanctions on an enemy country.

Classical issues in contract law, such as contract modification or termination, take on new dimensions when viewed within the realm of smart contracts. These "new problems" are akin to those encountered in the operation of vending machines for food and beverages. Similar to a customer changing its mind after inserting money or the machine failing to dispense a product, smart contracts, despite their automation, can encounter analogous issues during automatic execution (Sherata 2018, 6). They too can end up being void after execution, necessitating dispute resolution for refunds. More frequent disputes may focus on unjust enrichment[18] rather than the non-performance of a contractual obligation.

By their nature, smart contracts are inflexible[19] and immutable, and no one can stop the execution of the contract when the software recognizes that an event has occurred that activates the execution of the obligation. This is both an advantage and a disadvantage of a smart contract. The performance of the obligation does not depend on the will of the contracting party. Thus, if one person would like to buy a car from another person through a smart contract, the smart contract will automatically transfer money from the buyer's account to the seller's account (at a moment that is considered relevant for the fulfillment of the seller's obligation, for example when the car crosses the border of the buyer's country),[20] while it will automatically change the owner of the property right. Even with automatic execution, the possibility of a car having substantive defects remains, leading the buyer to question the seller's fulfillment of their obligation. Smart contracts are likely to decrease disputes related to non-payment of the contract price, but

18 For more on unjust enrichment in relation to the contract, see Lutman 2020, 111–113.

19 This inflexibility actually rises a plethora of new and additional costs during the negotiations, drafting and enforcement of a smart contract. Accordingly, it is up to parties to decide whether it is convenient to them to conclude a smart contract or a paper contract. For one of the examples where smart contracts increases the costs see in Sklaroff 2017, 292–293.

20 The smart contract notifies an oracle, an external data source that sends information to a computer program, about external events. For example, if flight delay or cancellation insurance is in the form of a smart contract, oracle transmits the information about delay or cancellation to the smart contract. See Law Commission 2021, 21.

conversely, they may notably increase disputes[21] concerning buyer rights and seller responsibilities due to the delivery of goods with substantive defects.[22]

The language used in contracts can sometimes be problematic, failing to clearly express the true intent of the contracting parties at the time of conclusion. Such issues can become more pronounced with smart contracts, as translating the will of the parties into code can lead to discrepancies between the actual intent and the developer's understanding or coding capabilities. Consequently, disputes regarding the genuine intent of the parties may become more frequent. Interpreting contracts written in part or entirely in code presents a new dimension that must be adapted to the reality of the digital world. Modes of interpretation traditionally developed for plain language provisions now face the challenge of interpreting codified provisions. Hence, various proposed solutions seek to adapt existing principles to these new challenges.[23]

Proving the existence, form, and content of a smart contract can be the subject of dispute, particularly when the contract is solely in the form of code, lacking a paper contract (Lefèvre, Delwaide 2019, 232). In addition, in most jurisdictions a contract is valid if entered into by parties with adequate legal capacity. Frequent pseudonymity or anonymity of parties in smart contracts makes it difficult to assess the fulfillment of this condition (Sherata 2018, 11).

21 The considered problem can be mitigated, for example, by providing the option for the party that is dissatisfied with the performance of the contract by the other party to order the automatic return of funds, and to activate the dispute resolution clause.

22 About the buyer's rights when it receives goods with substantive defects, see Art. 488 of the Serbian Law on Obligations. Under Art. 35 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner required by the contract. For an analysis of whether the CISG can be applied to smart contracts, see Janssen 2022, 9–17. If the affirmative answer is accepted, on other questions concerning CISG and smart contracts, see Duke 2019.

23 Thus, the question of how a reasonable person would understand the terms of the contract is replaced by the question of how a functioning computer would understand them. There is also a proposal with even more supporters – the application of the standard of a reasonable programmer (coder). In that case, the programmer would have the role of an expert who would "translate" the code to the forum with the main task of providing an expert opinion on what instructions the code is giving the computer. See Law Commission 2021, 16.

The issue of arbitration jurisdiction arises when the arbitration agreement is exclusively expressed in code,[24] without a traditional written contract. Within legal literature, extensive consideration is given to whether such a scenario fulfills the criterion stipulated in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[25] which requires the arbitration agreement to be in writing[26]. Additionally, this raises questions concerning compliance with more permissive national arbitration laws.[27]

Beyond traditional disputes, the unique features of smart contracts give rise to new issues. Inevitable "holes" or bugs in the code[28] significantly affect execution. The famous DAO incident serves as a stark example, illustrating how a single code vulnerability allowed hackers to withdraw $40 million (Shehata 2018, 6). Studies indicate that Ethereum-based smart contracts have an average of at least one hundred errors per thousand lines of code (Zaslowsky 2018, 360). This brings forth the crucial question of liability, particularly regarding the third party responsible for creating the smart contract.[29]

Completely new questions will arise regarding disputes from smart contracts with the currently most common subject matter – digital assets. These disputes will share many similarities with other commercial disputes with issues of contract enforcement, property rights, intellectual property rights, and vitiating factors. Nevertheless, the immaterial (intangible) nature of digital assets, the potential anonymity (or pseudonymity) of parties and the immutability of the distributed network, open completely new horizons of substantive law (Scott *et al.* 2022, 2).

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24 If arbitration agreements in the form of code become widespread, this may prompt arbitral institutions to create a model clause in that form.

25 The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. According to the UNCITRAL, it is a convention that has been ratified by 172 countries to date. It entered into force in Serbia in 1992.

26 New York Convention, Art. 2, paras. 1 and 2. For affirmative answer see Sharma 2022, 80, for the negative see Michaelson, Jeskie 2019, 130.

27 Serbian Arbitration Act, [Zakon o arbitraži], *Official Gazzete RS*, No. 46/200 was modeled after the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) and provides for a more liberal regime regarding the form of the arbitration agreement than the New York Convention. See Pavić 2010, 12.

28 Bill Gates said that software is a great combination of art and engineering. However, given that art, engineering and software are products of humankind, perfectionism is a utopia. See Michaelson, Jeskie 2019, 114.

29 In the future, it should be defined whether this is contractual or non-contractual liability. See Lefèvre, Delwaide 2019, 233.

Often the parties to the contract will not be from the same country, therefore, the answers to all these questions will depend on the applicable law. However, given the absence of smart contract regulation in many countries, the development of judicial and arbitration case law becomes pivotal. Resolving these unaddressed issues and legal gaps will largely depend on the willingness and intellectual capacity of decision-makers to navigate these novel aspects within the relevant legal frameworks. Taking into account that the parties will most often be located in different jurisdictions and unknown to each other (due to anonymity or pseudonymity), and that the distributed network is not present only in one country, there will be many pressing issues of private international law, which will concern above all, the jurisdiction of the courts or arbitration and applicable law (Scott *et al.* 2022, 2).

4. ARBITRATION AS A FORUM FOR RESOLVING DISPUTES OUT OF SMART CONTRACTS

Arbitration is a private way of resolving disputes that rests and largely depends on party autonomy. Not only is it up to the parties whether they will resolve the dispute in arbitration, but they have the opportunity to choose the seat of arbitration, the arbitrators, shape the procedure and otherwise use their party autonomy within the limits of the mandatory norms of the arbitration laws of the seat.[30] This adaptability to the needs and preferences of its users is one of arbitration's foremost advantages over court proceedings. In addition to commercial transactions, this way of resolving disputes has been adapted to the specific requirements of various other areas, giving birth to sports arbitration, commodity arbitration,[31] investment arbitration,[32] arbitration concerning intellectual property,

30 For a detailed analysis of the limitations of party autonomy in international arbitration, see Ferrari, Rosenfeld 2023, 49–80.

31 Within the Belgrade Arbitration Center, there are special rules on settlement of commodity disputes, which establish a faster procedure for settlement of this category of disputes. For more about this see Pavić 2021, 371–375.

32 On the differences between investment and commercial arbitration, see Paunović 2018, 173–189; Jovanović 2018, 345–364.

inter-state arbitration, etc. In recent times, the domain of arbitration has expanded to include all arbitrable disputes,[33] and we are witnessing the birth of special arbitration rules even regarding inheritance disputes.[34]

The attractiveness of arbitration[35] has already been recognized by companies dealing with cryptocurrencies, which most often include arbitration clauses in their contracts.[36] The decentralized nature of cryptocurrencies aligns well with party autonomy and the (relative) freedom of arbitration from interference by national courts (Taylor, Wu, Li 2022). Most of its characteristics, which are also differences in comparison to state courts, correspond to the business world in general. In other words, arbitration is suitable for adaptation to the requirements of any type of dispute that can be resolved privately.

4.1. Features of Arbitration in Relation to the Parties' Demands in Smart Contracts

Serbia has traditionally struggled with poor contract execution speed, which is a critical concern for users of smart contracts. Efforts have long been ongoing in Serbia and worldwide to promote alternative dispute resolution, particularly arbitration and mediation, aiming to enhance the

33 Different countries define the arbitrability of the subject matter of the dispute in different ways, and the question of the governing law for objective arbitrability also arises. See Jovanović 2021, 416–418.

34 Thus, the 2021 Vienna Arbitration and Mediation Rules contain supplementary rules for disputes related to inheritance, which apply, for example, when the testator provides so for the disposition of the property after death. See VIAC Arbitration and Mediation Rules 2021, Annex 6.

35 Due to Queen Mary University of London, White & Case (2021, 5), international arbitration is the preferred method of resolving cross-border disputes for 90% of respondents, either on a standalone basis (31%) or in conjunction with alternative dispute resolution (59%).

36 When concluding an arbitration agreement, the parties must consider the seat of arbitration that is friendly to digital assets, as well as conduct extensive analysis of the position of the courts of the countries in which the arbitral award will potentially be enforced. Every suspicion is justified. Thus, the Chinese court annulled the arbitral award made in China where the respondent was required to pay damages in Chinese yuan because he did not transfer the Bitcoins to the claimant. The court cited that the decision is contrary to public policy because it facilitates the circulation of cryptocurrencies and their exchange for money, contrary to Chinese law. See Scott *et al*. 2022, 4. Also, a Greek appellate court refused to enforce an arbitration award set out in Bitcoin citing public policy. See Taylor, Wu, Li (2022).

efficiency of the dispute resolution system (Pavić, Đorđević 2014, 244–245). Users of smart contracts have specific and apparent requirements. Their pursuit of automated contract execution and exclusion of intermediaries highlights their prioritization of speed, efficiency, confidentiality, expertise, and cost-effectiveness. Thus, for arbitration to become the preferred forum for resolving these disputes, it must effectively cater to these needs.

In this sense, arbitration holds an initial advantage over state courts. The length of the proceedings is a serious issue, especially in cases of disputes involving new technologies that might become obsolete before the court proceedings are concluded (Benton 2017). While court proceedings notably are prolonged and sluggish, arbitrations typically involve a more flexible, single-stage process, often governed by simplified delivery procedures and institutional rules that frequently impose deadlines for rendering a final award (Knežević, Pavić 2013, 21). For instance, in line with the expedited procedure[37] or even the "regular" rules of some arbitral institutions,[38] the deadline for reaching a decision is often set at six months from the case management conference or the constitution of the arbitral tribunal. Moreover, arbitration can be conducted through the electronic exchange of submissions, making it entirely paperless. Even if an oral hearing requiring evidence presentation is necessary, virtual (online) arbitrations have become a common practice.[39] Yet, for parties engaging in smart contracts, who prioritize efficiency, waiting for half a year for an award, along with at least a month for the procedural phase before the arbitrator appointment, might seem too lengthy to cease a business relationship and withhold disputed funds. At first glance, this may appear as a drawback of traditional arbitration, however, it is important not to overlook that parties, within their arbitration clause, can stipulate a shorter deadline for rendering an award. Nonetheless, it remains at the discretion of the permanent arbitral

37 See, for example, Rules of Arbitration of the International Chamber of Commerce (ICC), Appendix VI Expedited Procedure Rules, Art. 4, para. 1.

38 Rules of the Belgrade Arbitration Center (Belgrade Rules) – BAC Rules, Art. 32, para. 1.

39 Serbian law contains no obstacles to the arbitration being completely virtual. Both in Serbia and globally, it is expected that the option of virtual arbitrations will become a regular feature. Pavić, Đorđević 2021, 536. Additionally, the Queen Mary University of London, White & Case (2021, 27) survey shows that there appears to be a growing expectation that virtual hearings will become the default option for procedural hearings.

institution to assess the compliance of such provisions with its rules.[40] This assessment will shed light on the flexibility and adaptability of different arbitration institutions.

