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FACTORS OF THE EVOLUTION OF AIR PASSENGER SEGMENTATION: THE CASE OF THE SERBIAN AIR TRAVEL MARKET

The paper investigates the evolution of air passenger profiles in terms of regulatory environment, competitive landscape, socio-economic and demographic trends. The research is supported by passenger surveys carried out since 2001. The surveys have been designed to provide objective and in-depth insights into the preferences and behaviors of air passengers in the

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Serbian market. The resulting passenger segments are categorized based on socioeconomic and travel purpose criteria, but the surveys conducted at Serbian airports reveal that competition triggered the service quality to become a major issue in the Serbian market, after the entrance of low-cost carriers. The research of future projections of air passengers in Serbia is based on the Delphi method for two-time horizons (2025 and 2035) and three future scenarios are proposed.

Key words: *Air passenger profiles. – Air transport. – Passenger surveys. – Air transport market deregulation. – Projections.*

1. INTRODUCTION

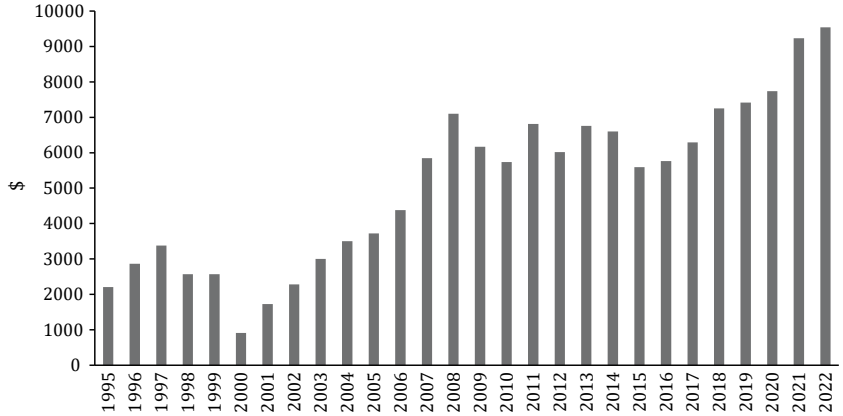
In order to perceive the development of the air transport market in Serbia during the 2000–2023 period, the air passenger profile, segments, and their evolution are analyzed. This analysis examines how air passenger profiles changed over time driven by the regulatory environment, competitive landscape, and socioeconomic and demographic trends.

In the past three decades, the Serbian air transport industry has adapted slower (in the beginning of considered period) or faster (from 2014) to new market conditions. The economic and political situation in the country has been changing dramatically. In total, the population decreased from 7.7 million in 1994 to 6.6 million in 2023 (Statistical Office of the Republic of Serbia 2024). The decrease in the population is caused by persistently low birth rates, high mortality rates, and continued emigration. Despite immigration from neighboring countries, the population decline trend is very pronounced. According to the World Bank data, the largest negative net migration (the total number of immigrants less the annual number of expatriates) was in 1997 (-496,000) (Federal Reserve Bank of St. Louis 2024). Significant emigration of highly educated people (university and scientific staff, IT experts, etc.) and skilled labor (medical staff, professional drivers) has been noted in the past three decades, but official data from censuses and registration instruments largely underestimate the volume of international migration (Rašević 2016).

The period from 2000 to 2023 was characterized by an improvement in the economic situation (GDP per capita was USD 914.7 in 2000, and USD 9,537 in 2022, Figure 1). Serbia went through a process of transition to a market-based economy and from a developing and low-income country crossed to the upper middle-income category. Despite many global crises (COVID-19, economic recession, Russian-Ukraine war, war in Gaza), affecting

various markets and industries directly, Serbia has managed to preserve the stability of its economy based on cumulative real GDP growth during the period 2020–2023 of around 12% (National Bank of Serbia 2024).

Figure 1. GDP per capita (current USD)



Source: authors, based on NBS data.

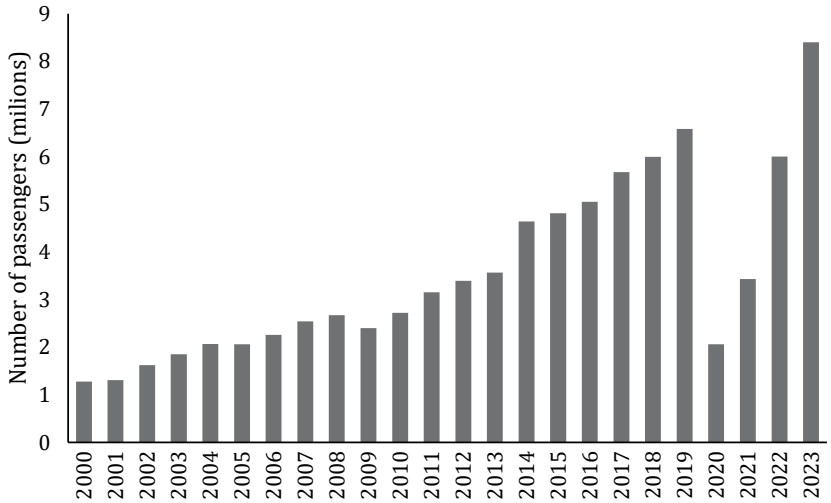
It is worth noting that the GDP per capita in period 1995 to 2000 was between USD 2,207 and USD 3,380. The GDP per capita in the late 1990s was approximately three times lower than the GDP per capita in 2022.

Air transport regulation in Serbia has evolved in line with international standards, but in the past three decades, few regulatory factors fostering a favorable business environment can be identified. The negotiations about the Stabilization and Association Agreement (SAA) between Serbia and the European Union (EU) started in 2005 (Ministry of European Integration – Serbia 2007). This was an important framework for cooperation between the EU and Serbia, which aimed to promote political stability, economic development, and European integration in the country. The SAA was signed in April 2008, and the ratification process in the member countries of the European Union was completed on 18 June 2013. Subsequently, in June 2006, the EU and the countries of South East Europe signed an agreement on the establishment of a European Common Aviation Area (ECAA) by 2010. This agreement, also known as the Open Skies Agreement, enabled the arrival of low-cost airlines to Serbia. Apart from these agreements on a multilateral level, Serbia has been extensively negotiating and signing bilateral air services agreements (covering aspects such as route rights, capacity, safety standards, and regulatory cooperation) with numerous countries, with the aim of expanding its air connectivity. During this period, Serbia has been working towards aligning its aviation regulations with EU standards, which involves

monitoring compliance with safety, security, and operational standards, as well as enforcing regulations related to ticketing, pricing, and passenger rights (Civil Aviation Directorate of the Republic of Serbia, 2013, 2024).

Political and economic changes in Serbia had a tremendous influence on the air transport market and its growth. The number of passengers at Serbia's airports (Belgrade Nikola Tesla and Niš Constantine the Great) has increased more than sixfold (from 1.28 million in 2000 to 8.4 million in 2023), Figure 2. In 2020, due to the COVID-19 pandemic, the number of passengers at Serbian airports decreased to 2.06 million.

Figure 2. Number of passengers at airports in Serbia (2000–2003)



Source: authors.

This paper provides an empirical analysis of the evolution of passenger characteristics in Serbia. The analysis is based on data collected from the surveys conducted at airports in Serbia between 2001 to 2017 and the Delphi method, supported by the findings obtained from the 2021 SYN+AIR survey.[1] Passenger segmentation and profiles are studied to better understand consumer behavior, which may support policy-making and generate ideas for tailoring products and services for airlines (airline

[1] This survey was conducted online due to the world pandemic of COVID-19, for the purpose of the SYN+AIR project (894116) from the H2020-SESAR-2019-2 call. The survey was active for one month and respondents were mostly from Greece, Italy, Spain and Serbia (where project partners originated from), as well as from the other countries in Europe.

schedule, including appropriate destinations in their offer, in-flight services, aircraft class configuration, etc.) and airports (airport access services, lounges access, parking services, technology innovations, digitalization, passengers experience improvement, etc.) in a more effective way.

2. LITERATURE REVIEW

Selected papers are presented to provide a short overview of recent research related to market segmentation, passenger profiles, and the application of the Delphi method in developing future scenarios. Over the past two decades, numerous studies have been conducted to provide an understanding of passenger segments in air transport. Harrison *et al.* (2015) proposed a new market segmentation model by including time sensitivity, degree of engagement, proficiency of traveler, and trip purpose to identify groups of international air passengers at Brisbane International Airport. Wittmer and Hinnen (2016) argued that the need for new segmentation is induced by the diverse cultural backgrounds of the passengers, the power of digitalization, different lifestyles or environmental concerns.

Generally, passenger profiles are changing over time, and in the upcoming period they will depend on future trends in socioeconomic, demographic, and technological factors affecting traveler behavior. This claim is confirmed in Cho and Min (2018), which considered the characteristics of low-cost carriers (LCCs) and non-LCCs passengers through similarities and dissimilarities between two time horizons (2005 and 2015) in the USA. The main finding is that in the past LCCs were able to meet the needs of price-sensitive passengers, but there is evidence of a considerable shift in the passenger mix according to airline type as a result of changing customer behaviors and airline services. Kluge *et al.* (2018) determined six future air passenger profiles for 2035, taking into account changes in environmental awareness, increased use of information and communication technologies, and disruptive developments, such as autonomous driving.

Concerning the use of the Delphi method in developing future scenarios, there are numerous papers that provide guidelines for this process (Linstone, Turoff 2011; Okoli, Pawlowski 2004; Melander 2018). There are also many papers applying the Delphi method in research related to air transport. Mason and Alamdari (2007) conducted the Delphi panel for the future trends in the European air transport sector. They concluded that economic growth, business confidence, people's desire to travel, and price are key drivers of demand for air travel. Linz (2012) presented scenarios for the future of aviation in 2025. According to expert estimations, traffic

growth on long-haul routes will be primarily linked to emerging countries, a number of substitution threats, liberalization and deregulation, increasing industry vulnerability, the finiteness of fossil fuels, and emissions trading. The emergence of low-cost cargo carriers and air cargo substitution by sea transportation were identified as potential surprises. Kluge *et al*. (2020) considered future projections of European air passengers in the light of intermodal, door-to-door (D2D) travel, with the 2035 time horizon. Their research resulted in three possible future scenarios obtained from a hierarchical cluster analysis: personalized D2D travel (highly personalized digitally-controlled future travel), integrated D2D travel (collaboration to offer integrated services and create valuable travel time), and the game changer (full monetization of the cabin by tech companies).