Arbitration significantly favors efficiency.[41] Once an arbitral award is rendered, the parties engaged in arbitration can benefit from the facilitated recognition and enforcement of the award across any member state of the New York Convention. Given that parties involved in smart contracts often come from different countries, this advantage elevates the attractiveness of arbitration, especially when considering the prevailing difficulty in international recognition of court decisions.[42] Moreover, arbitrations commonly operate as a single-stage process, usually without the option for an appeal. Dissatisfied parties have recourse against an arbitral award through the far narrower grounds for annulment, a remedy distinct from an appeal against a court decision, which has significantly broader grounds.[43]

Parties engaging in smart contracts often prioritize confidentiality, frequently operating under the principles of anonymity or pseudonymity to safeguard their identity and prevent alarming current or potential business partners or investors about any disputes. Arbitration distinctly upholds confidentiality; the identities of disputing parties remain undisclosed other than to the involved parties, the arbitrator, and the institution's secretariat. In the event of a dispute, parties would be obligated to disclose their identities. However, they can be assured that only a limited circle of individuals will be privy to this information and are required to maintain confidentiality.

In arbitration proceedings, unlike court proceedings, parties hold the autonomy to select the arbitrators who will adjudicate their dispute. Opting for an expert well-versed in the field pertinent to their dispute, comprehending the mechanisms of smart contracts, ensures a legally and

40 For example, BAC Rules in Art. 3, para. 1 stipulates that the procedure is governed by these Rules, as well as by the rules agreed upon by the parties, except for the rules whose application would be irreconcilable with the provisions of these Rules and the principles of arbitration.

41 For its users, the most valuable feature of international arbitration is the enforceability of awards, followed by avoiding specific legal systems/national courts, flexibility and ability of parties to select arbitrators. See the Queen Mary University of London, White & Case (2018, 7).

42 On the exequatur procedure and certain difficulties in Serbia, see Jovanović, Vučinić 2022, 535–552.

43 Perhaps the most significant difference is that, during setting-aside proceedings, the court does not review a wrongly established factual situation or a wrong application of substantive law, unless the mistakes are so significant that they also constitute a violation of public policy. See Stanivuković 2013, 30.

professionally sound final decision. The opportunity for parties to choose arbitrators based on their reputation serves as a powerful incentive for arbitrators to enhance their expertise in the relevant subject area and stay updated on the constantly evolving trends. This becomes especially significant in fields experiencing continuous and rapid development, pushing boundaries to extents that are currently beyond imagination.

Individuals engaging in contracts with automatic execution of obligations typically aim to eliminate additional intermediary costs. Similarly, in case of a dispute, they prefer a less costly resolution. Despite arbitration having predictable and predefined expenses, its costs cannot be currently deemed an advantage. In fact, it often proves more expensive than going to court, especially when abiding by the rules of the world's most prestigious arbitration institutions. Opting for an institution in Serbia might entail lower costs compared to the rules of renowned institutions in, for example, Paris or Singapore. Although this does not make arbitration notably inexpensive, "you can't have your cake and eat it too," so given its other advantages[44], participants in international commerce continue to regard it as their primary choice for dispute resolution.

As certain authors recognize (Landbrecht, Wehowsky 2022, 315), studying the past is essential to predicting the future. Classical arbitration has evolved various subtypes and adapted significantly in specific areas, such as commodity disputes[45] (focusing on speed, short deadlines, and reduced costs), aligning well with the process of resolving disputes from smart contracts. Therefore, as a further step toward the integration of arbitration in smart contract disputes, permanent arbitration institutions can create special rules. One notable example is the American Judicial Arbitration and Mediation Services (JAMS), which has introduced the JAMS Smart Contract Clause and Rules.[46] With just 18 articles, these rules establish a swift procedure with short deadlines, catering to the demands of simple, almost binary disputes, seeking quick, cost-effective solutions. This procedure is

44 For other advantages, see Knežević, Pavić 2013, 18–22.

45 The Belgrade Arbitration Center has special rules for commodity disputes. The Rules of the Belgrade Arbitration Center on Commodity Arbitration (the Belgrade Rules on Commodity Arbitration) were adopted on 26 March 2018, and came into effect on 21 June 2021.

46 JAMS Smart Contract Clause and Rules (DRAFT) – JAMS, *https://www.jamsadr.com/rules-smart-contracts* (last visited 14 November 2023).

conducted electronically, with some deadlines measured in hours[47] and the arbitration award typically rendered within 30 days of appointment.[48] In the case of an objection to the arbitrator's jurisdiction, a decision is made within 72 hours of the objection.[49] According to these rules, proceedings will conclude within a maximum of 45 days[50], significantly shorter than existing expedited procedure rules.[51]

The emergence of arbitration institutions exclusively dedicated to blockchain and new technologies disputes is a global occurrence. The first institution was established in Japan, followed by another in Poland, marking the first appearance on the European continent (Kasatkina 2022, 147). In addition to the traditional arbitration options, there are also specialized platforms specifically tailored to meet the requirements of these distinct groups of users.

4.2. Traditional Arbitration and Blockchain Arbitration: Alternative or Cooperation?

A spectrum of online dispute resolution platforms has emerged beyond the traditional arbitration as we know it today. Within the realm of resolving disputes from smart contracts, a key differentiation exists between off-chain solutions (external to the blockchain platform), employing classical arbitration, and on-chain resolution (within the blockchain itself), directly

47 For example, within 72 hours of the arbitration statement being filed and served, the parties shall appoint an arbitrator, who shall be a JAMS panelist. See JAMS, Art. 4, para. 1, it. 2. Any party may request clarification of the decision within 120 hours of issuance. See JAMS, Art. 13, para. 2.

48 JAMS, Art. 13, para. 1.

49 JAMS, Art. 7, para. 2.

50 The short deadlines are not a significant concern in low-value and low-complexity disputes, as detailed in the later part of the paper. Furthermore, the appointed arbitrators might not be senior professionals. Considering the rapid resolution expectations under these rules, arbitrators will largely handle cases with extremely tight deadlines, giving young arbitrators an opportunity to gain experience in these simpler cases.

51 The Permanent Arbitration (PA) at the Chamber of Commerce and Industry of Serbia prescribes in its Rules a 6-month deadline for reaching an award. Nevertheless, Art. 61, para. 1 of the Rules of PA, on the other hand, provides that the sole arbitrator will make the arbitral award within 15 days of the day when the hearing was held or within 15 days of the day when the conditions for making the award without holding a hearing were fulfilled. Provisions on the extension of the deadline are not provided. See critics in Đorđević 2021, 482–483.

addressing disputes within the blockchain network. Perhaps the most successful example of the latter[52] is Kleros[53], an online platform based on the Etherium blockchain, which uses cryptocurrencies and game theory to resolve disputes. Parties submit their case and evidence to the platform. The dispute is decided by the so-called jurors who play the role of arbitrators, while the final decision is taken by the majority of votes. Jurors invest their cryptocurrencies in order to participate in the decision making, and further developments depend on whether they voted in accordance with the majority. If they did not – they lose part of the invested funds, if they did – they earn part of the funds of those who lost, with additional compensation paid by the parties.

Given that jurors cannot communicate with each other, they must make a decision based on what they think other conscientious and well-informed jurors will decide. In game theory,[54] this approach is known as a "focal point" or "Schelling point", which represents the result that well-informed decision makers are most likely to reach as a consensus without mutual communication.

The functioning of Kleros as a blockchain arbitration is interesting, however, it raises the question of whether the decision made in that procedure can be enforced under the rules of the New York Convention. The main concern is whether procedural due process has been respected, which is a condition for the recognition of an arbitral award under the Convention. The selection of arbitrators, conduct of the proceedings, engagement in the dispute, and decision-making should align with the parties' right to equal treatment and fairness. This includes the opportunity for both parties to present their perspectives, evidence, and responses to the actions and

52 In this paper, we will pay attention to this platform because, as stated, Kleros is currently the most advanced project (Sharma 2022, 100), and furthermore, within this platform, the first ever arbitral award decision was made that was indirectly enforced by a Mexican court (more about that bellow).

53 In Kleros White Paper is stated: "Existing dispute resolution technologies are too slow, too expensive and too unreliable for a decentralized global economy operating in real time. A fast, inexpensive, transparent, reliable and decentralized dispute resolution mechanism that renders ultimate judgments about the enforceability of smart contracts is a key institution for the blockchain era." See Lesaege, Ast, George 2019, 1.

54 Legal scholars have already explored game theory, e.g., in the context of international law and the World Trade Organization. See Cvetković 2018, 90–94.

propositions of the opposing party.[55] Moreover, the award must be made by arbitrators who are impartial and independent,[56] otherwise the parties have the right to challenge them during proceedings.[57]

Considering that the parties involved in proceedings before Kleros are unaware of the jurors' identities, they do not have the opportunity to fully respond to the evidence of the other party and the jurors in the proceedings potentially have a financial bias (with their compensation or loss of invested funds dependent on their alignment with the winning or losing party), a question arises whether the Kleros award can be recognized and enforced under the New York Convention due to the application of Art. 5 para. 1, its. b) and d), and Art. 5 para. 2 it. b) (public policy). Furthermore, in order for a decision to be considered an arbitral award, it is important that a fair and impartial procedure is ensured during the proceedings and that the decision is based on law or principles of equity.[58]

We believe that the concerns raised in the literature and in practice are exaggerated. The New York Convention outlines various obstacles to recognizing a foreign arbitral award, categorizing them into groups that a court reviews only upon a party's objection and those it monitors *ex officio*. In the Kleros process, if Art. 5, para. 1, it. b) and d) are violated, we regard that the court may not refuse recognition of such an award. This is because these conditions are considered only upon a party's objection, and the party accepted this dispute resolution method by submitting it to Kleros, thereby

55 Serbian Arbitration Act, Art. 33, paras. 1 and 2, UNCITRAL Model Law, Art. 18. The party must have the right to be heard and to present its evidence at the oral hearing. The growth of opportunities for virtual arbitrations allows the oral hearing to be held without tremendous costs and time, and to be fully in line with the requirements of expedited procedure. See Uff 2021.

56 Serbian Arbitration Act, Art. 19, para. 3.

57 UNCITRAL Model Law, Art. 12, Serbian Arbitration Act, Art. 23.

58 In 2004, the German Supreme Court made a decision exemplifying this point. The case involved a member of a dog breeders association who initiated proceedings before an "arbitral tribunal", established based on the association's bylaws. Upon losing the case, the applicant challenged the "arbitral award" through set-aside proceedings. The Supreme Court concluded that the dispute resolution body did not meet the criteria of a genuine arbitral tribunal. The court reasoned that the tribunal was designed to resolve internal administrative disputes among members of the association's bodies. The association's bylaws lacked provisions for ensuring a fair and impartial procedure, and did not mandate decisions based on law or equitable principles. Furthermore, the parties did not have an equal opportunity to participate in forming the arbitral tribunal. Due to these reasons, the court determined that the decision could not be considered an arbitral award. See Ferrari, Rosenfeld 2023, 61.

precluding procedural challenges to the award. However, if the deficiency infringes upon the public policy of the state of recognition, the award's recognition must be refused.[59]

It is important to recognize that blockchain arbitration, at present, is suited for low-value and relatively straightforward disputes. Consider an example where a Serbian entrepreneur hires a freelancer from Argentina to build a website for a small business at a cost of 3,000 euros. If the entrepreneur is dissatisfied and seeks redress, turning to traditional legal proceedings presents challenges. The process begins with proceedings before Kleros, during which the jurors will have three choices: to issue a refund of 3,000 euros, to allow freelancer to retain 3,000 euros, or to provide an extended deadline for completing the website.[60] Engaging in court proceeding in Argentina for a dispute of such small value would be impractical and costly. Even opting for arbitration in Serbia would likely incur expenses close to the value of the dispute.[61] Consequently, the entrepreneur might opt for a more informal process, such as blockchain arbitration through Kleros, in order to seek "rough" justice without the procedural assurances guaranteed in court proceedings or traditional arbitration. This shift reflects the choice of efficiency over the intricacies of procedural fairness and equal treatment, often valued in traditional legal frameworks. The question arises regarding the extent to which parties can waive fundamental procedural guarantees and which ones they can or cannot forego. The concept of public policy, as the baseline checked *ex officio* by the court, will likely set the minimum threshold. However, as the values and complexities of these disputes grow, participants may become less inclined to rely solely on methods that do not ensure the comprehensive safeguards of due process, which have established through the centuries, ensuring fundamental principles of equitable treatment, a fair

59 It is worth mentioning, however, that in arbitration laws, such as the Serbian one, provisions concerning the equality of the parties in the proceedings and the right to respond to the allegations and evidence of the opposing party, as well as the rule on an odd number of arbitrators and their independence and impartiality, can be considered imperative. Hence, any gross violation of these provisions in the Kleros procedure could be deemed a violation of Serbian public policy.

60 A similar example is used in the Kleros White Paper. See Lesaege, Ast, George 2019, 2–3.

61 Thus, the registration fee, administrative costs and fee of the sole arbitrator before the Belgrade Arbitration Center would amount to a total of 2,700 euros in this case. See Belgrade Rules, Annexes 1, Arts. 2–4.

hearing,[62] and independent and impartial decision-makers. This will lead to the (re)emergence of traditional arbitration as a preferred forum for such disputes.

However, the legal challenges of blockchain arbitrations do not stop there. In addition to the abovementioned, many more questions are raised. Can an on-chain award even be considered an arbitral award within the meaning of the New York Convention and national arbitration laws?[63] Relatedly, does it have a *res judicata* effect preventing the initiation of off-chain arbitration or court proceedings? Does the arbitrator have to give the reasons for the decision? Is the arbitrator obliged to comply with the arbitration laws and if so, which ones?[64] Can national courts enforce an on-chain award based on the New York Convention? Can the award be set aside under national arbitration laws? There are many more questions, and for now very few definitive answers, with a fertile ground for legal science and practice to reach them.[65]

Beyond the essential considerations of due process, an additional issue surfaces in blockchain arbitration – including within the Kleros framework. The lack of reasoned decisions poses a significant challenge since parties have no guidance when formulating their arguments. This absence leads to an increase in resource demand in decentralized adjudication over time. The absence of previous case law, provided by traditional courts and tribunals for traditional contracts, means that each dispute must be argued from scratch, with no predictions of how these disputes will be assessed by decision-makers. Regrettably, this leads to increased business costs, contrary to the intended cost reduction through digitalization (Sklaroff 2017, 301–302).

62 The principle of equal treatment of parties has a rich history and is associated with the right to a fair trial. The principle has its roots in the *Magna Carta Libertatum* from 1215. Today, Art. 18 of the UNCITRAL Model Law is considered as the Magna Carta of arbitral procedure. See Scherer, Prasad, Prokic 2023, 1128–1130.

63 On the conditions in Serbian law, see Stanivuković 2022, 43–44.

64 These two questions are also raised in Scott *et al.* 2022, 9.

65 Moreover, it is questionable whether the prevailing party, having already benefited financially from the arbitration award, would willingly return the gains if the court subsequently annulled the award. If the party resists, a new dispute might have to be initiated, likely in court, undermining the speed and efficiency of dispute resolution. This is a critical question, since arbitrators could potentially place their award on the blockchain, enabling automatic execution of the award through a smart contract mechanism as soon as it is posted and verified on the chain, provided the parties agreed to such terms in their smart contract and deposited the funds or voluntarily provided a cryptographic key.

It remains to be determined whether classical and blockchain arbitration act as alternatives in competition or as cooperative mechanisms. It has been recognized that they serve distinct purposes and address different kinds of disputes, which suggests that they are not in competition. Furthermore, they have the potential to complement each other and enhance the dispute resolution landscape through collaboration. Within this collaborative mood, we see two possibilities for interaction. The first possibility is for on-chain arbitration to function as a preliminary dispute resolution mechanism before engaging in "real" arbitration proceedings. This concept is reminiscent of the recognized multi-tier arbitration clauses. For example, in construction contracts using FIDIC conditions, the process involving the Dispute Avoidance/Adjudication Board (DAAB) acts as an initial phase before progressing to final arbitration; traditional arbitration then provides the conclusive determination of rights and obligations, which can be enforced through state intervention.

Another solution could be the one that has already appeared in practice and was decided by the Mexican court (albeit in the context of domestic arbitration). The claimant initiated proceedings before an arbitrator in classical arbitration, while the arbitration clause stipulated that the arbitrator would refer the parties to settlement before Kleros, through a procedural order. Three jurors were appointed in the manner previously described and rendered a decision in favor of the claimant. Subsequently, the arbitrator incorporated the Kleros decision into the arbitral award and it was enforced before the national court as a domestic arbitral award.[66] Party autonomy is the primary postulate in arbitration and implies that the parties can create the procedure and the way of decision-making up to the limits of the imperative norms of the seat of arbitration. Unquestionably, arbitrators must be careful about the eligibility of the decision to be recognized in the country where the decision is going to be executed, and it remains to be seen how national courts will accept the incorporation of blockchain arbitral awards into the classic arbitral awards in the recognition process. At first glance and with a high level of abstraction, we see no reason why such awards would not have a bright international future.

66 For additional details about the case, see Carrera 2022, 16–18.

4.3. The Most Suitable Type of Arbitration in Relation to the Value and Complexity of Smart Contract Disputes

As observed so far, blockchain arbitration is not an alternative to traditional arbitration. Both mechanisms should mutually support their legitimacy: the former to address low-value and low-complexity disputes, and the latter to ensure the certain enforcement of the former through its established mechanisms. Smart contract disputes vary in value and complexity. Also, they stem from either hybrid or fully coded smart contracts. Presently, not all types of arbitration are universally appropriate for these disputes. Hence, in the context of this study, we offer a tabular presentation categorizing different dispute groups according to their value and complexity, delineating the most suitable methods for their resolution through arbitration, as a more appropriate means of dispute resolution in comparison to the court system.

Dispute Group No.	**Type of the dispute in relation of value and complexity**	**The most suitable type of arbitration for smart contract disputes**
1	High value and high complexity	Classic arbitration without a stipulated deadline for making an award; classic arbitration with a deadline for making an award of at least 6 months
2	High value and low complexity	Classic arbitration with a deadline for making an award of up to 6 months; special rules of arbitral institutions for resolving smart contract disputes
	Low value and high complexity	
3	Low value and low complexity	Special rules of arbitral institutions for resolving smart contract disputes; blockchain arbitration (on-chain)

Table 1.
The most suitable types of arbitration in relation to the value and complexity of smart contract disputes

The determination of whether a dispute is of high or low value is indeed subjective and may vary significantly based on the perspective of the involved parties. Acknowledging this subjectivity, we omitted the classification of disputes of medium value in the initial grouping, although they could certainly fall within the second category.

In cases where disputes hold substantial value – potentially impacting the businesses of the involved parties – it is unlikely that they would forgo the procedural safeguards developed over centuries, the expertise of arbitrators, and the need for meticulous resolution of the disputes. The maximum that the parties might agree to is setting deadlines for rendering an award, but without excessively speeding up the decision-making process.

In the context of disputes that fall within the second group, parties are unlikely to turn to blockchain arbitration. This reluctance may stem from the substantial value involved, where they seek equivalent procedural assurances and expertise, as is the case with disputes in the first group. Alternatively, the complexity of these disputes might require professional arbitrators instead of unknown decision-makers relying on game theory or similar methodologies. However, when dealing with disputes of either low complexity or value, the speed of resolution becomes crucial.

Finally, disputes from the third group are absolutely suitable to be resolved quickly at low cost, with short deadlines, in order to resolve the unwanted misunderstanding as soon as possible. It is worth noting that the suitability of fully coded smart contracts for complex disputes is also a subject of consideration. As mentioned previously, for contracts demanding flexibility and containing vague provisions, such as good faith, the recommended choice should be the hybrid contract. Fully coded contracts, referred to as smart contracts in the true sense, find optimal use in situations with minimal uncertainty or where monitoring performance would otherwise be excessively expensive, particularly in routine transactions.[67] As a significant portion of these transactions involves low-value transactions, the role of the third category of disputes holds immense significance within this domain.

5. CONCLUSIONS

New technologies are reshaping the landscape of business contracting and dispute resolution, potentially revolutionizing these spheres. Among the dispute resolution methods, arbitration stands out as having the highest potential to evolve and meet the demands of users engaging with smart contracts and blockchain technology, serving as an alternative to traditional court proceedings. Despite its numerous advantages, arbitration must

67 Sklaroff 2017, 302.

continually adjust and cater to the ever-evolving needs of its users in order to prevent users from seeking an alternative to the already established alternative.

The adaptability of arbitration has already given rise to special institutions or institutional rules for the resolution of disputes arising from smart contracts. There are also special types – blockchain arbitrations, whose enforceability according to the New York Convention is questionable, the issue being whether these platforms can be used under the notion of "arbitration". Either way, they can be a significant factor in resolving disputes that have so far been off the radar of arbitration and courts. In addition, traditional and blockchain arbitration should cooperate and take advantage of each other. On this occasion, we analyzed which type of arbitration is the most adequate for dispute resolution, according to their value and complexity. This shows that the interests of all the variations of traditional arbitration do not coincide with blockchain arbitration in any segment.

It has been proven that smart contracts and blockchain technology will not prevent disputes – in fact we are not even certain that they will reduce them. Issues that will continue to arise are related to classical contract law, only in a new guise, as well as some new ones. However, this will lead to the need for adjustments to arbitration as we know it today. Apart from speed, efficiency, lower costs and arbitrator specialization, this will increase the need for experts who are well versed in programming, but will not cause arbitrators to stop being lawyers.

Beyond the realm of arbitration, it is up to the entire legal system to work on accepting the new institute with great potential. It is desirable for Serbia to establish itself as a jurisdiction that is supportive and accommodating of smart contracts, in order to be competitive in the digital age. When entering into arbitration agreements, parties should be diligent in selecting a smart contract-friendly jurisdiction as the seat of the arbitration. This becomes even more critical when the contract concerns cryptocurrencies, necessitating a jurisdiction that is favorable for this domain. The careful selection of the arbitration seat and the applicable law in such cases becomes essential to ensure the maximum certainty that the arbitration award can be enforced.

The title of this paper may suggest that the subject is futuristic, however, the "future" it denotes is already upon us. Adjustments to new business practices, contract conclusions, dispute resolutions, and the specialization of arbitrators in these evolving disputes cannot happen soon enough. Gašo Knežević (2006, 123) likened the law to Sleeping Beauty, expressing the view that due to its conservative nature, it tends to lag chronically behind societal changes. Presently, there is an opportunity to look ahead. This forward-

looking perspective will distinguish market participants who leverage the transformations brought by new technologies to their advantage, over those who might miss the opportunities or fail to adapt. This inevitable division arises because not all jurisdictions remain dormant. Lawyers from some countries are actively working to position their jurisdictions as favorable for smart contracts, addressing both the procedural and substantive aspects. Serbia's forthcoming activities in this technological revolution remain uncertain. Will it settle for the major players' table scraps, or will it take advantage of the momentum to claim a seat at that table? Given Serbia's thriving IT climate made by numerous companies, including those dealing with smart contracts, the author remains hopeful that Serbia's future will shine brightly in the midst of the clash between dormant law and tireless technology.

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*A REVIEW OF THE 2023 US DRAFT MERGER GUIDELINES***

The aim of this article is to provide a short overview of the 2023 US Draft Merger Guidelines and some interpretations of its impact on merger control practices. The US practice shows that merger control standards have been changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which could reduce innovation and other behaviours of undertakings that lead to an increase in economic efficiency and improve competition.

Due to the fact that guidelines can influence how judges evaluate challenges to mergers, it remains to be seen how the final guidelines will enable the courts to understand and support the agencies' views on antitrust enforcement.

Key words: *Merger control. – Merger guidelines. – Clayton Act. – Competition law. – Antitrust law.*

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** The interpretations expressed in this paper are those of the author and do not necessarily reflect the views of the Commission for the Protection of Competition.

1. INTRODUCTION

On 19 July 2023, the US competition authorities, i.e. the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the Agencies), jointly released for public comment the 2023 Draft Merger Guidelines (Draft Guidelines).[1] The Draft Guidelines, which would replace the current separate horizontal and vertical merger guidelines, describe and guide the Agencies' review of mergers to determine compliance with federal antitrust laws.