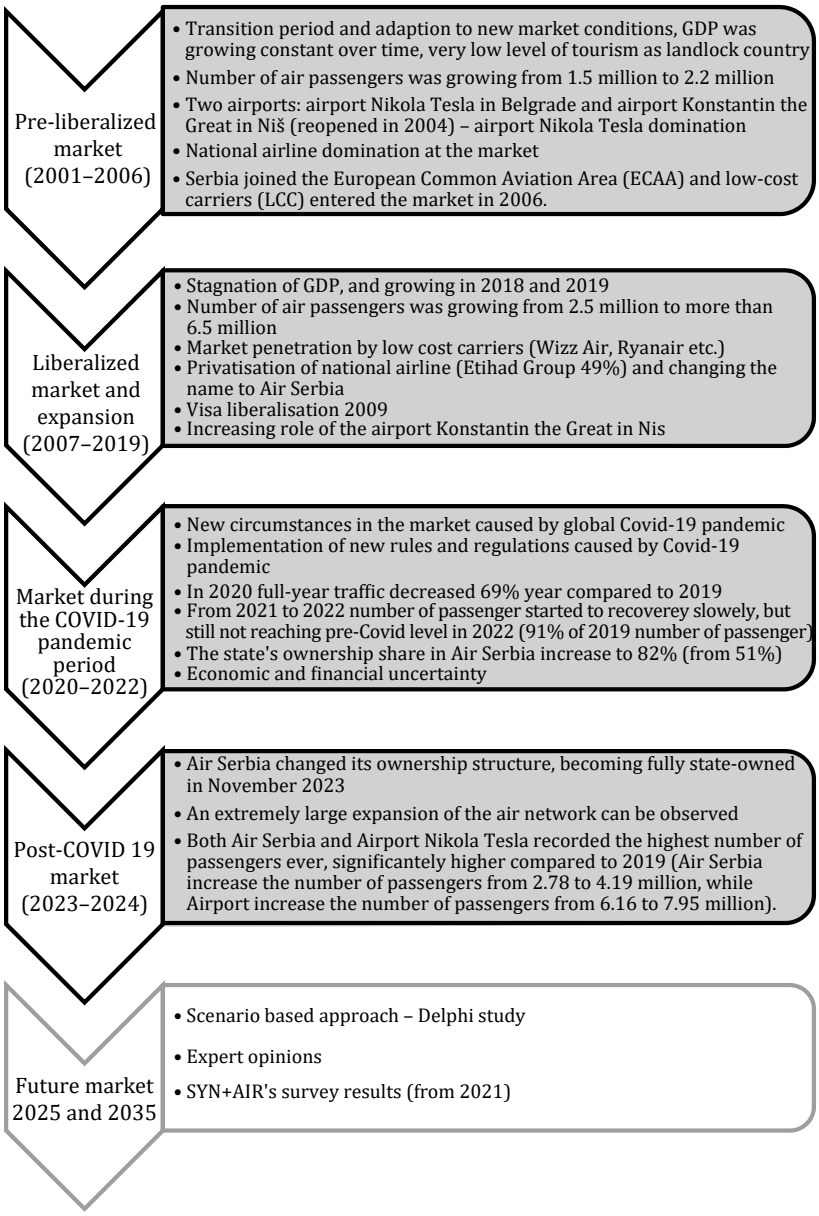
3. METHODOLOGY AND OBSERVED PERIOD

Our approach to the air passenger segment evolution in the Serbian air travel market is based on the analysis over different periods of time (Figure 3). These periods featured specific events and processes that marked the entire period.

Appropriate analysis of these periods is supported by the results from surveys conducted through face-to-face interviews at Belgrade (primarily international) and Niš (small regional international) airports, during the summer or winter schedule, covering one week, as well as online passenger and Delphi surveys conducted during 2021. There were eight face-to-face surveys between 2001 and 2017 (Table 1). The surveys were designed to enable a general analysis of the passenger profile at the airports in Belgrade and Niš. It was presumed that the characteristics of departing and arriving passengers are very similar because the flows in the two directions were symmetrical. Consequently, only departing passengers were interviewed due to the activities and the time that they spent in the terminal. The interviews were carried out in the check-in area and at the airport lounge, after passengers had passed through security and passport control, but before proceeding to the gate.

Finally, a market forecast for the years 2025 and 2035 is given. These forecasts for the air travel market in 2025 and 2035, and the appropriate passenger profiles, are defined based on expert opinions expressed in the Delphi study (March/April 2021) and supported by the last SYN+AIR survey conducted online (April 2021, Table 1).

Figure 3. Serbian air travel market characteristics during different periods



Source: authors.

Table 1. Information about the surveys

Year	Survey period	Number of respondents	Year	Survey period	Number of respondents
2001	27 Jul – 02 Aug	875	2010	15 Mar – 21 Mar	1475
2002	21 Apr – 27 Apr	1058	2013	April–May	766
2003	30 May – 05 Jun	1039	2017	09 May – 18 May	502
2005	12 Dec – 18 Dec	1109	2021	March–April	12 experts
2006	18 Dec – 24 Dec	1023	2021	April	562

Source: authors.

The following subsections explain each of these periods in more detail, providing better insight into Serbian market conditions as well as European market conditions.

3.1. Pre-Liberalized Air Transport Market in Serbia (2001–2006)

After a long period of political and economic isolation, conditions for the development of air transport were slowly created in the country, and all the industry stakeholders had to adapt to these changes. Moreover, they had to catch up to the new trends on the global market (globalization, liberalization, new business models, etc.). Regarding the situation in the Serbian air travel market, it can be observed that regulatory conditions for LCC entrance to the market were created in 2006. During the period from 2000 to 2006, Serbia went through a process of transition from a regulated to a market-based economy and experienced fast economic growth. During that period, the Serbian economy grew 4%–5% annually, average wages quadrupled, and economic and social opportunities improved (World Bank Group, 2019). The key drivers for air transport demand were geopolitical (visa restrictions, outgoing tourism, migrations, etc.) and economic (personal income, etc.).

Thus, the period before the entry of LCC into the market was characterized by the dominant role of the national carrier, Jat Airways,[2] which performed most of the international traffic. International air transport was governed

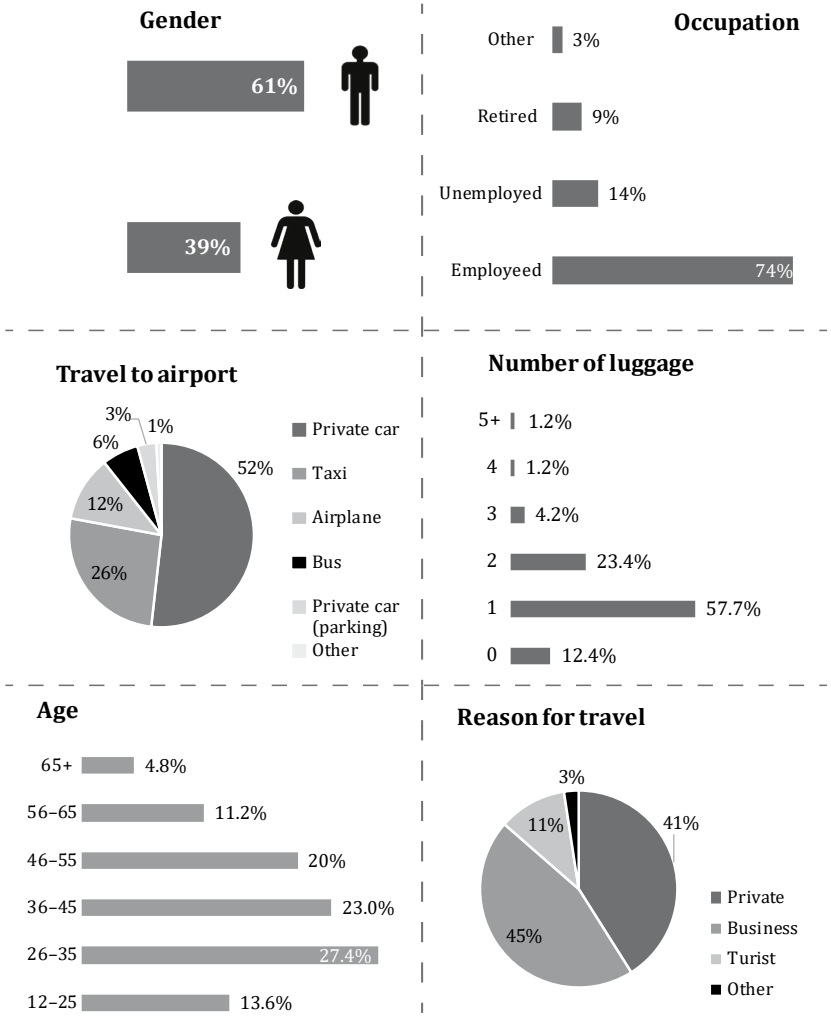
[2] The national airline was known as Yugoslav Airlines (JAT) until 2003, when its name was changed to Jat Airways. Following the partial privatization of the national airline in 2013, it was renamed Air Serbia.

by bilateral air services agreements between Serbia and other countries. In 2001 there were 8 other airlines, in addition to Jat Airways, whose transport services were available to passengers. The number of airlines doubled in 2006. Regardless of this increase in the number of carriers in the market, the flag carrier was a monopolist on a large number of routes, which also influenced high prices of tickets that only a small percentage of the population was willing to pay. During the period from 2001 to 2006, the number of passengers per year at Serbia's airports (Nikola Tesla Belgrade and Constantine the Great Niš) grew very slowly, from around 1.5 million in 2001 to 2.22 million in 2006.

At the same time, the EU created the internal market and removed all barriers, to foster heathier airlines competition. New airlines emerged providing very low air fares and offering more choice to passengers in terms of destinations, airports, and services. However, not all the EU countries developed at the same pace, due to a significant disproportion in the respective levels of socioeconomic development. The air transport market in Europe encompasses different national markets and the development was dictated by the time when the liberalization started, internal (national) regulations, macroeconomic and transport conditions, socioeconomic circumstances, etc. What was common for European countries was that most of them had a state-owned national airline already operating international and domestic traffic from its national home base(s). The development of the Serbian air transport market was very similar to other countries in Central and Eastern Europe (CEE) with a small shift in time. They all share a common history, similar economic system, and geographical location, which is grounds to put them in the same group and analyze the air transport development in Serbia from that perspective, with the inclusion of individual features for each country. During the 2000–2004 period, the air transport markets in CEE countries developed very slowly, despite being required to join the common EU/EEA single aviation market and open their national markets. Since 2004 LCCs have been the main driving force behind the changes in the air transport market in the CEE (Fu *et al.* 2010).

The most important results from surveys, with the total sample size (overall 5,104 respondents) for the period from 2001 to 2006, are presented in Figure 4 as the average values for the observed period. The survey design was consistent across the years, the same principles were followed each year (air passengers were questioned after passing through security), which allowed for the comparison of the presented data. Figure 4 shows that from 2001 to 2006 men were air passengers in majority, most of them were employed, more than 50% used a car to access the airport, the majority of respondents carried only one piece of luggage, and passengers travelled equally for business and privately. During the observed period, respondents aged between 26 to 35 took the highest number of trips.

Figure 4. Passenger characteristics in the Serbian market, during the 2001–2006 period



Source: authors.