The Draft Guidelines, which was a highly anticipated draft published by the Agencies, were subject to public comment for 60 days. According to the Agencies, the goal of this update is to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law. After the comment period, the agencies would review the comments received and finalize the new Merger Guidelines.

The proposal of the Guidelines is part of President Joe Biden's economic reform agenda and is the response to the executive order he signed in 2021 to improve competition across the economy.[2] The executive order directed the DOJ and the FTC to rewrite their guidance for companies on how the agencies seek to enforce antitrust laws that cover mergers. These Guidelines correspond to an effort to support the Biden administration's aggressive antitrust enforcement agenda. In addition, the Commissioners Alvaro Bedoya and Rebecca Slaughter, as well as Chair Lina Khan, issued statements regarding the proposed merger guidelines.

The Draft Guidelines explain how the Agencies identify potentially illegal mergers in order to help the public, business community, practitioners, and courts understand the factors and frameworks that the Agencies take into consideration when investigating mergers. In general, the US merger guidelines describe the Agencies' review of mergers and explain

1 See press releases US Department of Justice, Office of Public Affairs. 2023. Justice Department And FTC Seek Comment on Draft Merger Guidelines, 19 July. *https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-guidelines* (last visited 30 October 2023); US Federal Trade Commission. 2023. FTC and DOJ Seek Comment on Draft Merger Guidelines, 19 July. *https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines* (last visited 30 October 2023).

2 See White House. 2021. Executive Order on Promoting Competition in the American Economy, 9 July. *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/* (last visited 30 October 2023).

how they approach merger enforcement. The first US merger guidelines were published in 1968 and have been revised multiple times by different administrations. The last update was in the Horizontal Merger Guidelines for mergers in 2010. The Vertical Merger Guidelines were last revised in 2020, however the FTC has withdrawn its approval of the Vertical Merger Guidelines, which were issued jointly with the DOJ.

The US courts are not bound by the guidelines, because the guidelines are not law, therefore there is no major change in merger enforcement decision making as yet. The guidelines serve to educate the courts about the analytical tools that the Agencies use in merger analysis and thus the courts need time to adopt the new approach and framework within which merger analysis takes place.

The Guidelines should help the business community to assess how the Agencies are likely to evaluate horizontal mergers, because it must consider how the Agencies will react to potential mergers. Therefore, it is very important that the Agencies and courts harmonise their practice in order to increase the certainty and transparency of the analytical process underlying the enforcement decisions. Because guidelines can influence how judges evaluate challenges to mergers, it remains to be seen how the final guidelines will enable the courts to understand and support the agencies' views on antitrust enforcement.

2. SPECIFIC GUIDELINES

The Draft Guidelines point out the question from which the Agencies should begin their merger analysis: how does competition present itself in the given market and could this merger risk lessening that competition substantially at the present or in the future? In order to answer this question, the Agencies apply the 13 core 'guidelines', which reflect the most common issues that arise in merger review:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.

5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.
6. Vertical mergers should not create market structures that foreclose competition.
7. Mergers should not entrench or extend a dominant position.
8. Mergers should not further a trend toward concentration.
9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.
10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.
12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.
13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

As it is prescribed in the Draft, Guidelines 1–8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be to substantially lessen competition or to tend to create a monopoly. Guidelines 9–12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies assess mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

These Guidelines include references to binding legal precedent which do not necessarily suggest that the Agencies would analyse the facts of those cases the same way today. The Draft also provides a more in-depth analysis and tools that may apply to individual categories.

If we focus on some key highlights of the 13 principles spelled out in the guidelines used by the DOJ and the FTC as the framework in merger assessment, we can conclude that the Draft Guidelines endorse a more rigid reliance on the standard for considering a merger anticompetitive under the Clayton Act.

The Agencies pay greater attention to the strengthened structural presumption that the merger may substantially lessen competition or tend to create a monopoly, as well as to serial acquisitions, elimination of potential entrants, coordinated effects, vertical mergers and foreclosure concerns, companies with dominant positions, labour competition, and innovation.

For example, the Draft Guidelines adopt lower concentration thresholds and market shares that trigger the presumption that a merger is anticompetitive. Threshold concentration, measured by the Herfindahl–Hirschman Index, is decreased from 2,500 to 1,800, and a new 30% market share threshold is adopted for the structural presumption, i.e. as the basis for the presumption of the illegality of the merger. The Draft Guidelines claim that in highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition. As a result, even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition. The Draft also introduces new theories of harm for vertical mergers, by adding structural presumption for when a vertical merger should be deemed unlawful, i.e. presumption of harm in vertical mergers if the foreclosure market share is above 50%.

Other notable expansions include: concerns regarding the acquisition of potential competitors (elimination of potential entrants); roll-up strategies and serial acquisitions, even if no single transaction itself substantially lessens competition; competition in labour markets; concerns raised by minority or cross partial ownership and multisided platforms, as well as concerns regarding transactions undertaken by a firm with a dominant position.

It seems obvious that the Guidelines reflect the DOJ and FTC's current thinking regarding merger review, while at the same time reflecting a significant change in their approach to merger enforcement. If the Guidelines are adopted as currently proposed, some unproblematic mergers would be viewed by the Agencies as presumptively illegal. In the long term, a broad range of transactions will undergo fact-intensive scrutiny. Considering that competition law should not intervene where the markets tend to be self-correcting and where the competition can restore or create competitive conditions, this Draft moves away to a more sceptical view of the benefits of mergers in ways that would subject more mergers to scrutiny.

Also, the judiciary will have difficulties to follow the new 2023 Draft Guidelines while the Agencies will have to persuade the courts to accept the Guidelines as reasonable and reliable. The Agencies declare their aggressive merger enforcement and radical shift in both procedural and substantive

standards regarding merger assessment. The Guidelines make reference to the precedent of the 1960s and 1970s, and return to historic Supreme Court case law for guidance. It is recognised that while these older decisions have not been explicitly overturned, modern decisions have not relied on many of their more sweeping holdings (Crowell & Moring 2023). Therefore, the Draft Guidelines do not point to broader trends in antitrust law and more modern merger precedent, although it is stated that the Guidelines are revised to reflect shifts in economic understanding and economic conditions (White House 2023). It would be valuable if the courts could consider these Guidelines as instructive and adopt many of their principles as legal standards. However, the real implications of the Draft Guidelines and how they will influence the courts once issued, will remain an open question, as will the broader issues of predictability and credibility. This will depend on how the Agencies and courts will use and treat the Guidelines and whether the courts will rely on them and actually write them into law.

3. PUBLIC COMMENTS ON THE DRAFT MERGER GUIDELINES

In order to finalize the new Merger Guidelines, the DOJ and the FTC are currently reviewing comments from the public on the Draft Guidelines, which were submitted online during the comment period ending on 18 September 2023. As expected, the Draft Guidelines have generated significant comments by prominent academics, numerous industry participants, practitioners, and others – more than 3,300 public comments have been received.[3] In response, several debates and discussions on this topic were organized, including the ProMarket Merger Guidelines Symposium, which hosted a two-round symposium where 12 antitrust experts provided their comments on the Draft Merger Guidelines.[4]

These comments included both favourable and negative views on the draft Merger Guidelines. The negative comments suggest that the Draft Merger Guidelines overly emphasize law, at the expense of economics, and rely on unjustified and potentially counterproductive assumptions about concentration and competition. Those who provided mixed comments seem

3 See Federal Trade Commission. 2023. Draft Merger Guidelines for Public Comment. *https://www.regulations.gov/docket/FTC-2023-0043* (last visited 31 October 2023).

4 See ProMarket. 2023. ProMarket Merger Guidelines Symposium. *https://www.promarket.org/tag/promarket-merger-guidelines-symposium/* (last visited 31 October 2023).

to generally agree with the goals of the new Guidelines, but question whether they are likely to advance those goals. The favourable comments noted that the new Guidelines would move merger enforcement towards its status prior to the incorporation of the Chicago School into merger analysis and the Reagan-era 1982 Merger Guidelines, and that would be a good outcome (Capps, Dafny 2023).

For example, negative opinions claim that Draft Merger Guidelines demote economics to justify aggressive antitrust enforcement and that the proposed Guidelines will fail to receive the broad-based support that recent prior Guidelines have achieved (Carlton 2023b). Bearing in mind the highly selective cited cases, it is noted that those cases are old, their principles have often been rejected in subsequent court decisions, and they are often based on economic reasoning that would be rejected today (Carlton 2023b). Another deficiency of the Draft Guidelines, in comparison with prior ones, is the failure to state clearly what is their overriding goal, which increases the risk of falling into the antitrust trap of confusing the protection of rivals with the protection of competition. Therefore, it is not clarified whether the Agencies have abandoned their public pronouncements that they will discard the 'consumer welfare standard' and broaden their goals to include other issues, such as fairness, income equality, employment, and perhaps others (Carlton 2023a).

A similar opinion is that the Draft announces a dramatic shift in merger policy and abandons the focus on market power, which has been fundamental to all previous merger guidelines. The Draft ignores the central harm that merger control seeks to prevent, namely harm to consumers caused by a lessening of competition. It favours an approach based on preserving deconcentrated market structures, instead of making the clear statement that mergers should not be permitted to enhance market power and consequently harm customers (Shapiro 2023). Another view is that Guideline 1 is concerned with structural concentration, but never discusses the relationship between structure and performance, measured by output, price, or innovation. It does not identify any harm associated with concentration, which is an approach that is at odds with the structuralism that dominated antitrust thinking in 1950, when the merger law was amended (Hovenkamp 2023a; Hovenkamp 2023b). In addition, it is stated that the Draft Guidelines treat as a presumption of law the Supreme Court's Philadelphia Bank conclusion that a merger creating a firm with a market share above 30% is unlawful. However, the question whether a merger of that magnitude harms competition is factual is ignored and nothing in the Draft speaks to that question, and certainly not to the 30%. According to

this opinion, more questionable is the treatment of general economic effects as if they were matters of law, thus placing them beyond empirical review (Hovenkamp 2023a).

The favourable comments emphasise the need for greater enforcement of the antitrust laws, i.e. merger control rules, because these rules have been underenforced, resulting in more powerful companies, higher prices, lower quality and other. These comments claim that the Draft Guidelines are consistent with modern economics, displacing older Chicago School views (Fox 2023). The Draft actually covers the concerns dropped in prior Guidelines, such as those related to: mergers that significantly increase concentration in highly concentrated markets; mergers that eliminate substantial competition between firms; mergers that increase the risk of coordination; mergers that eliminate potential entrants in concentrated markets; vertical mergers that create market structures that foreclose competition; mergers that entrench or extend a dominant position; and mergers that undermine innovation incentives (Fox 2023). Therefore, the claim that the Draft Guidelines abandon reason, economics and consumers is wrong (Fox 2023).

Another opinion suggests that the Draft Guidelines address many of the issues by incorporating the latest economic wisdom and the Agencies' experience since 2010 (Posner 2023). Such examples propose strengthen the Herfindahl–Hirschman Index thresholds for challenging mergers to what they were in the 1980s, and remind businesses that the legal theories that the Supreme Court endorsed in the 1960s are still good law (Posner 2023).

4. CONCLUSION

It is not always easy to distinguish between mergers that should be allowed and that should be prohibited. The US antitrust law is not regulatory and it should not stand in the way of companies using regular means to maximize their profit, on account of it protects the openness and competitive structure of the market. Therefore, the US courts have taken a relatively conservative approach toward merger control, in the sense of showing reluctance to penalize a firm simply because of its monopoly status or dominant position.

It is often said that US antitrust law protects competition and does not protect competitors from hard or rough competition, from unfair, even fraudulent, competition; it protects consumer welfare by not intervening in the marketplace (Fox 2006, 69–70). The basic concept of the US

antitrust law is that price should be controlled by the free market because if the firm prices at monopoly levels, the high price itself may invite new entry and expanded competition, and market forces would gradually wear away the monopoly power (Fox 1986, 993). Considering that 'efficiency' is the watchword of the US antitrust law, it is understandable why the courts are ready to apply the antitrust law only to improve efficiency (Fox 1986, 983).

Therefore, there is no need for the expansive application of merger control rules that may reduce innovation, which means that the US should not repeat early mistakes by protecting competitors instead of protecting competition. The US antitrust law should not be an obstacle to innovation and growth. This is why merger control standards should be properly defined and the Draft Guidelines should respond to modern market realities and enable the Agencies to transparently and effectively protect the consumers from the harm caused by anticompetitive mergers.

The analysis in this article shows that the Draft Guidelines would significantly expand the reach of merger reviews. Major changes include a departure from the focus on the 'consumer welfare' standard, which focuses on price effects, and the lowering of the threshold for a companies' post-merger market share that would lead to the Agencies challenging a deal.

The Draft advances the Agencies' view that prevailing approaches to merger control rules have been too permissive and do not fully address mergers that harm consumers. Therefore, it is understandable why the Draft would represent a significant change to the Agencies' longstanding policies and practices in merger reviews. The proposal to advocate market analyses with 'structural presumptions' in favour of direct evidence of competition, could potentially represent a radical change in merger enforcement.

The final Guidelines should include all constructive feedback in order to allow the Agencies to effectively conduct merger investigations and attract support from commentators and courts, and convince them that these Guidelines provide useful guidance.

However, it remains to be seen whether the final Guidelines will gain wide acceptance from the courts because (as it is stated) only 11 of the 46 cases cited in the Draft Guidelines were decided after 2000, and the only cited case to be decided since 2020 is not a merger case (Buffier, McDonald, Edwards 2023). The Agencies rely primarily on case law from the 1960s and 1970s, which is believed to reflect the prevailing view of Chair Lina Khan and Assistant Attorney General Jonathan Kanter on how the law *should* be applied rather than an accurate summarization of how the judicial branch

applies the law today (Buffier, McDonald, Edwards 2023). That is why the Draft Guidelines are substantively different from prior guidelines and are also stylistically quite different from prior guidelines due to the extensive citation of case law in the Draft. As a consequence, it is difficult to expect that the Draft Guidelines will be significantly changed in the long run.

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/BOOK REVIEWS

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Jackson, Julian. 2023. *France on Trial: The Case of Marshal Pétain*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 448.

In memory of Vlajko Begović (1905–1989)
Combatant and officer of the Resistance (La Résistance),
the FFI (Forces françaises de l'Intérieur),
and the French Army (Armée de Terre) – 1943–1945.

Julian Jackson is hardly a stranger to France's darkest period in the 20th century: defeat in 1940, German occupation until August 1944, and the Vichy government. His previous books include a comprehensive and very balanced study of the occupation and collaboration period (Jackson 2001) as well as the thought-provoking inquiry into the 1940 defeat (Jackson 2003). This time he decided to provide a book on the epilogue of the 'dark years',

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focusing on the trial of a person who was the embodiment of collaborationist Vichy France – Philippe Pétain, head of the Vichy French State (*État français*) until August 1944 and still a Marshal of France at the time his trial began.

The author points out in the Introduction that he does not seek to "re-open" the trial or to argue that Pétain was treated too harshly or not harshly enough, but rather to revisit the trial. "Revisiting Pétain's trial is not the same as re-opening it. It offers a fascinating opportunity to watch the French debating their history. Through the arguments in the courtroom we can explore choices that were made and paths that were taken; but also paths that were not taken and choices that were rejected. We can hear the historical actors of both sides explaining their decisions, see how Vichy's defenders justified their actions, and understand what the regime's accusers considered to be its main crimes" (p. xxviii). Well, this is undoubtedly a job for a historian, a thoroughbred one, like Jackson is, rather than a lawyer.

Furthermore, at the beginning of the book the author lays down the cards. In a few skilful strokes of the pen, he made the case explaining why Pétain had to be tried and punished. The Introduction starts with the infamous meeting of Pétain and Hitler on 24 October 1940 at Montoire-sur-le-Loir, Pétain's shaking hands with the enemy (the armistice signed in June 1940 was just a suspension of hostilities, not the end of the war) and a few days after that handshake, declaring (three times) 'collaboration' with that very enemy as the policy, in his radio address to the population. Based on the insights of the author, the reader infers that, from the legal point of view, it was easy, and from the political point of view it was inevitable, to prosecute and to put Pétain on trial. It was easy, because the indictment was focused on 'collaboration' and was based on the French Penal code which (at the time the deed was done) stipulated the crime of 'collusion with the enemy', and Pétain publicly declared that collusion, labelled as collaboration, and in the documents of the Vichy government there was ample evidence about that collusion. It was inevitable because on 13 July 1940 General Charles de Gaulle had declared that France would 'punish ... the artisans of her servitude'. There was no doubt whom General de Gaulle had in mind as in his subsequent speeches he referred to Pétain as "*le Père la Défaite*" – Father of Defeat – an ironic inversion of the soubriquet applied to Georges Clemenceau, France's prime minister during the Great War, who had been dubbed '*le Père la Victoire*' – Father of Victory" (p. xxiv). After the Liberation, it was time for de Gaulle to fulfil the promise/threat. In April 1945 it was Albert Camus, a person with impeccable literary and moral credentials, who pointed out: "If Pétain is absolved, it would mean that all those who fought against the occupier were in the wrong. Those who were shot, tortured, deported would have suffered in vain" (p. xxv). So, the author concludes, Pétain's trial was

obviously a 'political' trial, and it was inconceivable that Pétain would not be found guilty. The author considers that the only uncertainty was the penalty. The reader is not convinced. It rather seems that the only uncertainty was whether the death penalty rendered by the court would be commuted to life imprisonment (for humanitarian reasons, due to the age of the defendant, or political ones, or both) or not.

But because the trial was politically inevitable, that did not mean it was (politically) easy. On the contrary, it was a difficult one. As the author suggests in the title of the book and further points out in the Introduction, the trial of Pétain was in some sense putting France on trial: according to the author, few people had not believed in him – at some moment. Jackson understands the view that this trial was "an elaborate ceremony aimed at symbolically condemning a policy" (Novick 1968, 173), but he believes that despite many irregularities, what took place in the courtroom was not a charade. From what follows, the book provides ample evidence that the trial was a tremendous opportunity for the painful soul-searching of the French people, after the traumas they had endured from May 1940 to August 1944. The author suggests some of the questions. Was the armistice itself treason?[1] Was there a realistic alternative? Was the vote granting powers to Pétain in 1940 legal? Had he abused the powers he had been granted? Could collaboration be defended? Had Pétain supported it? Why did Pétain hang on to power even after November 1942 (i.e. the Allies' landing in North Africa, and the German occupation of the whole of France)? What were the respective responsibilities of Pétain and Laval (his Prime Minister) in this tragic history? Where did patriotic duty lie after the defeat? Does a legal government necessarily have legitimacy? Are there times when conscience overrides the duty to obey laws? Are there times when the immediate well-being of the people of a nation can conflict with that nation's higher interests? Oh yes, that was France in 1945, and the "trial was about much more than the fate of one extremely old man" (Prince 2023).

The trial took place in Paris (where else?), opening on 23 July 1945 and ending on 15 August. Nonetheless, the book starts in earnest (Part One 'Before the Trial') much earlier, with a young Pétain, his somewhat

1 Just as an illustration of different views, the author refers to the approach of three relevant people. Charles De Gaulle, Reymond Aron and Simon Weil all opposed Vichy – but each took a different view of the Pétain's crime. For de Gaulle, the crime was the armistice and nothing but the armistice; for Aron the armistice was defensible and Pétain's crime came two years later, when he remained in France even after the Germans had flouted the armistice by occupying the entire country; Weil condemned the armistice as an act of collective cowardice which could not be blamed on Pétain alone.

disrupted family, and an ordinary military career, up to – Verdun. There, the myth was born – a hero who did not give in, a master of defence and a general who cared about the welfare of ordinary soldiers. In the aftermath of Verdun, nonetheless, the high command was a bit concerned that he was too reluctant to seize the advantage with a counteroffensive. Pétain's detractors often commented that his prudence leaned towards pessimism, even at times defeatism. One way or the other, it was Ferdinand Foch who was appointed to be in overall command of the Western Front, and it was, among other things, his determination that made that it was not 'All quite at the Western Front'. The victory of the French army in 1918 was accompanied by the deification of Pétain into Marshal of France and the literary unavoidable hero of Verdun. "His mythic stature was also sustained by his appearance: piercing blue eyes, snow-white hair, and his famous 'marble countenance' (*visage marmoréen*)" (p. 4).

Until his retirement in 1931, he played a leading role in French military planning. That perhaps explains, at least up to a point, the French military obsession with defence between the world wars.[2] Although he was 75 when he retired, he entered French politics. "Pétain started to conceive of himself as a political sage with views about the world going beyond the military. He was no ideologue (nor was he, for that matter, a great reader)" (p. 5). In 1934, Pétain became War Minister, and after a brief stint as France's ambassador to Franco's Spain, exactly at the time of bloodshed in the aftermath of the Civil War, he joined the French Government as the Deputy Prime Minister on 18 May 1940, eight days after the start of the German invasion. The rest is – history.

The book picks up the history on 17 August 1944. The German forces were withdrawing from France; the Allies, including de Gaulle's Free French, were advancing both from the West (from Normandy) and from South (from Provence), and the spa city of Vichy was about to be liberated. Quite expectedly, a German senior official at Pétain's office, whom Pétain himself referred to as 'his jailer', ordered the Marshal of France to – evacuate. Although Pétain wanted to stay in France, even writing a letter of protest to Hitler (the letter was unanswered), he obeyed his 'jailer'. The Germans first moved him to the east of France, to Belfort, but this solution was unsustainable due to the further advance of Allied forces, so on 6 September 1944, Pétain was transferred again, this time to Germany – to the Sigmaringen Castle, situated in Baden-Württemberg, on the Danube River. From that moment on, Petain

2 At the time defence-prone Pétain retired from the French military, it was far away in the Russian steppe that clandestine collaboration between Germany and the Soviet Union produced a new military doctrine (Johnson 2021). In Russian language it was Deep operation (*Глубокая операция*), in German it was – *Blitzkrieg*.

was effectively a German prisoner and without any clout – political or administrative. He was respected as the most senior person in the strange crowd that had been gathered in the castle, but even the local show was run by the others – predominantly fanatic pro-Nazi collaborators. This was the terminal stage of Pétain's political disease.[3]

From the solitude of the *Schloss*, the author moves to the fervent post-Liberation France, i.e. 'meanwhile in Paris'. That was the time of *épuration* – post-liberation purges. It was not only the idea of retribution and revenge but also of purification and cleansing. The author points out that the purges were intended not only to punish the guilty, but to create a morally renewed nation. Things went somewhat wild as "In the early days of the Liberation, when the government turned a blind eye, some 9,000 people lost their lives in this so-called *épuration sauvage*" (p. 34).

Nonetheless, no purification or cleansing of the nation can be achieved without a trial of the key personality of the collaboration – Pétain himself. Without that trial, all other efforts could be considered as *Hamlet* without the prince. There was a constitutional provision in France to judge politicians accused of treason. In the Third Republic, established in 1875, this role was given to the parliamentary upper house – the Senate – sitting in special session as a High Court. There were substantial problems for de Gaulle in pursuing that avenue of action. The first one, the Third Republic had been effectively abolished with the establishment of (Vichy) French State.[4] Furthermore, "It was not even yet decided whether France would keep the same constitution, and most members of the Senate elected under it had voted Pétain full powers in 1940" (p. 32). Instead, a new High Court (*Haute*

3 There is a telling description of the environment of this stage in the book. "The castle, while massive, could not house the 1,500 or so French refugees – criminals, black marketers and ultra-collaborators with their assorted wives, mistresses and hangers-on – who had followed the 'government' of France to Germany. This hoi-polloi had to make do with the overcrowded hotels, school buildings and gymnasia scattered around the town" (p. 19) What a bunch!

4 As pointed out in the book, after the armistice on 22 June, France's parliament was convened hastily at Vichy on 10 July, to grant Pétain full powers to draft a new constitution. The very next day he issued a series of 'Constitutional Acts' which effectively made him a dictator and put parliament into abeyance. The Republic was not formally abolished, but Pétain was now described as 'Head of State' – leaving it ambiguous what kind of state he headed. Using these new powers, Pétain's government proceeded to implement what it described as a 'National Revolution', issuing a string of new ordinances. The author rightfully dismisses a quip that Vichy France was 'a banana republic without bananas' (Neiberg 2021, 36), as it was not only bananas that were missing. The motto of the former Republic, 'Liberty, Equality, Fraternity', was replaced by 'Work, Family, Fatherland'. The Third Republic was effectively dead.