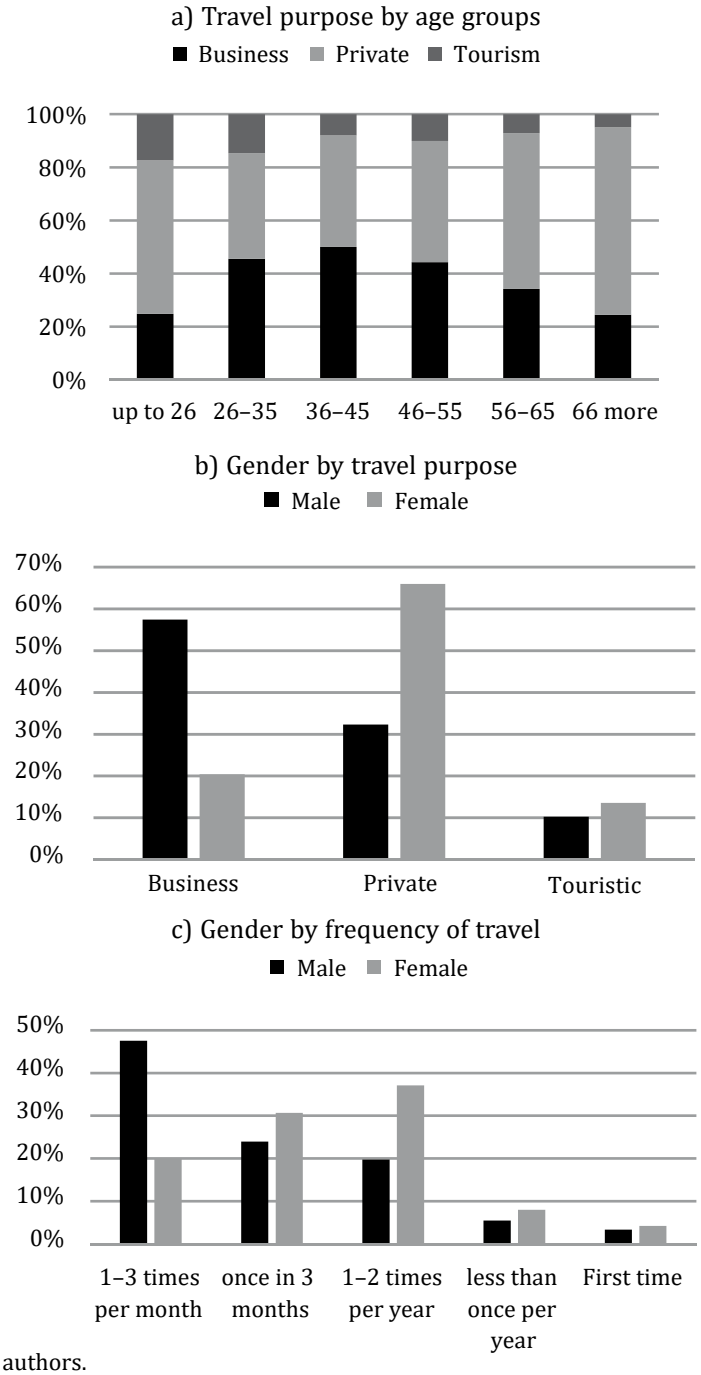
Additional analysis were done to profile passenger segments and to gain a more detailed picture of the market. The selected cross-tabulation based on the data from a survey conducted in 2006 at the airport in Belgrade (1,023 responses) are presented to demonstrate the differences between air passenger age groups, gender, trip purpose, citizenship, social status, travel frequency, and airport access mode choice (Table 2, Figure 5). In all

presented cross-tabulations, a dependence between examined variables is statistically confirmed by the Chi-square (χ^2) test of independence. The null hypothesis in the Chi-square test is that there is no dependence between the two observed variables and the alternative hypothesis is the opposite. In all analyses within this paper, the significance level (α) is set to 0.05 (5% risk of declaring that two variables are not independent when they are independent). The hypothesis of independence fails to be rejected if the test statistic is lower than the critical Chi-square value or if the corresponding p-value is equal or less than the significance level. If the test statistic is higher than the critical Chi-square value, the hypothesis of independence can be rejected. The obtained values of Chi-square tests and their statistical significance are presented in Tables 2 through 6, while for cross-tabulations graphically presenting those results are omitted so as not to overload the graphics.

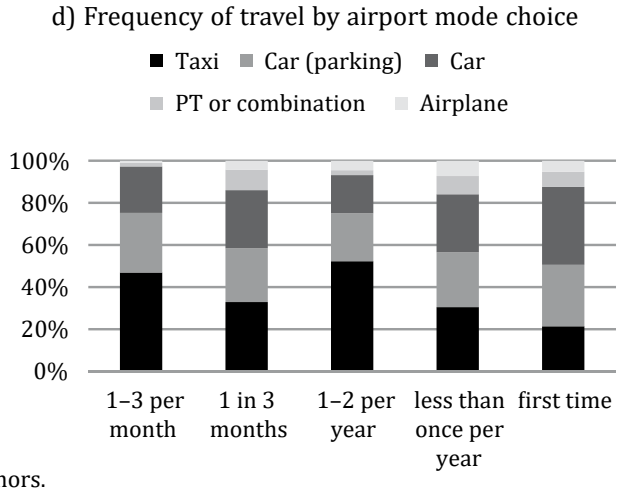
The comparison between different age groups of respondents and their travel purpose is presented in Figure 5a, from which it can be concluded that people aged 56 and older mostly travelled for private and then business purposes. People aged between 46–55 travelled for private and business purposes equally. Younger people, aged 26–45, travelled mostly for business, and then for private purposes. Tourists were mostly up to 36 years of age.

It is also interesting to note that women traveled more for private purposes while men traveled for business purposes. Within tourists, there were slightly more women than men. The differences in travel behavior by gender were mostly due to the complexity of activities more often experienced by women than men (e.g., women often have multiple tasks and activities, such as employment, household, child care, etc.). Men traveled more frequently than women. Most of the men traveled very often (1–3 times per month), while most of the women traveled 1 or 2 times per year.

Figure 5. Results of selected cross-tabulations of the survey conducted in 2006



Source: authors.



Source: authors.

Related to airport access mode choice, 41.8% of respondents were dropped off by car by someone, while 4.4% of respondents drove by car and parked in the airport parking. Taxi was the mode of choice for 28.5% of respondents, while 18.7% of them came by plane.[3] Bus as mode choice (Yugoslav Airlines/JAT Airways shuttle bus or public transport bus) was the mode choice for 4.8% of respondents, and all results are statistically significant at the level of risk lower than 5% (Table 2). Part of the passengers arrived at the airport on another flight and had connecting flights. They are presented in Table 2 as using airplanes as the access mode.

Table 2. Cross-tabulation of selected categories by travel purpose

	Travel purpose			
Airport access mode choice	Business Count (% within airport access mode choice)	Private Count (% within airport access mode choice)	Tourism Count (% within airport access mode choice)	Total Count (% within airport access mode choice)
Taxi	134 (46.7%)	130 (45.3%)	23 (8.0%)	287 (100%)
PT or combination	14 (36.8%)	17 (44.7%)	7 (18.4%)	38 (100%)
Car (dropped off by someone)	164 (39.0%)	200 (47.5%)	57 (13.5%)	421 (100%)
Car (parked)	24 (54.5%)	16 (36.4%)	4 (9.1%)	44 (100%)

[3] The survey from 2006 was conducted in front of gates, therefore transfer passengers (arriving by plane) were included in the sample.

Airplane	58 (30.9%)	106 (56.4%)	24 (12.8%)	188 (100%)
Travel purpose by airport access mode cross-tabulation: χ^2 (8, N = 978) = 20.554[a], p-value = .008, a: 1 cell (6.7%) has an expected count of less than 5. The minimum expected count is 4.47.				
Travel frequency	Business Count (% within travel frequency)	Private Count (% within travel frequency)	Tourism Count (% within travel frequency)	Total Count (% within travel frequency)
1–3 per month	244 (69.5%)	87 (24.8%)	20 (5.7%)	351 (100%)
1 in 3 months	107 (39.2%)	142 (52.0%)	24 (8.8%)	273 (100%)
1–2 per year	49 (17.8%)	176 (64.0%)	50 (18.2%)	275 (100%)
less than once a year	8 (12.1%)	45 (68.2%)	13 (19.7%)	66 (100%)
first time	4 (10.8%)	22 (59.5%)	11 (29.7%)	37 (100%)
Travel purpose by travel frequency cross-tabulation: χ^2 (8, N = 1002) = 226.059[a], p-value <.0001, a: 1 cell (6.7%) has expected count less than 5. The minimum expected count is 4.36.				
Travel group size	Business Count (% within group size)	Private Count (% within group size)	Tourism Count (% within group size)	Total Count (% within group size)
1	314 (44.2%)	325 (45.8%)	71 (10%)	710 (100%)
2	77 (30.9%)	134 (53.8%)	38 (15.3%)	249 (100%)
3	10 (32.3%)	15 (32.2%)	6 (48.4%)	31 (100%)
4	11 (64.7%)	3 (17.6%)	3 (17.6%)	17 (100%)
Travel purpose group size cross-tabulation: χ^2 (6, N = 1007) = 23.148[a], p-value = .001, a: 2 cells (16.7%) have an expected count of less than 5. The minimum expected count is 1.99.				
Citizenship	Business Count (% within citizenship)	Private Count (% within citizenship)	Tourism Count (% within citizenship)	Total Count (% within citizenship)
Foreigner	246 (46.4%)	227 (42.8%)	57 (10.8%)	530 (100%)
Expatriate	37 (30.6%)	77 (63.6%)	7 (5.8%)	121 (100%)
Serbian	129 (36.2%)	173 (48.6%)	54 (15.2%)	356 (100%)
Travel purpose by citizenship cross-tabulation: χ^2 (4, N = 1007) = 25.833[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 14.18.				

Source: authors.

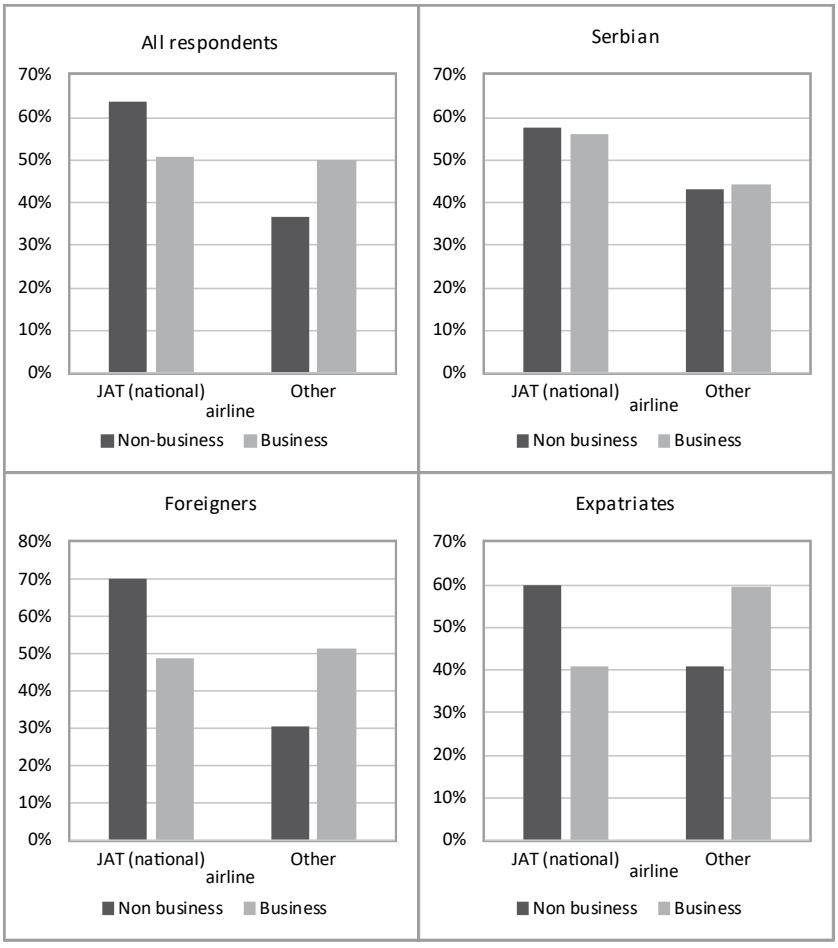
Business and private travelers came to the airport mostly by car (someone drove them to the airport), followed by taxi and plane. Business passengers more often left their cars in the airport parking compared to the passengers who traveled privately. Both used the Yugoslav Airlines/JAT Airways bus service equally. Tourists were usually brought by car to the airport, followed by plane and taxi. Business passengers travel very often, while most of the passengers who travel for private purposes usually travelled 1 or 2 times per year.