Cour de Justice) was established to try the Vichy leaders. Even the problem of finding untarnished judges to run the court, given how compromised the entire French legal establishment had been during the occupation, was resolved. Following several trials of somewhat minor defendants, most of them resulting in death sentences, the political pressure resulted in the indictment against Pétain being compiled, and on 23 April 1945 it was announced that the trial would start on 17 May *in absentia*.[5] At the time of the announcement, Pétain was still in Germany.

That was about to quickly change. Just a day after the announcement, with the German government collapsing, Pétain arrived in Switzerland. "He was resolute to come back to France, because since the establishment of the High Court his consuming obsession was to defend his reputation before it" (p. 42).[6] Based on the French request, Petain was transferred to France on the evening of 26 April 1945, and right on the border, he was turned over to the French authorities. "De Gaulle had sent General Koenig to meet Pétain on behalf of the French government. [...] When Pétain got out of his car, Koenig saluted. Pétain held out his hand but Koenig kept his hands rigidly at his side. Koenig had not planned what to do, but it seemed inappropriate to shake the hand of the man he was arresting. Momentarily taken aback, Pétain was forced to withdraw his hand" (pp. 44–45).[7] Pétain was back home.

There is enough evidence in the book that Pétain coming home was considered a political hot potato for de Gaulle and the new government, as Pétain could talk back at the trial and the old wounds of the 1940 armistice

5 The decision to pursue the trial *in absentia* was made somewhat earlier, on 17 March 1945. Formally it was made by the High Court, but that was obviously a political decision, i.e. de Gaulle's.

6 It is a bit curious that Pétain had such a strong desire to go back to France and appear before the court. The author conjectures that Pétain was not a natural martyr and that he probably believed that he was still protected by the magic of his legend. 'For four years he had lived in the bubble of his regime's propaganda, adulated by cheering crowds on choreographed provincial tours. The hagiographical effusions of the Pétain cult are beyond parody' (p. 52). After all, he was 89 years old at the time – not exactly the best age to change his opinion of himself, the reader concludes.

7 De Gaulle's decision to dispatch General Koenig to meet Pétain at the border was not random, as the general was the first and only commanding officer of the FFI (*Forces françaises de l'Intérieur*), a service within the French armed forces that in 1944 consolidated all the units of the Resistance (*La Résistance*), and it was disbanded later during the war, when its personnel were fully integrated into the French Army (*Armée de Terre*). It was Resistance combatants that inflicted the heaviest losses on Pétain's armed collaborators and suffered the heaviest casualties from them. By appointing General Kening to this mission, de Gaulle sent, without a word, a strong and unambiguous message to Pétain. Whether it was understood is another matter.

could be deepened.[8] In the words of a contemporary commentator quoted in the book "Apart from a few fanatics, everyone regrets Pétain's return – regrets the fact that he lived on until the end" (p. 46). De Gaulle's personal view of Pétain was much more unambiguous, as he remarked that Pétain was a great man who had 'died' in 1925. The author believes that what he seems to have meant was that by viewing Pétain at close quarters, he realized that he had become a prisoner of his own myth. Pétain's ideas about the world – and warfare – had ossified.[9] One way or the other, the public had no second thoughts. The author refers to the public opinion poll conducted in June 1945 with the question: 'If you were a juror in the trial of Marshal Pétain and the prosecution asked for the death penalty what would be your verdict?' The answers were striking: 44 per cent of respondents answered a straight 'Yes' and 32 per cent 'Yes with mitigating circumstances'. Only 18 per cent said 'No'.

With Pétain being available, in accordance with the rules of French law, the additional pre-trial investigation started on 30 April 1945, which resulted in the somewhat revised indictment. The investigation had started well before Pétain's return to France but after that, it had to be supplemented by his interrogation. As he had some trouble in selecting his trial lawyers, i.e. his legal representatives, he decided to go for the interrogation alone, obviously thinking that he was not vulnerable and that his Marshal aura was still an impenetrable shield. According to the author, the interrogation was a fiasco for Petain. "He was now confronted with questions that leapt randomly from subject to subject which anyone at the height of their mental powers would have struggled to answer. His responses were a mixture of evasion, blame-shifting, amnesia and perplexity" (p. 60). Well, the reader concludes that vanity is literally a mortal sin.

The public prosecutor was André Mornet and the prosecutor in charge was Pierre Bouchardon, who had a long experience of treason trials. He had been the prosecutor of the famous/infamous Mata Hari, who was convicted

8 The author points out that when Pétain entered Switzerland, de Gaulle informally let the Swiss authorities know that, although the French would obviously be required to ask for Pétain's extradition, they would not pursue the matter if the request were denied. Nonetheless, the Swiss authorities were anxious to get rid of Pétain, he was eager to go back to France for the trial, and the French government requested his extradition, hence Pétain's stay in Switzerland was record-breaking short.

9 A few de Galle's notes about Pétain from that time, specifically from 1938, are both stylish and telling: "Cloaks the misery of his solitude in pride … Very sensitive in matters concerning himself … Too assured of himself to give in. Too ambitious to be a mere arriviste. Too personal to have any faith in others. Too prudent not to take risks … More grandeur than virtue" (p. 49). De Gaulle's famous verdict of Pétain in his *Memoirs* was that 'old age is a shipwreck'.

and executed as an ostensibly German spy in 1917 and he gained his fame for that accomplishment.[10] One way or the other, he specialised in treason cases, he was passionate about them, and the charges against Pétain were exactly that – treason, i.e. collusion with the enemy, as stipulated in the French Penal Code.

There was a team of Pétain's lawyers, described in detail in the book as people of different areas of specialisation, different temperaments, different motivations for the service, different strategies of defence, and all of that even with a bit toxic chemistry among themselves, which prevent proper communication and coordination. Hardly a winning combination even for a low-profile defendant.

Fernand Payen, the most senior member of Pétain's defence team, was a well-known civil lawyer with little experience in penal law. His main obsession was to be elected to the *Académie Française*, which usually had one seat for a celebrity lawyer. This was his main motivation. Jacques Isorni, a much younger member of the team, was a passionate admirer of Pétain because of his right-wing, reactionary political views and most of the energy coming from the defence bench was exactly the one created by Isorni – he was a believer.[11] As a junior partner, the author points out, he had no intention of being confined to an auxiliary role. Pétain liked Isorni's approach and the two of them formed a bond behind Payen's back. The third lawyer, who had been selected by Payen, was Jean Lemaire. He was, by all means, a third wheel. Perhaps that was exactly the reason Payen chose him.

The lawyers' team worked with the client in preparing his defence, asking him questions regarding difficult issues, such as his proclamation that drafting French workers to German factories was working in the interests of France. The reply was not helpful if it was a reply at all. One of the contemporary comments on Pétain was 'I have the impression of a magnificent façade with nothing behind it.' The author points out that "At Vichy it was often said that Pétain was only capable of concentrating for two hours a day" (p. 80). The reader wonders whether the main reason for

10 The author shares a rather widespread view that Mata Hari was actually not guilty as charged, and that she was essentially a scapegoat in 1917, a year of the Great War with many disappointments for France, not only widespread mutinies in the French Army. "She was a sacrificial victim, killed to satisfy a bloodthirsty public" (p. 63).

11 According to the author, Isorni was an admirer of the monarchist polemicist Charles Maurras (who polemically clashed with Émile Zola in the Dreyfus case), and the leader of the ultra-right *Action Française* movement, which he joined as a schoolboy, and by the time Isorni graduated from university he was writing regular columns for right-wing student newspapers.

Pétain's unhelpful reply to the questions by those whose job it was to help him was his diminishing intellectual strength and substantially reduced cognitive capacity. Or perhaps, he was aware that his actions in collaborating with Germany were just indefensible and he was conscious that he had already burned all the bridges. The doubt remains.

One way or the other, in the final stage of the investigation Pétain was quizzed about two documents, which the prosecution hoped might nail the claim of treason ('collusion with the enemy'). The first one was a letter from Pétain to (German foreign affairs minister) von Ribbentrop on 18 December 1943, stating that 'modifications of laws will be submitted before publication to the occupation authorities' – collaboration at work. Pétain responded that this was just a formal concession. The problem was that this ostensibly formal concession was enforced. The second document was a telegram congratulating Hitler on the success of repulsing the Anglo-Canadian landing at Dieppe on 18 August 1942, labelled as 'aggression on our soil' and offering for French troops to contribute to the 'protection of Europe'. Petain did not dispute the text, only whether it had been sent or not. The author points out that in the same month in 1942 "over 11,000 Jewish men, women and children were arrested by French police in the Unoccupied Zone of France for deportation to Auschwitz" (p. 87). This was not the author's critical remark of the content of the indictment (focused on the French Penal Code), but a remark about Petain's historical responsibility, which became legally punishable only sometime after the trial.

The revised indictment was ready on 11 July 1945. It opened with Pétain's responsibility for the signing of the armistice on 22 June and accused him of (1) 'Attacking the internal security of the State', (2) 'Collusion with the enemy in order to favour his own ambition which correlated with those of the enemy'. These crimes fell respectively under articles 87 and 75 of the Penal Code. The author concludes that in the ten weeks since Pétain's return the shape of the indictment that had already been prepared before his arrival had not radically changed. The *Première Chambre de la Cour d'Appel de Paris*, a rather small courtroom situated at the heart of Paris in the *Palais de Justice*, was selected to be the site of the trial. Everything was ready.

Part Two of the book ('In the Courtroom') is focused primarily on the trial itself – almost a day-by-day chronicle of the event. Although, not only of the trial itself, but also putting it in the framework of the political environment, like the debate on the new constitution in the *Assemblée Consultative*, which began on 27 July 1945, four days into the trial. "Those debating France's future always had Pétain in their minds, just as those deliberating Pétain's fate in the courtroom always had an eye on France's future" (p. 103).

The author points out that many famous names covered the trial. The two most celebrated reporters were Albert Camus, who wrote for *Combat*, and François Mauriac, who wrote for the conservative *Le Figaro*. In addition to publishing Mauriac's occasional articles, *Le Figaro* also hired Jean Schlumberger, a novelist, poet and friend of André Gide. Quite a literary coverage!

The defendant, according to the author, wanted to appear as a civilian so as not to sully the prestige of the Marshal's uniform. It was his lawyers who convinced him to appear in the uniform. Photographs from the courtroom looked more spectacular, but it seems to the reader that it hardly made any difference for the better for the defendant. The point is that the High Court was composed of three judges and twenty-four jurors – twelve resisters and twelve parliamentarians – drawn by lot from a pool of fifty in each category. The pool of resisters was selected by the *Assemblée Consultative* from its members, and the parliamentarians from among those pre-war senators and deputies who had not voted full powers to Pétain on 10 July 1940. The reader guesses that resisters were not amused by the uniform.

The chief judge, Pierre Mongibeaux, had sworn an oath of loyalty to Pétain during Vichy France (as had other sitting judges) but he had not otherwise distinguished himself in any way, negatively or positively, during the occupation – though he had raised eyebrows when he suddenly appeared out of nowhere at the *Palais de Justice* at the Liberation with a tricolour resistance (FFI) armband on his sleeve. It seems that adjustment was a keyword of the day in the French judiciary.[12]

After reading the indictment, according to the decision by Pétain and his legal team, he addressed the court with the prepared declaration, written basically by his lawyer Isorni. Apart from this declaration, Pétain remained almost silent throughout his trial. That is the reason why the integral version of the (not-so-long) declaration is cited in the book. The author does not appreciate the declaration. "Overall, the declaration was a compilation of dubious assertions and half-truths, approximations and provocations. The phrase that some acts 'caused me greater suffering than they did you' would surely have been better omitted given that many in the court had suffered unimaginable personal losses" (p. 121). The reader concurs.

12 Contrary to that, jurist Léon Lyon-Caen, who had been sacked from the *Cour de Cassation* under Vichy legislation excluding Jews, would have been an eligible candidate for the chief judge. Later, he had narrowly escaped arrest by the Gestapo, one of his sons had died at Auschwitz, and two others in the Resistance. Lyon-Caen was readmitted to the *Cour de Cassation* in 1945, but he refused to be considered for the role of the chief judge because he believed that he could not be impartial. A rather seldom example of virtue among civil servants in those days in France.