It is interesting to note that foreign passengers were dominant in all travel purpose categories. Foreign passengers were traveling mostly for business, while passengers from Serbia and expatriates were mostly traveling for private purposes. Passengers who travelled for tourism were also foreigners. Foreigners mostly came by plane, followed by taxi. Also, many of them had someone take them to the airport. Expatriates had someone to take them to the airport in most cases. Their second mode choice was the taxi. People from Serbia predominantly had someone take them to the airport. Among foreigners, there were almost 50% more men than women. Among expatriates, there were more women, while among Serbian passengers women traveled as much as men.

Figure 6 shows the distribution among airline choices between Jat Airways and all other airlines that were present in the Serbian air market during the observed period (Lufthansa, Montenegro Airlines, Alitalia, British Airways, etc.). Business passengers chose almost equally Jat Airways (207 respondents) and other airlines (205 respondents), while leisure passengers' choice was predominantly Jat Airways (306 respondents) vs. other companies (171 respondents) (Figure 6).

To identify meaningful groups of passengers, a Partitioning Around Medoids (PAM) cluster technique was performed (Ivanov, Kalić 2011). The results from PAM confirmed the general segmentation of passengers into users who are price sensitive, i.e., the leisure segment, and the users who are price insensitive, i.e., the business segment. During this period the business and non-business segments had almost equal shares (45% and 52%, respectively) and this proportion was stable over the years. Although this segmentation did not bring any novelty to a general market picture, it presents a correct assessment of the circumstances and environment at that time.

Figure 6. Airline choice by respondents' nationality and trip purpose (data from 2006 survey)



Source: authors.

3.2. Liberalized Air Transport Market and Expansion in Serbia (2007–2019)

The period between 2007 and 2017 featured substantial GDP fluctuation, which was improved in 2018 and 2019 when the Serbian economy showed signs of moderate recovery. By the end of 2019, the applied macroeconomic policy showed some positive results, which led to macroeconomic stability and improvements in the key economic indicators (e.g., price stability,

intensified investments, increased GDP and employment, etc.). After Serbia joined the ECAA in 2006, the aviation market changed in terms of the structure of the market, entry, and competition. Soon after that, LCCs entered the Serbian market, causing a significant traffic increase at airports in Serbia. In the decade from 2007 to 2017, the number of passengers at Serbia's airports more than doubled, from around 2.5 million in 2007 to 5.6 million in 2017. The LCCs initially entered the market timidly, but with the arrival of one of the largest LCCs in Europe, Wizz Air, in 2010, the LCC expansion started bringing about certain changes.

Meanwhile, the Serbian national airline was rebranded from Jat Airways to Air Serbia in 2013, after Etihad acquired 49% ownership. The next important event happened in May 2015, when the U.S. and Serbian governments signed an Open Skies Agreement, which allowed for the introduction of direct flights to the United States. The first direct flight to New York, operated by Air Serbia, took place in June 2016. Due to the implementation of the Open Skies agreement, the abolition of the Schengen visa requirement in 2009, and new airlines entering the Serbian aviation market, Serbian citizens were able to use new services at significantly lower prices.

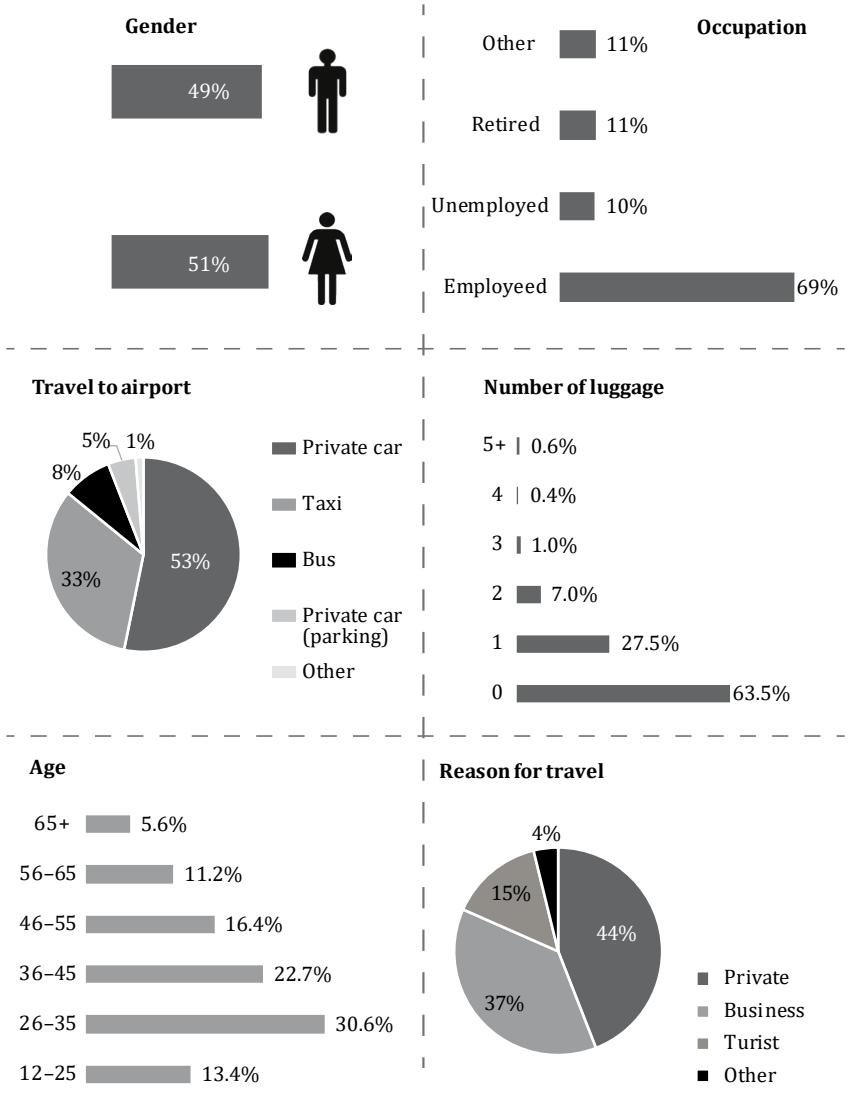
All these changes positively affected airport activity growth in Serbia. The number of passenger at Nikola Tesla Airport rose to 6.1 million in 2019. This was driven by the introduction of a larger number of new routes at more affordable prices. Along with Air Serbia, the Belgrade Airport also became a base airport for Wizz Air (in October 2012).

The Niš Airport, in southern Serbia, also experienced a strong growth in passenger traffic between 2007 and 2019. Many airlines had multiple attempts to establish sustainable transport services from this airport, but it was Wizz Air that succeeded, in 2015. Shortly after, Ryanair followed its example by announcing flights from the Niš Airport. In 2019 the Niš Airport handled more than 420,000 passengers.

The most important characteristics of passengers in the Serbian market in the period of 2007–2019 are presented in Figure 7. The total sample size for the 2007–2019 period (three surveys) is 2,743 passengers.

The surveys (in 2010, 2013, and 2017) showed that passenger segments have been changing over time in terms of age structure, distribution of passengers by occupation, trip purpose, mode choice for traveling to the airport, etc. (Figure 7). The gender share changed, reaching almost equal percentages. Regarding the occupation, it is notable that people without income travelled more than before the advent of LCC.

Figure 7. Characteristics of passengers in the Serbian market during the 2007–2019 period

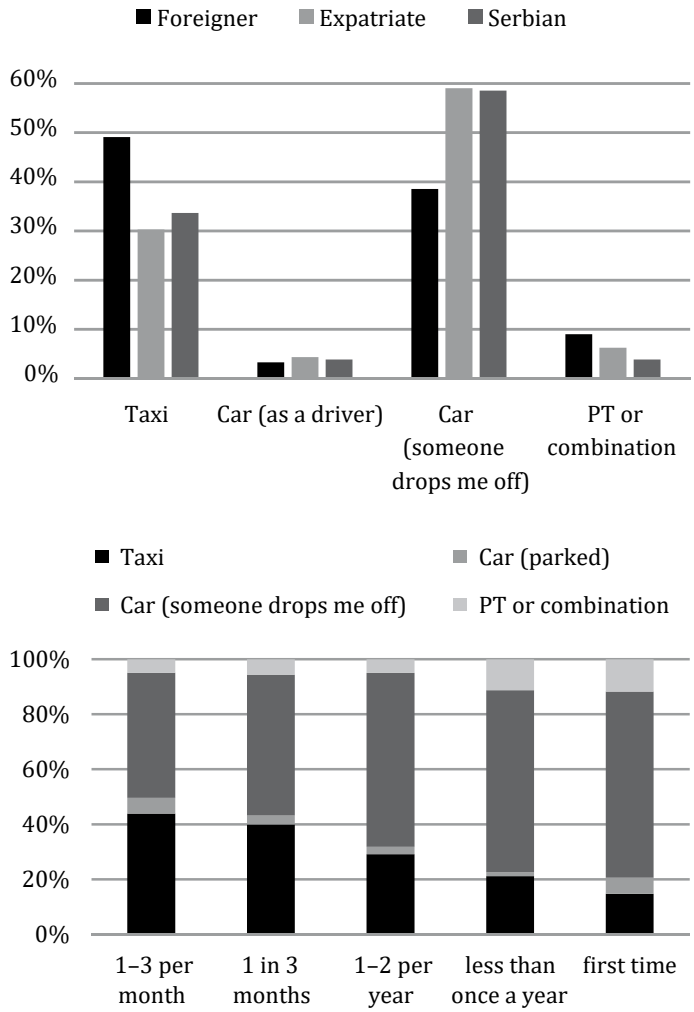


Source: authors.

The choice mode of traveling to the airport in 2010 changed slightly. Namely, private cars (drop off) still had the largest share (54.2%), but the share of taxis increased to 36.4%, while the share of buses decreased to 5.6%. The airport parking was used by only 3.9% of respondents. All these changes can be explained by the better social status of passengers and the improved Serbian economy.

The distributions of choice of travel mode to the airport, depending on citizenship and frequency of travel, are presented in Figure 8. Foreign passengers used taxi or public transport (PT) more than expatriates or passengers from Serbia, who were mostly dropped off by car at the airport. Related to frequency of travel, taxi as a mode choice was proportional to the frequency of travel, meaning that passengers who travelled more often tended to use the taxi more than less frequent travelers, who mostly used a car with someone else as a driver.

Figure 8. Mode choice to airport by a) citizenship and b) frequency of travel, in the 2010 survey



Source: authors.

Table 3 shows the same cross-tabulations as Table 2, now with data from the survey conducted at the Nikola Tesla Airport in March 2010. All results, differences among the categories, are statistically significant at the level of risk lower than 5%.

Table 3. Cross-tabulation of selected categories by travel purpose, in the 2010 survey (Belgrade Airport)

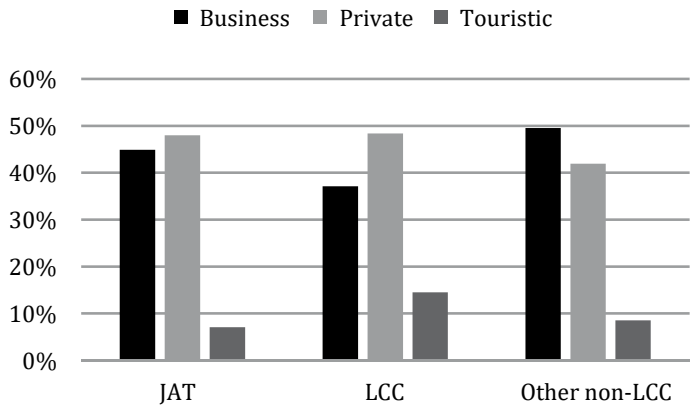
Travel purpose				
Airport access mode choice	Business Count (% within airport access mode choice)	Private Count (% within airport access mode choice)	Tourism Count (% within airport access mode choice)	Total Count (% within airport access mode choice)
Taxi	308 (57.4%)	189 (35.2%)	40 (7.4%)	537 (100%)
Car (parked)	34 (59.6%)	17 (29.8%)	6 (10.5%)	57 (100%)
Car (dropped off by someone)	325 (40.7%)	406 (50.8%)	68 (8.5%)	799 (100%)
PT or combination	35 (42.7%)	38 (46.3%)	9 (11.0%)	82 (100%)
Travel purpose by airport access mode cross-tabulation: χ^2 (6, N = 1475) = 43.055[a], p-value <.0001, a: 1 cell (8.3%) has an expected count of less than 5. The minimum expected count is 4.75.				
Travel frequency	Business Count (% within travel frequency)	Private Count (% within travel frequency)	Tourism Count (% within travel frequency)	Total Count (% within travel frequency)
1–3 per month	339 (69.2%)	130 (26.5%)	21 (4.3%)	490 (100%)
1 in 3 months	208 (48.3%)	188 (43.6%)	35 (8.1%)	431 (100%)
1–2 per year	137 (30.7%)	256 (57.4%)	53 (11.9%)	446 (100%)
less than once a year	11 (15.5%)	50 (70.4%)	10 (14.1%)	71 (100%)
first time	7 (20.6%)	25 (73.5%)	2 (5.9%)	33 (100%)
Travel purpose by travel frequency cross-tabulation: χ^2 (8, N = 1472) = 184.873[a], p-value <.0001, a: 1 cell (6.7%) has an expected count of less than 5. The minimum expected count is 2.79.				
Travel group size	Business Count (% within group size)	Private Count (% within group size)	Tourism Count (% within group size)	Total Count (% within group size)
1	451 (48.8%)	425 (46%)	48 (5.2%)	924 (100%)
2	151 (40.7%)	165 (44.5%)	55 (14.8%)	371 (100%)

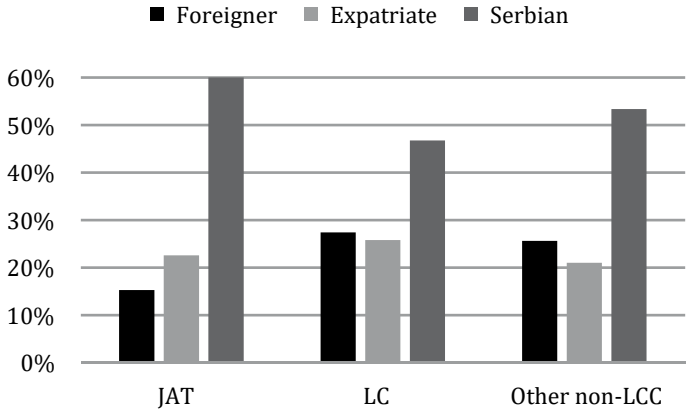
3	49 (55.1%)	33 (37.1%)	7 (7.9%)	89 (100%)
4+	51 (56%)	27 (29.7%)	13 (14.3%)	91 (100%)
Travel purpose by group size cross-tabulation: χ^2 (6, N = 1475) = 46.010[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 7.42.				
Citizenship	Business Count (% within citizenship)	Private Count (% within citizenship)	Tourism Count (% within citizenship)	Total Count (% within citizenship)
Foreigner	220 (66.3%)	92 (27.7%)	20 (6.0%)	332 (100%)
Expatriate	49 (15.3%)	257 (80.3%)	14 (4.4%)	320 (100%)
Serbian	433 (52.6%)	301 (36.6%)	89 (10.8%)	823 (100%)
Travel purpose by citizenship cross-tabulation: χ^2 (4, N = 1475) = 238.988[a], p-value <.0001 a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 26.68.				

Source: authors.

Related to airline choice, the entrance of LCCs into the market changed the distribution of passengers. Starting from the modest number of operations in 2007, LCCs largely expanded their operations in 2010. In 2017 LCCs reached a share of approximately 20% of passengers in this market. Figure 9 presents cross-tabulation of airline choice by travel purpose and citizenship. Age structure has also been changed, and the increase is observed in the segments of young passengers (26–35) and passengers older than 65 years, while the 46–55 years segment recorded the largest decrease.

Figure 9. Airline choice by a) travel purpose and b) citizenship, from 2010 survey



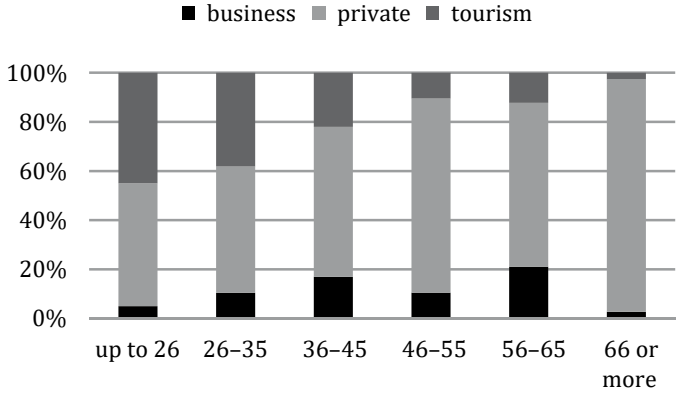


Source: authors.

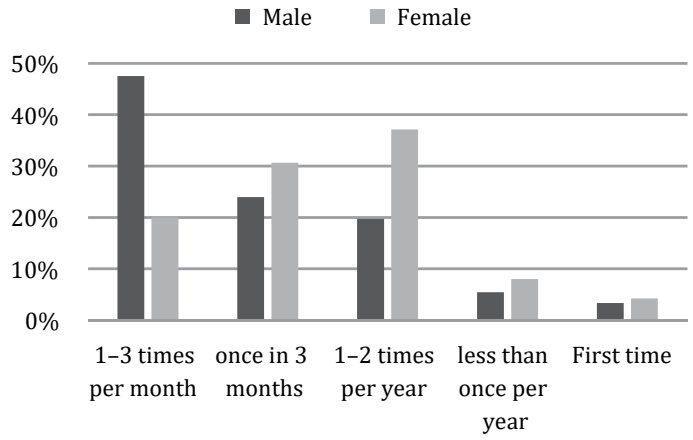
The last part of the in-depth analysis of the Serbian market's air passenger attitudes and behaviors during the 2007–2019 period is related to the data obtained from the survey conducted in 2017 at the Niš Airport. This airport is a regional one, intended mostly for LCCs, which led to the creation of different passenger profiles compared to the Belgrade Airport. From the total of 502 responses, the following results are selected. The largest share in all age categories related to travel purposes was private, followed by tourism which was almost equal to private purpose share among passengers up to 26 years of age (Figure 10a). Traveling for tourism decreased with age, while most passengers traveling for business were in the 36–45 and 56–65 age groups. A lower share of business passengers is expected due to the dominance of LCC flights at the Niš Airport.

Figure 10. Selected results from the 2017 survey

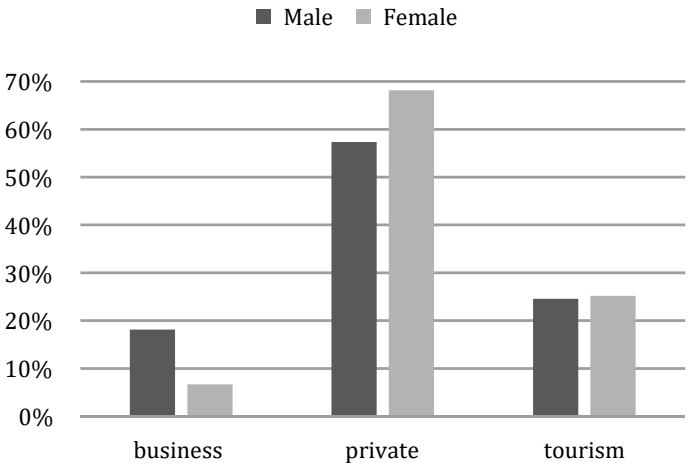
a) Travel purpose by age group

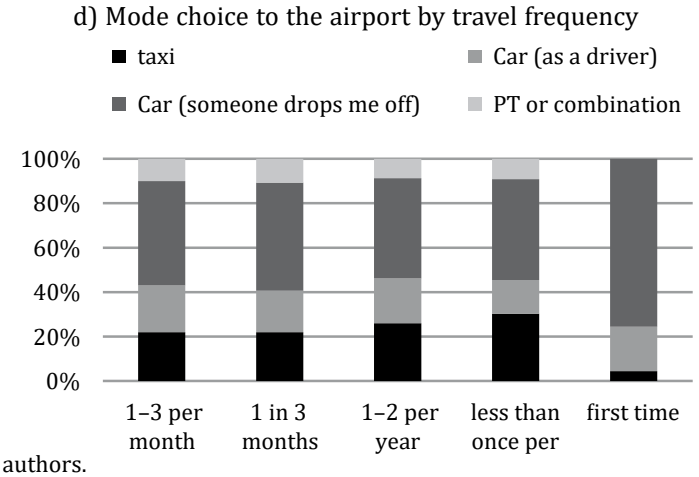


b) Gender by travel frequency



c) Gender by travel purpose





Source: authors.

Regarding gender distribution, men were still traveling for business more than women, but the difference in shares was significantly lower than in surveys from previously observed periods, pointing to an increasing number of female business travelers (Figure 10b). There is also a notable increase in the shares of both genders, traveling for private and tourism, which was caused by both cheaper air tickets and the growth of personal income.

When it comes to the choice of mode of transport to the airport, the number of passengers who parked their car at the airport parking increased, due to lower prices of parking at the Niš airport. Below in Table 4, consistently with Tables 2 and 3, one can find the same selected cross-tabulations. All a result, the differences among the categories are statistically significant at the level of risk lower than 5%.