Then the witness for the prosecution started their testimonies. This was perhaps, from a historiography point of view, the most interesting part of the trial because this was a rich in details group painting of the French political and military elite at the final time of the Third Republic. "Over the course of the first week the court would hear the testimonies of four former premiers, a former President of the Republic, the two men who had presided over France's Chamber and Senate in 1940, and other leading politicians. All had been victims of the Vichy regime; some had been imprisoned; three had only just returned to France from deportation" (p. 125). Military decision-makers from 1940 also testified. The author provides a brief portrait of each of them, starting with Paul Reynaud, the last prime minister before Pétain, who failed miserably in June 1940 and who invited Pétain to join the government as deputy prime minister, and who replaced the commander-in-chief, General Maurice Gamelin, with General Maxime Weygand, who was the key advocate of the armistice. There is an intriguing observation of the author: "For de Gaulle, the explanation for Reynaud's failure was that he remained a prisoner of the political system that had created him; that he lacked the spark of self-belief necessary for leadership; that, in short, he was not de Gaulle" (p. 128). The reader is convinced that only an outsider from the framework of political institutions of the (late) Third Republic was capable of achieving a turnaround from the on-going disaster.[13] In short, de Gaulle.

Pages and pages of the book are rightfully allocated to the extensive testimonies of the French leaders of the time which were basically almost the same – the differences were about details, almost in every case about the personal role. The testimonies themselves were insincere, opportunistic, self-serving, with no desire to go to the crux of the issue – quite telling from the people who were not in the dock but witnesses of the prosecution. The only exception, both in terms of personality and testimony, was Léon Blum, who became France's first-ever Socialist premier at the sunset of the Third Republic.[14] It was he as the prime minister who started the rearmament

13 The author points out "In the end, Reynaud lacked the authority, conviction or force of personality to impose his opposition to an armistice" (p. 129). Nonetheless, the reader concludes, that it could have been anyone from the French political elite of the time. The title of Émile Zola's 1892 novel of the Franco–Prussian war – *La Débâcle* – was even more appropriate for the 1940 French not so much military but political downfall.

14 The other exception, though not in the trial, but two years later, during the work of the parliamentary commission that was set to carry out an autopsy of the defeat of 1940, was one of Reynaud's former ministers, Raoul Dautry, who demonstrated more honestly than anyone had done at Pétain's trial why no uncontested truth would ever emerge about the events of June 1940: "We were there, 20 people, not

of France due to Hitler's rise to power and the advent of the threat of Nazi Germany. It was he who voted against the unconstrained powers of the Vichy Head of State, which effectively abolished the Republic. It was he who was imprisoned near the camp of Buchenwald, knowing that he could be shot at any time. As to his appearance at the court, the author points out that "Blum's testimony had been the high point of the trial so far. The impact derived from his avoidance of declamatory rhetoric or point scoring. Every sentence was phrased with intellectual fastidiousness – but also artistry" (p. 147).

The defence lawyers skilfully played their cards, knowing the numerous political liabilities of the prosecution's witnesses and counting on the image of Pétain as a (previous) war hero, by asking every witness the same question: 'Do you think Marshal Pétain betrayed his country?'. All were evasive, there was no straight yes or no. All, save one. It was Léon Blum who pointed out "So that for me is the key issue: the massive and atrocious abuse of moral confidence. Yes, I think that can be called treason" (p. 161). Finally, the defence lawyers had got what they had asked for.

Now the time came for the defence witnesses. And the star witness was – Pierre Laval. He was an embodiment of collaboration with Nazi Germany, being twice the prime minister in Pétain's government.[15] But Laval (who was also twice prime minister and minister of foreign affairs in the 1930s, i.e. during the Third Republic), according to the insight from the book, was also something else – the incarnation of the worst of the politics of the Third Republic. Though author has some respect for Laval and claims that "He was a self-made man who owed nothing to anyone. Laval had risen through the ranks thanks to hard work, native intelligence, guile and determination" (p. 195), all other insights in the book reveals a person with no moral constraints whatsoever, whose obvious success in French politics was due to his unlimited wheeling and dealing. In short, Laval was the nadir of the

sitting round a table but in complete disorder in armchairs and in every corner of a room which had been set up for a meeting of the Conseil … You cannot imagine the confusion of that meeting with ministers who had not slept for two days, who were no longer thinking straight, fighting furiously over improvised propositions … The confusion was such, people were so exhausted, so incapable of putting together arguments, that they threw words at each other like bullets rather than offering arguments and reasons" (pp. 290-291). Quite a vivid and convincing painting of the last days of the Third Republic, the reader concludes.

15 In the first stint (July–December 1940), because Pétain was simultaneously head of the state and head of the government, Laval was *de jure* (the only) deputy prime minister. Effectively he was the prime minister in that stint. In the next one, up to the end of the Vichy government, he was *de jure* prime minister, much trusted by the German government, until the evacuation of the administration from Vichy in August 1944.

Third Republic. As explained by the author "Apart from his versatility, Laval's political ascension is hard to explain. He had no talent as an orator or writer; he read no books; his ignorance of history, geography and literature was legendary" (p. 197). His physical appearance, according to the description in the book (supported by a photo from the courtroom on one of the pages) was consistent with the repulsive character of his personality. Such a man was two times the prime minister of the Third Republic. This speaks about the Third Republic and its sunset more than hundreds of pages.

Nonetheless, for Pétain's defence, Laval was an ideal scapegoat. He had openly collaborated with Nazi Germany, and he was even proud of it – he was the one who openly, in a radio address to French people in 1942, declared that he 'wished for a German victory', hence a reasonable strategy of defence was to load all the responsibility for collaboration on him.[16] The problem with that strategy was that Laval was a skilful player of the blame game. His testimony was long and self-serving, but it was, as substantial parts of it are cited in the book, rather a colourful sketch of the operations of the Vichy government. The author thinks that "Despite [...] lapses, Laval's performance had been skilful. He had avoided direct criticism of Pétain, distanced himself from some of his measures, and shown that Pétain was no less implicated in the policy of collaboration than he was" (p. 209).[17]

All other defence witnesses paled in comparison with Laval's colourful personality and thrilling appearance. It was the 'generals and bureaucrats' of the Vichy government who gave their testimonies. The full painting of the operation of the Vichy government was unveiled, although it is questionable how reliable it was. Most of the debate was about November 1942 and the Allied landing in North Africa. It was the Vichy government who ordered French troops to shoot at Americans, so the debate whether the order came

16 Laval was not entirely blind to reality. The author points out that after the statement of his preferences regarding German victory, general "Weygand had said to Laval 'you have 95 per cent of France against you'. Laval replied: 'You are joking! It is 98 per cent but I am doing what is best for them despite them'" (p. 198). Hence, the interesting question is why he came back to France, as he was offered to take refuge in Ireland. It seems that he wrongly overestimated his skills and underestimated the hatred and contempt for him in France after the war. Shortly after Pétain's trial, Laval was sentenced to death and executed. Although the trial was a charade (Paxton 1982, 425), and the author points out that "Even Laval's bitterest enemies agreed that his trial was a travesty" (p. 288), no tears were shed after his hasty execution. Laval was a liability that France wanted to forget.

17 One of the most revealing of Laval's slips during the testimony was "when he referred to D-Day as 'the aggression in Normandy'. The court exploded with laughter" (p. 209). So much about Laval's sincere allegiance during the war, even in its later stage.

directly from Pétain hardly mattered. What mattered was that one week after the Allies landed in North Africa, the Germans violated the armistice agreement by occupying all of France (no Free Zone anymore), and the French fleet was scuttled in Toulon. It was the last opportunity for Pétain to switch sides. He remained loyal to Hitler and Nazi Germany. To the very end.[18] No one can deny that.

The closing arguments for both sides were – long. Prosecutor Mornet spoke for five hours. "Towards the end tiredness showed when he referred on two occasions to 'Marshal de Gaulle'" (p. 253). The defence's closing argument, with three defence lawyers, was even longer – "combined seven hours of their speeches contained overlaps, repetitions, even contradictions" (p. 255). The reader concludes that no one was any wiser after the closing arguments. The author provides a vivid sketch of the atmosphere in the overcrowded courtroom, packed with officials and journalists, not only during the closing arguments. The hot, humid, and sometimes even stifling air in the courtroom, due to the high temperatures of the Parisian summer (air conditioning was not a common feature in France at the time), long and not always focused speeches, jurors and even defendant Pétain's dozing off from time to time, and jovial exchanges between officials in the courtroom that had nothing to do with the trial.

The jury was – efficient. Just a few hours after the closing arguments, at 4 a.m. the following day, 15 August 1945 the verdict was announced. The court "'. . . condemns Pétain to the death penalty, *indignité nationale*, the confiscation of his property'. The only surprise lay in the final words: 'Taking account of the great age of the accused, the *Haute Cour* expresses the wish that the judgement not be carried out.' [...]. If Pétain had heard or understood, he did not show it. He remained slumped in his chair as if not comprehending what had happened" (p. 274).[19] On 17 August de Gaulle commuted the sentence to life imprisonment as the court had recommended – and, the author points out, as he had always privately intended. The majority of French people were happy with such an outcome. As one commentator with a Resistance background wrote: 'The Marshal no longer has the right to divide France.

18 According to the author, it was Pétain who wrote a letter on 7 April 1945 to Hitler, asking him permission to go back to France, effectively acknowledging Hitler's authority in such a matter. Hardly surprising, there was no reply. At that time, in the remaining 23 days of his life, Hitler had other priorities. Much closer to Berlin.

19 It remains a mystery to what extent Pétain's impaired ability to hear during the trial was genuine. In some cases, like during Laval's testimony, he demonstrated that he heard what the witness said and even commented on it. It seems that his impaired hearing was rather selective.

We do not have the right to divide her with his blood.' The trial as a legal procedure was over, but its political legacy as well as the legacy of the Pétain and Vichy government remained, as Pétainist have lingered on the national political scene for decades.

The final segment of the book (Part Three 'Afterlives') deals with the aftermath, starting from the end of the trial and ending with the contemporary developments on the French political scene and society, with some intriguing counterfactual excursion to the time of the advent of Pétain as the head of the state. As to Pétain's personal fate, the author points out that immediately after the verdict he was transferred to the prison fortress of Portalet in the Pyrenees as a temporary arrangement. The choice of the location was symbolic as one of Pétain's telling comments was 'Now I understand why Reynaud and Blum blame me for having put them in such a sinister place.' His final destination was the island: Île d'Yeu, about 20 kilometres off the west coast of Brittany. The citadel of Pierre Levée, where Pétain was incarcerated, had been constructed in the 1850s, serving successively as a barracks and a prison. It was Pétainists, points out the author, who compared the fate of Pétain on the Île d'Yeu to that of Dreyfus on Devil's Island in French Guyana, but Pétain's incarceration conditions were incomparably better, as Pétain had two rooms, frugally furnished, and he could take walks around the courtyard of the fortress. "The only similarity with Devil's Island was the government's hope that Pétain would be forgotten until he died" (p. 285). It seems, according to the book, that Pétain was concerned with food. The author reports that after Pétain complained about his menu, a guard told him that this was what Parisians had been eating for four years, to which Pétain replied: 'I couldn't care less. I need to eat.' – not exactly an answer of a kind, noble, and repented person, the reader concludes.[20]

Although in April 1948 a Committee for the Liberation of Marshal Pétain was established, it was not effective, as the French political elite at that time (de Gaulle was not in power anymore) had no incentives to release the prisoner. On 23 July 1951, Pétain died – he was 95. His body was interned in the marked but modest, undistinguished grave in a local cemetery on a remote island and a funeral was a low-key affair.

The Association to Defend the Memory of Marshal Pétain (ADMP) was soon established, and it was, according to the author, more of a cult than a political movement. Nonetheless, France was entering into a period of

20 This attitude of Pétain is corroborated by a remark that his wife gave to the guard when it was uncertain where he would be sent to serve his sentence: 'If he can get oysters, he would happily be shut up anywhere'. The reader is convinced that she knew what she was talking about.

post-war prosperity later dubbed the '30 glorious years'. In 1951 and 1953 parliament voted amnesty for most of those convicted in the post-war trials; the French wanted to move on. The new challenge came with the decolonisation process and with it the biggest question of all in the late 1950s: what would happen to French Algeria? It was de Gaulle who was invited back from his voluntary political retirement. He accepted, under his constitutional terms and the Fifth Republic was created. Algeria gained independence. The French colonial empire collapsed. The political turmoil at the time, let alone military insubordination, was followed by assassination attempts on de Gaulle, all that created new energy for right-wing political movements, which built on the legacy of Pétain, his accomplishments and his (ostensibly unjust) trial. This part of the book could be somewhat tedious for a reader who is not passionate about 1960s French politics.