Table 4. Cross-tabulation of selected categories by travel purpose, in the 2017 survey (Niš Airport)

	Travel purpose			
Airport access mode choice	Business Count (% within Airport access mode choice)	Private Count (% within Airport access mode choice)	Tourism Count (% within Airport access mode choice)	Total Count (% within Airport access mode choice)
Taxi	9 (8%)	67 (59.8%)	36 (32.1%)	112 (100%)
Car (parked)	4 (8.9%)	30 (66.7%)	11 (24.4%)	45 (100%)
Car (dropped-off by someone)	30 (12%)	171 (68.7%)	48 (19.3%)	249 (100%)
PT or combination	17 (17.7%)	49 (51%)	30 (31.3%)	96 (100%)

Travel purpose by Airport access mode cross-tabulation: χ^2 (6, N = 502) = 15.250[a], p-value = .018, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 5.38.				
Travel frequency	Business Count (% within travel frequency)	Private Count (% within travel frequency)	Tourism Count (% within travel frequency)	Total Count (% within travel frequency)
1–3 per month	20 (20%)	60 (60%)	20 (20%)	100 (100%)
1 in 3 months	22 (11.8%)	131 (70.1%)	34 (18.1%)	187 (100%)
1–2 per year	8 (7.7%)	55 (52.9%)	41 (39.4%)	104 (100%)
less than once a year	5 (7.6%)	46 (69.7%)	15 (22.7%)	66 (100%)
first time	5 (11.1%)	25 (55.6%)	15 (33.3%)	45 (100%)
Travel purpose by travel frequency cross-tabulation: χ^2 (8, N = 502) = 26.824[a], p-value = .001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 5.38.				
Travel group size	Business Count (% within group size)	Private Count (% within group size)	Tourism Count (% within group size)	Total Count (% within group size)
1	36 (15.5%)	164 (70.7%)	32 (13.8%)	232 (100%)
2	15 (8.5%)	107 (60.5%)	55 (31.3%)	177 (100%)
3	4 (8.3%)	27 (56.3%)	17 (35.4%)	48 (100%)
4+	5 (11.1%)	19 (42.2%)	21 (46.7%)	45 (100%)
Travel purpose by group size cross-tabulation: χ^2 (6, N = 502) = 35.483[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 5.38.				
Citizenship	Business Count (% within citizenship)	Private Count (% within citizenship)	Tourism Count (% within citizenship)	Total Count (% within citizenship)
Foreigner	6 (9.2%)	42 (64.6%)	17 (26.2%)	65 (100%)
Expatriate	10 (14.1%)	57 (80.3%)	4 (5.6%)	71 (100%)
Serbian	44 (12%)	218 (59.6%)	104 (28.4%)	366 (100%)
Travel purpose by citizenship cross-tabulation: χ^2 (4, N = 502) = 17.183[a], p-value = .002 a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 7.77.				

Source: authors.

The LCCs induced new travels, by younger and older passengers, for private or tourist purposes. Additionally, the LCCs offered routes that track migratory patterns, which substantially influenced the increase in the number of people aged 65+ who visited members of their family. On the

other hand, the population aged 35–45 years belongs to employers, which do not use LCCs for their business travels. Regarding travel purposes, it can be observed that the share of business travel was reduced, and that can be explained by the increase in private and tourist travel induced by the lower ticket prices offered by LCCs.

The penetration of LCCs into the Serbian air travel market has generated a completely new segment of passengers who would not have used air transport otherwise. The segments of the passengers of both traditional and LCC airlines were obtained using two-cluster analysis techniques (Kuljanin, Kalić 2015). Within LCC four segments were derived: in two of them, expatriates accounted for more than 50% of passengers, 33% were mainly passengers from Serbia, and 25% were foreigners. Concerning traditional carriers, two segments were obtained and the purpose of the journey appeared to be a main segmentation variable.

3.3. Serbian Air Transport Market during the COVID-19 Pandemic Period (2020–2022)

After years of record traffic growth, with the outbreak of the COVID-19 pandemic in 2020, global air transport faced the sharpest and most sustained fall in demand. Passenger traffic was almost stopped, with the exception of passengers who were abroad and who needed to return home. New rules were established for air travel. Many countries decided to close their borders and limit the movement of people. Moreover, new measures were introduced (e.g., PCR tests, vaccination, COVID certificates) aimed at preventing the spreading of the disease.

In circumstances like this, travel demand in the Serbian market recorded a sharp fall (Table 5; Kalić *et al*. 2022). In the second half of 2022, air traffic started to recover, resulting in an increase in the number of flights and in the number of passengers. Air Serbia changed its ownership structure, with the state's share increasing from 51% to 82% in late 2022.

Table 5. The number of passengers served by airports in Serbia

Year	Airport Nikola Tesla	Airport Niš	Serbian market (total)	Percentage of change compared to 2019
2019	6,159,000	422,255	6,581,255	
2020	1,904,025	154,233	2,058,258	-69%
2021	3,286,295	146,296	3,432,591	-52%
2022	5,611,920	389,022	6,000,942	-9%

Source: authors.

3.4. Serbian Air Transport Market in the Post-COVID-19 Period (2023–2024)

The period following the lifting of all the restrictions related to COVID 19, has been characterized by an extremely large expansion of the air network. Serbian airports are offering a large number of new routes, which has resulted in a significant increase in the number of passengers. Serbian air transport achieved many records in 2023. Namely, Air Serbia increased the number of passengers from 2.78 in 2019 to 4.19 million in 2023. Moreover, this number has continued to increase, recording the highest number of passengers in the first quarter of 2024 (17% YoY). Air Serbia changed its ownership structure once again, becoming fully state-owned in November 2023.

Considering the airports in Serbia, it should be noted that Airport Nikola Tesla recorded the highest number of passengers ever in 2023, 7.95 million (29% increase compared to 2019). Additionally, Airport Niš served 448 thousand passengers in 2023, exceeding the number of passengers in 2019 (442 thousand).

3.5. Future Serbian Air Transport Market (2025 and 2035): An Assessment

The same uncertainty that exists in the global air transport market has also been observed in the Serbian market. Due to the forecasting of future demand generally being very challenging, a Delphi survey among air transport experts and researchers was conducted during the COVID-19 pandemic. At about the same time, in April and May 2021, an online survey for air travelers was conducted for the purpose of SYN+AIR project (Kukić *et al*. 2021; Colovic *et al*. 2022; Babić *et al*. 2024) and selected answers from Serbian residents were used to support some projections accepted or rejected by the experts in the Delphi study.

3.5.1. Delphi Survey

The Delphi method is a group process involving the interaction between the researchers and a group of identified experts in a specified area, usually through a series of questionnaires. It represents an effective tool for achieving consensus when there is uncertain information or a lack of empirical evidence. The Delphi survey was performed in two rounds, during

March and April 2021. Due to the great uncertainty caused by the COVID-19 pandemic, two time horizons, 2025 and 2035, were observed (Kukić *et al*. 2021).

A questionnaire for the first round consisted of 20 projections for 2025, grouped in five categories: (1) air traffic volume factors, (2) business travel, (3) leisure travel, (4) passenger segments, and (5) new procedures and services in air transport (mainly caused by the COVID-19 pandemic); and 20 projections for the 2035 time horizon grouped as (1) automation and new procedures, (2) passenger characteristics, and (3) changes in passenger behavior (Kukić *et al*. 2021).

The response rate was 85.7%: 14 experts were invited by e-mail, but 12 agreed and all of them participated in both rounds. The panel group consisted of five academic researchers, seven air transport experts from industry, and one manager from a tourist agency, which provided a wide variety of different perspectives. Concerning a response scale, a four-point Likert scale was used (1 – "Don't believe it will happen" to 4 – "It will very likely happen"). An even number scale was chosen in order to avoid a neutral level of agreement. As a consensus, we defined a predetermined percentage of 75% participant agreement, where ratings 3 and 4 were counted as agree, while ratings 1 and 2 were counted as disagree.

The survey was administered online, and the participants responded to the questionnaire sent by e-mail. The possibility for comments and suggestions was provided at the end of each part of the questionnaire. Detailed results of the first round, as well as the comments, were sent to the participants. In total, 18 of 40 projections were accepted and those will be briefly presented below, through possible scenarios for 2025 and 2035 developed from the Delphi projections that reached consensus.

3.5.2. SYN+AIR Survey (Conducted in 2021)

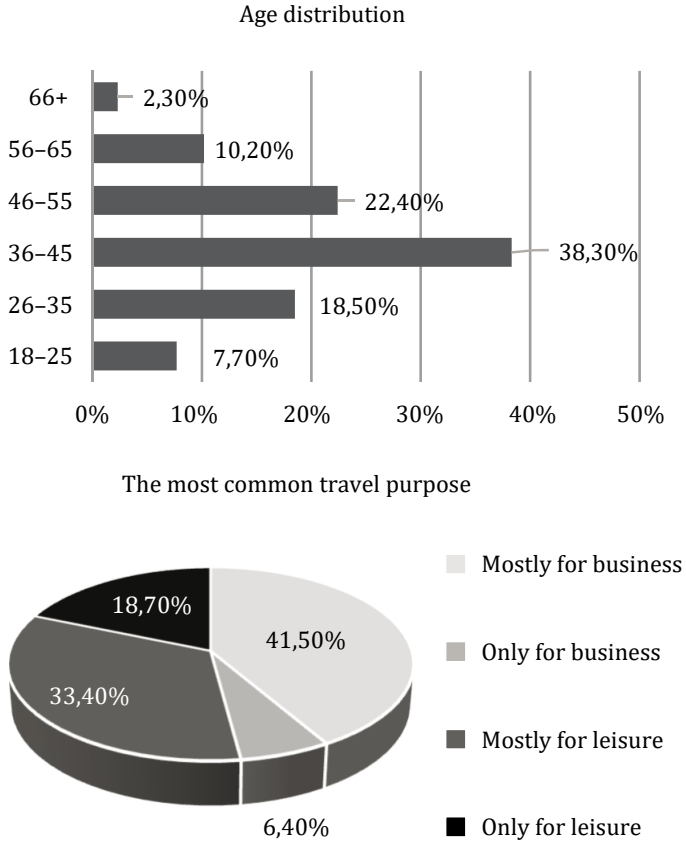
As has already been mentioned, the survey was conducted online due to the COVID-19 restrictions. The questionnaire consisted of three parts: Mobility Profile, Travel Preferences in 3 different hypothetical scenarios, and Sociodemographic Profile (Kukić *et al*. 2021; Colovic *et al*. 2022; Babić *et al*. 2024).

The results are quite interesting, but they should not be compared with the results of previous surveys conducted face-to-face at airports in Serbia, regarding to plane travel. The SYN+AIR survey was based on a

stated preference questionnaire with mostly hypothetical questions and respondents answered as potential passengers referring to their common behavior when traveling by plane.

A total of 562 respondents from Serbia filled out the questionnaire, of which 66% were male, and 33.4% were female respondents. The percentage of respondents who often travelled by plane (in regular conditions, without COVID-19) was 43.6%, while 30.4% of respondents travelled rarely, 15.5% frequently, and 10.5% of respondents rarely travelled by plane. The sample distribution regarding age and the most common purpose of travel by air are presented in Figure 11. Regarding employment status, 86.8% of respondents were employed, 4.6% were students, 3.9% were retired, 1.6% were unemployed, and 3% other.

Figure 11. Age and travel purpose distribution in a sample from Serbia in survey from 2021



Source: authors.