Much more interesting in the perception of the Pétain's legacy is the reference to the book by an American historian that was published in the early 1970s (Paxton 1972). "Using German documents, Paxton showed that the Vichy regime, far from having collaboration forced upon it, had consistently sought a collaboration that the Germans rebuffed; that the first repressive policies of the Vichy regime, including the persecution of the Jews, were entirely home-grown and not the result of German pressure" (p. 325). Furthermore, according to the new historical reading, "collaboration was not so much about 'treason', as the Pétain trial had sought to argue, as it was the underpinning of a domestic political strategy, rooted both in the immediate context of defeat – finding culprits – and in a longer tradition of extreme right-wing politics" (pp. 325–326). This was a paradigm shift. It demonstrates that the trial itself was only about legality (whether some legal rule had been breached or not) but not about the legitimacy of (all) the actions of the defendant. It is only historiography that can provide an evaluation of legitimacy – a verdict of history. Furthermore, this paradigm shift explains why Pétain and the memories of him have been so important for contemporary (mid-20th century) right-wing politics in France. It was about abolishing the Republic, it was about 'Work, Family, Fatherland' (a slogan almost certainly not coined in Berlin), it was about repealing liberal democracy and replacing it with an authoritarian executive branch of government, perhaps with a slight anti-Semitic flavour (Paxton, Marrus 1981). That has exactly been the appeal of Pétain for French right-wing political entrepreneurs, and not collusion with Germany, as those entrepreneurs – chauvinists after all – hated Germans and Germany very much.

It took decades and a new generation of the French political elite to move the debate about Pétain and the Vichy government into a higher gear. It was President Jacques Chirac in a solemn speech on 16 July 1995, the

fifty-third anniversary of the round-up of Jews at the Vel d'Hiver stadium, who was unambiguous – it was four hundred and fifty French police agents and gendarmes, acting under the authority of their leaders, i.e. the Vichy government that accomplished the task. President Emmanuel Macron took the same line on 16 July 2017. He added one remarkable sentence: 'Not a single German took part'.

The author claims in the Epilogue of the book that all these developments undermined Pétain as a political inspiration for French conservatives. It was Marine Le Pen who managed, in the author's words, to 'detoxify' the brand of the political party she inherited from her hard-core Pétainist and chauvinist father. In the second round of the last presidential election, Le Pen secured the historically high vote of 41.5 per cent to Macron's 58.4 per cent – making the author conclude that France's future does not lie in invoking the memory of Pétain and Vichy government. The Pétain case is closed, the author claims. The reader is not quite convinced. It is worth remembering de Gaulle's words about Pétain quoted in the book. When de Gaulle's aide and future prime minister Georges Pompidou conveyed the news that 'Pétain is dead', de Gaulle corrected him: 'Yes, the Marshal is dead.' And when Pompidou added: 'The affair is now over once and for all', de Gaulle corrected him again: 'No, it was a great historical drama, and a historical drama is never over.' The future will tell whether de Gaulle was right.

There are a few interesting counterfactuals in the last chapter of the book (the one before the Epilogue). Being aware that historians have some second thoughts about counterfactual analysis (Evans 2013), the author provides a methodological framework for a sensible counterfactual (Ferguson 1997; Bunzl 2004). The most interesting counterfactual is a governmental decision not to ask for an armistice in June 1940 but to continue the war and evacuate to French North Africa. The author demonstrates that it was feasible, both militarily and politically, and estimates that some 800,000 men and a substantial part of the French Air Force, with French and British Fleet controlling the Mediterranean Sea, could have been transferred to North Africa. The Third Republic would have lived on, and the government would have operated from French soil since at that time Algeria was *de jure* France. The French armed forces would have continued to fight the war on the side of the Allies (although only with Great Britain and the Commonwealth at the time), relying heavily on the American supply of material. Meanwhile, France would have been fully occupied by the Germans.[21] The political position

21 Considering this counterfactual, the reader realised that Churchill's 4 June 1940 speech in Parliament was not only addressed to the British political elite and people, and the German and American political elite, but also to the French

of the French government and French armed forces would have been much better, the military position of the Allies would have been superior, with prospects for landing in France much earlier than in June 1944, and living conditions in France under German occupation would not have been significantly worse than they were under the armistice terms. Nonetheless, the last government of the Third Republic, under the decisive influence of Pétain, opted for an armistice, estimating that Germany would soon defeat Great Britain and the peace agreement, i.e. *Pax Germanica*, a segment of the emerging New Europe, would be concluded. Obviously, they were betting on the wrong horse. Britain (with the Allies) was victorious in the end and *Pax Germanica* was never to be established. It was rather *Germania dēlenda est* peace that was established.

This was the first of the crossroads at which Pétain selected what in hindsight was the wrong path. But his decision to go that way is rather easily comprehended. Notwithstanding his wrong decision, his reasoning in this case is rather clear, although many of the assumptions that he based that reason proved to be wrong. It is much more difficult to understand his reasoning at the second crossroads, in November 1942, after the Allies landed in North Africa, after the Germans occupied the Free Zone of Vichy government jurisdiction, at a time when it was evident that Great Britain had not surrendered, and America and the Soviet Union were allies against Germany, and – even to great believers of Nazi Germany – the probability of *Pax Germanica* was somewhat remote at that time. So the difficult question is: why did Pétain decide at that time not to move to French North Africa and to side with the Allies, but opted to stay in France, and to change nothing in the relations with Nazi Germany? Especially taking into account that, by violating the armistice agreement and occupying the Free Zone of the Vichy government, Germany gave him a pretext to turn his back on them. The book provides some elements for the answer, but it is up to the reader to make their own explanation, however convincing it may be.

That author points out that it was Isorni, Pétain's lawyer at the trial, who many years later, as a member of the parliament, contemplating the outcome of the Algerian crisis, considered that de Gaulle's 'betrayal' was easy to

government, indicating the possibility of continuing the struggle even if the mainland is occupied. In short "we shall never surrender, and even if, which I do not for a moment believe, this Island or a large part of it were subjugated and starving, then our Empire beyond the seas, armed and guarded by the British Fleet, would carry on the struggle, until, in God's good time, the New World, with all its power and might, steps forth to the rescue and the liberation of the old." (*https://winstonchurchill.org/resources/speeches/1940-the-finest-hour/we-shall-fight-on-the-beaches/*, last visited 5 October 2023).

explain: unlike Pétain, who believed that defending France meant defending her 'soil', de Gaulle had a purely abstract vision of France as an 'idea'. Even for fierce Pétainists, it is difficult to see how their idol was defending French soil after November 1942, with Germans doing whatever they liked to do all over the place, with impunity.

The even greater problem the reader has is to explain the choice at the third crossroads, though one with negligible military and political consequences: the August 1944 evacuation from Vichy French State and arrival in Germany, at Sigmaringen Castle, with a stopover in Belfort. It was crystal clear that the Vichy French State game was over. It was crystal clear that Germany would lose the war – the uncertainty was only about the timing and prospective causalities. Nonetheless, Pétain remained sided with Germany. It is indisputable that he was effectively hijacked by the Wehrmacht, but the question is: why did he let that happen? The worst thing that could happen to him at that moment was to be shot by the Germans. He was 88 years old at that time. Pétainists would have loved that outcome. No trial whatsoever and Pétain's heroic death from a German bullet. Could it have been better? Nonetheless, the reader concludes that Pétain loved himself more than anything else. What remains elusive is his state of mind, his cognitive abilities, especially his touch with reality. His surreal letter to Hitler on 7 April 1945 is not exactly a testimony of a sober person. Perhaps his determination to go back to France and to respond to the charges at the trial was not the result of high moral standards and a sense of duty to the nation, but rather, as suggested earlier by the author, of poor judgment and hope that his aura – the old glow of Marshal Pétain of Verdun and saviour of the nation – still worked. To his quite likely reduced cognitive ability, the reader would add arrogance as a character trait as an explanation of such a decision. Perhaps that trait was decisive: a less arrogant person would have thought twice before going back home.

This splendid book is an excellent and riveting read. The reader is eager to turn page after page, as it has been written like a great novel. The book reminds the reader of André Gide's masterpiece *The Counterfeiters* (*Les Faux-monnayeurs*). There are, in books, many characters and complicated (dynamic) relationships between them, with some hard choices being unavoidable. Although there are many characters in both books, the plotlines start with a few. In Jackson's book, there are two main characters. One is highly visible in the book – Marshal Pétain, who was on trial – with all his choices, blunders, and short-sighted views, with all his arrogance, vain, overconfidence, and authoritarian character. The other one is not visible – General de Gaulle, who (effectively) set the trial. He was also a person with an authoritarian character, but "He was an authoritarian who believed in

the constitution, an opponent of party politics and democracy who adapted his instinctive authoritarianism to both" (Kershaw 2022, 176). Both his political instincts and wisdom enabled France to be saved (twice) and his contribution to a modern, liberal, and non-violent Europe is immeasurable.[22]

The book provides ample food for thought about the grim features of many European nations' histories, not only France's. One of these features is collaboration with the enemy, after a defeat, based on the lesser evil principle, either out of a genuine wish to diminish the suffering of the people of the defeated nation or for some hidden agenda to be pursued – usually in political institutions and domestic politics, hardly of any genuine interest to a victorious foreign power. Is collaboration – the one noble, with a genuine wish for some betterment – really the lesser evil? Perhaps it is only sharing responsibility with the enemy? What are the stains on the nation that are created by such collaboration, especially if prominent people, like (previous) war heroes, are involved? These are questions, with some specific local colours, that are frequently visited and revisited in genuine soul-searching of a nation's past. The book demonstrates that straightforward answers should not be expected. Nonetheless, this does not mean that the search for these answers should be abandoned.

The other question is the one about retribution and purges after the liberation – either from the foreign occupation or an oppressive regime, be it domestic or foreign. What should be a proper punishment for those involved, which would not greatly harm the social fabric of the nation, i.e. which would polarise society beyond repair? Should the ugly past be forgotten, or should collective amnesia be established in the name of social cohesion and a fresh start, like it has been done in Kazuo Ishiguro's *The Buried Giant*? Is that the lesser evil? Or perhaps the collective amnesia will backfire at some point with a vengeance? François Mauriac's comment after Pétain's sentence that 'a trial like this one is never over and will never end' proved correct in hindsight, at least for the time being. Nonetheless, the book demonstrates to the reader that Pétain's trial, however painful the soul-searching that it induced proved to be a solid ground for a fresh start for France. Perhaps that is the lesson that can be learned – facing the devil early on cannot be bad after all.

22 More on de Gaulle's personality: "He was dogmatically inflexible, yet tactically subtle. For many who had to deal with him, he was insufferable – arrogant, intolerant, abrasive, often curtly dismissive even of loyal supporters. But at the same time he could exude charm and attract deep devotion" (Kershaw 2022, 176). By the way, the reader finds no traces of Pétain's charm throughout the book covering his trial as well as his whole life.

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(see especially Demsetz 1967)

(Scott and Coustalin 1995)

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T(ext): Following Ely (1980, page), we argue that

R(eference list): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

Two authors

T: As demonstrated elsewhere (Daniels, Martin 1995, page),

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T: Using the method of Greene (1997), we constructed a model to show

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Journal article

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T: The model used in Levine *et al*. (1999, page)

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T: The fairness or efficiency benefits of bad-faith laws are discussed at length in *Texas Law Review* (1994)

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T: Use abbreviated reference for in-text citations of cases (CJEU C-20/12, or Giersch and Others; Opinion of AG Mengozzi; VSS Rev. 1354/06) consistently throughout the paper.

R: Do not include cases in the reference list.

Legislation

F: Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, Art. 6 (3); Zakonik o krivičnom postupku [Code of Criminal Procedure], *Official Gazette of the RS*, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014, Art. 2, para. 1, it. 3.

T: Use abbreviated reference for in-text citations of pieces of legislation (Regulation No. 1052/2013; Directive 2013/32; ZKP, or ZKP of Serbia) consistently throughout the paper.

R: Do not include legislation in the reference list.

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Footnotes in appendixes should be numbered consecutively with those in the rest of the text.

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Graphics files should be black and white.

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