3.5.3. The Future of the Serbian Air Transport Market Supported by the Surveys

Based on the projections that reached consensus (Kukić *et al*. 2021), one scenario that stands out is "Return to Travel", for the time horizon of 2025. Despite the uncertainty related to the air travel future, four out of six projections that reached consensus for 2025 were optimistic. Due to the long period of the COVID-19 lockdown and various measures that reduced economic activity and increase the number of unemployed in Serbia, it is expected that in 2025 the average household spending will be reduced. Thus, experts assume that the number of passengers without personal income (students, housewives, etc.) will decrease (the first non-optimistic projection). In addition, the air ticket price is expected to be higher compared to 2019, due to higher fuel prices and higher airline costs (the second non-optimistic projection).

Regardless of the expected higher air fares, participants anticipate that after the period of pandemic lockdown, leisure and visiting friends and relatives (VFR) travels will increase and passengers will start to plan their trips enthusiastically. In order to make the trip easier and more acceptable, policy and bilateral agreements between Serbia and other countries will be signed by 2025. That will lead to an increase in the number of passengers at airports in Serbia and ultimately to a total recovery of the air transport market in Serbia and a return to pre-COVID-19 levels. In 2025 business air travel will persist despite IT technology innovations (people have experience using online meeting platforms). Experts believe that the business air traveler segment in Serbia will decrease by 20%. Generally, the scenario developed for 2025 is optimistic, which is a consequence of the long lockdown during the COVID-19 period and people's strong desire to travel.

Passenger profiles were also created, in addition to the developed scenarios. The 2025 time horizon is rather close and significant changes in passenger profiles are not expected, but two new profiles can be recognized. The first are Cautious Passengers consisting of careful persons who will try to avoid potential threat of disease. After the COVID-19 pandemic, they will still be in fear of disease and they will travel by plane only if they have to, without joy. The second are Fearless Passengers who are so eager to travel that they will neglect potential risks.

Two scenarios have been developed for the 2035 time horizon. Common for both scenarios is the increase in automation and digitalization. In that sense, it is expected that new technologies in passenger process automation at airports will be implemented (fully automated check-in, pre-security, boarding, etc.). Air passengers in Serbia will show a good response to the digitalization. In 2035 young and middle-aged travelers will be "digital natives"

while the majority of older travelers will use advanced telecommunication technologies and services at that time. Despite digitalization and automation, some passengers will require human assistance. Additionally, advanced information and communications technology will partly replace short-haul air travel for business trips. The first Open World scenario is rather optimistic. After the end of the COVID-19 pandemic, there will be no other new pandemic diseases and the economic situation in Serbia will be stable. This will be a period of constant GDP growth, which will lead to increase in the number of passengers in the air transport. A number of people will be employed by foreign companies, working online from Serbia, and they will have a salary significantly higher than average. These people will travel frequently by air, for leisure or VFR. A new passenger segment will appear, due to medical, health, and therapeutic tourism. Foreigners and expatriates from Serbia belong to this segment. They will come to Serbia in order to use dental services, cosmetic and plastic surgery, spa treatments, and physical therapy, which are significantly cheaper in Serbia. In the business air passenger segment, the share of females will be greater than in past decades. The results from surveys in Serbia show that females represent 30% of business travelers and this is expected to increase up to 50% in 2035, which can also be confirmed by the results from the SYN+AIR traveler survey in which female respondents represent 31.4% of business travelers. People who are middle-aged at this moment have a habit of traveling, so it is anticipated that the segment of older/retired people who travel by plane in 2035 will be larger.

The second scenario, the Prolonged Pandemic Tension scenario, is rather pessimistic. Globally, the economic situation will be unstable in 2035. New epidemics and pandemics can be expected in the period until 2035, so additional virus-related procedures will become part of the standard procedure at airports. Additional airport/airline charges will be introduced to cover, for example, different necessary medical tests. In 2035, passengers at airports will be separated into pandemic-safe and pandemic non-safe areas, based on traveling to countries that will require necessary documents for entry. Since the disease risks in some countries will be significantly higher than in others, it is necessary to separate the flow of passengers at the airport in order to prevent the uncontrolled spread of infectious diseases. Part of business class passengers of traditional airlines will use the "taxi-sharing" service offered by air-taxi companies with aircraft capacity of 15 seats (flying vehicles).

Three air passenger profiles follow from the corresponding scenarios for 2035. The first profile is the Digital Native Generation, which refers to persons who have grown up in the digital age, in close contact with

computers, the Internet, mobile phones, and social media. These persons partially belong to the generations Z and Y (Millennials). In 2035 they will be between 26 and 45 years old. The second profile consists of ambitious, open-minded, educated upper middle-aged people, belonging to Generation X – Well Informed Positive Attitude Cosmopolitan. The third profile is the New Generation of Retired. Those are modest, traditional-values people who like to travel, connected to Baby Boomers.

One of the projections that was rejected by 83% of the Delphi panelists was that passengers in Serbia would be more environmentally conscious and would choose environmentally responsible airlines. The panelists share the opinions provided in the answers from respondents in the traveler surveys (Table 6). The question related to printing the boarding pass when traveling, clearly shows that at the moment when the survey was conducted (April and May 2021), environmental awareness of Serbian passengers was not at the level of EU passengers (only 3.7% of respondents from Serbia chose option "No, I don't want to waste paper", compared to, for example, 30% of respondents from Spain, while 44% of respondents from Serbia answered "Yes, it's more convenient when in the paper", compared to 14% of respondents from Spain with the same answer).

A higher percentage (24.4%) of passengers who travel often or frequently prefer to have a boarding pass on their phone compared to passengers who travel rarely (11.7%), while it is the opposite for passengers who prefer to have a boarding card on paper (52.6% of passengers who travel rarely vs. 37.3% of passengers who travel often or frequently, Table 5). Similarly, different habits related to printing boarding cards are observed for different age groups (with the age limit set to 45 years). All results and differences among the categories are statistically significant at the level of risk lower than 5%.

Table 6:
Cross-tabulation of habits related to printing boarding cards
by age groups and frequency of travel by plane

	Do you usually print your boarding pass when traveling?				
	No, I don't want to waste paper	No, I prefer to have my boarding pass on my phone	Yes, in case my phone stops working, to be sure that I have my boarding pass available	Yes, it's more convenient when on paper	Total Observed (percentage within row category)
Age: 45 or below	4.1%	24.3%	35.4%	36.2%	362 (100%)
Age: 46 or more	3.0%	10.0%	30.0%	57.0%	200 (100%)
Printing boarding pass by Age groups cross-tabulation: χ^2 (3, N = 562) = 28.083[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 7.47.					
Travel frequency: Rarely or almost never	3.9%	11.7%	31.7%	52.6%	230 (100%)
Travel frequency: Frequently or often	3.6%	24.4%	34.6%	37.3%	332 (100%)
Printing boarding pass by Frequency of travel cross-tabulation: χ^2 (3, N = 562) = 18.960[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 8.59.					

Source: authors.

Another projection rejected by 83% of panelists was that high-speed rail and new highways in Serbia would take over a significant proportion of air passengers. This can be confirmed by the high percentage of respondents in the traveler survey who chose the plane in the "train or plane" hypothetical scenario (Table 7).

Respondents were asked to choose between a plane (the door-to-door travel time is 4 hours) and a high-speed train (the door-to-door travel time is 6 hours) in the case of business travel. The plane was the choice for 71%

of respondents and regarding the reason for that choice 47.5% stated time, followed by 35.2% of respondents whose reason for the choice was comfort. Almost 80% of female respondents chose the plane, while at the same time a slightly lower percentage of male respondents made that choice (66.8%).

Regarding the reasons for plane/train choice, in Table 7 one can see that 5.3% of female and 2.2% of male respondents do not like to travel by plane, while only 0.5% of female and 4.6% of male respondents do not like to travel by train. Also, 56.4% of female respondents and 42.9% of males made choices based on time as a factor. When it comes to younger and older respondents, it is visible that older respondents value comfort as a factor in making decisions, while younger more value time as a factor. All results, differences among the categories are statistically significant at the level of risk lower than 5%.

Table 7:
Cross-tabulation of reasons for plane/train choice by gender and age groups

	Why did you make a choice between plane/train?						
	Comfort	I do not like to travel by plane	I do not like to travel by train	Other	Reliability	Time	Total Observed (percentage within row category)
female	31.9%	5.3%	0.5%	4.3%	1.6%	56.4%	188 (100%)
male	37.2%	2.2%	4.6%	8.4%	4.9%	42.9%	371 (100%)
Reasons for Plane/Train choice by Gender cross-tabulation: χ^2 (5, N = 559) = 22.559[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 8.66.							
Age: 45 or below	31.2%	3.1%	2.5%	8.1%	4.7%	50.4%	230 (100%)
Age: 46 or more	43.0%	3.5%	4.5%	5.0%	2.0%	42.0%	332 (100%)
Reasons for Plane/Train choice by Age groups cross-tabulation: χ^2 (5, N = 562) = 12.934[a], p-value = .024, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 6.44.							

Source: authors.

4. CONCLUSION

This paper presents the air passenger segment evolution in Serbia from 2000 to 2035. The observed period is divided into five time horizons: two in the past, one current, and two in the future. In the past horizons, the evolution of air passenger segments is considered based on the results of surveys conducted from 2000 to 2017. The first period (2000–2006) refers to a non-liberalized market, and the general segmentation of passengers is confirmed, i.e., the leisure and business segments are distinguished. The emergence of LCCs in the 2007–2017 period induced air travel demand, and generated a passenger segment that started to used air transport instead of other modes. Different segments can be observed in LCCs (expatriates were the most common users) and traditional airlines (two segments were obtained based on the trip purpose).

The current period (2023–2024) induced new travels since the supply in the Serbian market has significantly improved. This supply is mostly driven by Air Serbia's capacity increase, as well as by Wizz Air's presence in the Serbian market.

The future scenarios and passenger profiles are based on the Delphi method. Due to the great uncertainty caused by the COVID-19 pandemic, two time horizons 2025 and 2035 were observed. In the 2025 Return to Travel scenario and two profiles Cautious passengers and Fearless passengers are singled out. In 2035 two scenarios (Open World and Prolonged Pandemic Tension) and three profiles (Digital Native Generation, Well Informed Positive Attitude Cosmopolitan, and New Generation of Retired) are defined. The obtained results could be generalized and applied to South East European (SEE) countries since countries in this region had similar socioeconomic features in the past. Additionally, the Digital Native Generation is a profile that is expected to be present in the global air travel market.

This research provides valuable information for product planning, for both airports and airlines. Thus, it helps them to offer appropriate services in the highly competitive air transport market. The proposed approach could be applied to other countries in SEE, which is a possible direction for future research. Additionally, the proposed methodology could be extended to advanced statistical techniques, in order to provide deeper insight into passenger behavior and profiles, pointing out more sophisticated differences and similarities among countries.

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ADVANCE DIRECTIVES IN LEGISLATIVE AND THEORETICAL FRAMEWORKS OF FAMILY LAW

After appearing only in medical law for a long time, advance directives and other forms of voluntary measures are increasingly also being recognised as an effective protector of the right to self-determination in family law. The aim of the paper is to consider the Croatian model of advance decision making in family law, observing it in the context of European, international and comparative law. In this sense, the paper first provides an overview of relevant international and European documents, then briefly analyses different solutions to the discussion in question that exist in the national legislations of the selected European countries, namely, Germany, Slovenia, the Czech Republic, Serbia, and finally a detailed analysis of Croatian law. The paper aims to point out certain doubts and ambiguities that exist in Croatian law, give suggestions for improving the legislation, and encourage the continuation of scientific research in this legal field.

Key words: *Legal (in)capacity. – Support. – Advance directive. – Guardianship*.

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1. INTRODUCTION

Right to self-determination is the right to manage our lives and decide for ourselves in the different aspects and levels of importance of personal and property matters, such as where to live, what medical procedures are used for our health protection, how to manage our property, how to spend money, as well as with whom to have close relationships, how to dress, which cultural or sports events to attend, etc. In other words, the right to self-determination guarantees everyone to 'live their own way', in accordance with their own wishes, interests and preferences. But the question arises, how to protect right to self-determination if we become a vulnerable person who has lost the ability to make decisions on some or all these issues. In accordance with international and European standards in this area, national legislators have started to promote voluntary measures as a primary means of protecting and empowerment of vulnerable persons, as they contribute to protecting the individual's personal autonomy and right to self-determination: in other words, a person's ability to govern their life choices (Karjalainen 2022, 66–67). In this sense, various advance planning models have been developed for such circumstances in which we may not be able to make certain decisions ourselves, to ensure that these decisions reflect our (previously expressed) wishes and needs. Advance plans allow persons to provide instructions on how to deal with future emotional crises and/or to appoint a person to support them in those particular circumstances (UN Special Rapporteur 2017 par. 32).

This paper primarily discusses advance directives as a form of voluntary measures, but also some other voluntary measures, such as continuing (or enduring) powers of attorney, because certain legal systems, namely Croatian, have not clearly delineated them. Moreover, some institutes have been developed that include elements of several different voluntary measures. The principles of autonomy and self-determination place advance directives in the ambit of the human rights approach to mental health law (Morrissey 2010, 11; Weller 2010, 3), but also of human rights approach that goes far beyond mental health law. Advance directives are widely recognised as vehicles for the principles of participation, non-discrimination, acceptability and accessibility (Morrissey 2010).

The paper begins with an analysis of international and European documents that directly or indirectly protect the right to advance decision making. This is followed by a discussion of the protection of this right in the legal systems of Germany, Slovenia, the Czech Republic and Serbia. A special chapter is devoted to the regulation of the right to advance decision making in Croatian law, highlighting the problems that the Croatian system

has in legislation and implementation. Certain suggestions for improving legislation in this area are provided, as is an incentive for further research that will result in the creation of new proposals for effective protection of the right to self-determination through a system of advance directives. It should also be noted that this paper primarily deals with advance directives in the field of family, linking them to brief observations on advance directives in other legal areas.

2. INTERNATIONAL AND EUROPEAN LAW

As one of the responses to the long history of social neglect and prejudice, and even abuse of people with disabilities (Stein *et al*. 2007), international organisations have recognised advance care planning as one of the necessary measures to ensure that people with disabilities receive care and support in accordance with their personal wishes and needs. The United Nation's Convention on the Rights of Persons with Disabilities[1] (CRPD) 'was required due to the failure of human rights instruments to fully ensure the human rights and fundamental freedoms of persons with disabilities in order to achieve a society accessible for all' (Bianchi 2020, 2). The CRPD can be interpreted as promoting various forms of supported decision making including advance directives (Reilly, Atkinson 2010). Namely, under Article 12 of the CRDP, States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law and requires themselves to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. In this regard, 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[2] The importance of self-direction is at the core of Article 12, ensuring that the exercise of legal capacity respects the rights, will and preferences of the person (Keys 2017, 267). The Committee on the Rights of Persons with Disabilities in its General Comment No. 1 points out that support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and that 'for many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes

1 UN 2006, Annex I.

3 UN 2006, Article 12.

to others'.[3] In that sense, applying an advance directive is an important example of support to exercise legal capacity (Flynn 2019, 50). The terms 'will' and 'preferences' are not defined in the CRPD. Arstein-Kerslake and Flynn (2016, 483) clarify that in general, an individual's 'will' is used to describe the person's long-term vision of what constitutes a 'good life' for them, whereas an individual's 'preferences' tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them. Although it should not always be so difficult for someone close to the person who is unable to decide for themselves to determine what that person's will and preferences would be, advance directives certainly prevent wrong conclusions when there is a dilemma. However, the importance of advance directives is even greater in situations where there is a danger that decisions will be made contrary to the person's will and preferences, even though there is no doubt about what they are. The determination when an advance directive comes into force, as well as when it ceases to have effect, should also be the decision of the person issuing it and such a determination should be an integral part of the advance directive as well; the assessment that a person lacks mental capacity is certainly not a basis to follow.[4]

Speaking of the European context, it is evident that the Council of Europe also strives, especially through the practice of the European Court of Human Rights, to encourage a paradigm shift in the status and protection measures of persons with disabilities, emphasising their autonomy and human rights in national legislation (Hrabar *et al*. 2021, 396). The right of an individual to decide certain aspects of their private and family life on their own, without the intervention of the authorities or at least with the intervention reduced to the minimum possible derives from Article 8 par. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedom[5] (ECHR). The European Court of Human Rights has cut the link between the right to autonomy and the right to privacy, as protected by Article 8, and has stated that based on the ECHR in general and through the concept of human dignity, a right to autonomy can be deduced from the ECHR (Goffin 2012, 133). Although they are, of course, not explicitly mentioned as such in the ECHR, the European Court of Human Rights has in its practice discussed advance directives (mainly in the context of bioethical and religious issues) based on the said right to autonomy.

3 UN Committee on the Rights of Persons with Disabilities 2014, para 17.

4 *Ibid*.

5 Council of Europe 1950.

The Council of Europe first recognised advance directives in its documents regulating decision-making issues in biomedical matters. The most important of these documents is the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[6] (Oviedo Convention), the only international legally binding instrument on the protection of human rights in the biomedical field. Article 9 of the Oviedo Convention proscribes that 'previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account'. This provision is certainly important as it marks the first recognition of the value of advance directives in a common European binding instrument. Although the wording 'previously expressed wishes' is used instead 'advance directives', the latter expression, which also does not appear in the Convention's Explanatory Report[7], was not included on the ground that it presupposes the binding nature of such documents (Andorno 2012, 76–77). The Explanatory Report states that the expression 'taken into account' does not mean that previously expressed wishes should unconditionally be followed and provides some examples to demonstrate the exemptions.

Aware that the issue of adults with incapacity was arguably the most topical issue of family law at the time at both the national and international level (and that it would be in the following years as well) and concerned with the fact that, despite the overall improvement in the protection of human rights, this area of law was underdeveloped or even completely neglected in a number of member states, the Council of Europe adopted Recommendation CM/Rec (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity[8]. The Recommendation is based on principle of promotion of self-determination, which is mentioned five times in the Recommendation and clearly embodies the key value of this document (Andorno 2012, 78.). In accordance with this principle, the Council of Europe recommended that member states give voluntary measures priority over involuntary measures of protection. 'Continuing powers of attorney and advance directives constitute two methods of self-determination for capable adults for periods when they may not be capable of making decisions. Both are anticipatory measures which subsequently have a direct impact on granters' lives during periods when their capacity to make decisions is

6 Council of Europe 1997.

7 Council of Europe 1997.

8 Council of Europe 2009.

impaired'[9] (Council of Europe 2011, 17). Continuing power of attorney is defined as 'a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity'[10] and advance directives are defined as 'instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity'[11]. The Recommendations do not limit the application of advance directives to specific strictly defined personal and/or property issues. Moreover, it is prescribed quite generally that advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed.[12] The Recommendation leaves room for States to determine the (non)binding effect of advance directives, but still do not allow the State to completely deprive the advance directive of its character of a strong protector of a person's wishes. In this sense, in accordance with the Recommendation, States should decide to what extent advance directives should have binding effect but at the same time the Recommendation determines that if advance directives do not have binding effect they should be treated as statements of wishes and given due respect. States should also consider what form and other provisions or mechanisms may be required to ensure the validity and effectiveness of advance directives, but in any case, it should be revocable without any formalities.[13] As can be seen, despite the legally non-binding character of the Recommendation, it certainly represents the European direction regarding the use of advanced instructions as an important instrument of protection and social respect of incapable adults (see also Morrissay 2010, 13).

3. COMPARATIVE LAW

A number of relevant comparative studies have shown great and significant differences in the legal regulation of advance directives in national legislations (see Atkinson 2007; Goffin 2012; Lack, Biller-Andorno, Brauer 2013; Veshi, Neitzke 2015). These studies are mainly from the field of biomedicine and (mental) health protection; there are still not a significant number of family law studies in this regard. The Family Law in Europe

9 Council of Europe 2011.

10 Council of Europe 2009, Principle 2.1.

11 *Ibid.*, Principle 2.3.

12 *Ibid.*, Principle 14.

13 *Ibid.*, Principles 16–17.

(FL-EUR)[14] academic organisation is currently intensively working on the analysis of national legislations in the field of protection and empowerment of vulnerable adults within family law, including advance directives as a voluntary measure, and this is a promising project that is expected to bring valuable knowledge in this area.

In order to show the different approaches of European legislation to what is under discussion, the relevant legislation of Germany, Slovenia, Czech Republic and Serbia will be analysed below. German legislation because it served as a model for the Croatian legislator when introducing advance directives into the family law system in 2014 (Rešetar 2022, 505) and because it provides answers to some open questions that still exist in Croatian legislation at the present. Slovenia is an example of a country that abandoned the institution of deprivation of legal capacity, but still provides protection for persons with disabilities through the institution of guardianship. However, advance decision making is recognised only in the area of guardianship for minors. The Czech Republic is specific insofar as some forms of advance decision making, recognized by some other European countries as family law mechanisms, are recognised as status law mechanisms in Czech law. Serbia belongs to the group of European countries whose family law, as well as status law legislation does not recognise any form of advance decision making, and Serbian legal theory has criticised that even in other branches of law they have not taken root as they should.

Since the boundaries between continuing powers of attorney and advance directives are not always completely clear in the considered legal systems, the former are also partially included in the discussion below.

3.1. Germany

Voluntary measures that serve as protection of the autonomy of the vulnerable adult in Germany are mostly regulated by the German Civil Code[15] (BGB). A vulnerable adult can issue powers of attorney in accordance with general provisions of civil law to take care of their affairs and through this they can authorise a self-chosen representative/support person. The appointment of a custodian is generally not necessary if such attorneys can

[14] FL-EUR currently gathers 34 eminent experts from the academic community and practitioners in the field of family law, from 31 European jurisdictions. More information at *https://fl-eur.eu/*, last visited April 12, 2024.

[15] *Bürgerliches Gesetzbuch*.

legally manage the affairs of a vulnerable adult (Dethloff, Leven 2023, 46). A precautionary power of attorney for possible circumstances that would require assistance is called continuing power of attorney (*Vorsorgevollmacht*), which is defined in BGB Vol. 4, dedicated to family law.

The fourth volume of the BGB also regulates living will and custodianship directive. The adult can specify in a living will (*Patientenverfügung*), in case of their incapacity to consent in writing, whether they consent to or prohibit certain examinations of their state of health, medical treatments or operations that are not yet imminent at the time of the specification[16] (Dethloff, Leven 2023, 47).

A custodianship directive (*Betreuungsverfügung*), which is legally defined in § 1816 (2) BGB, can specify which person the court should choose as the custodian, but also who should not be the custodian under any circumstances. It concerns in particular the suggestion of a specific custodian who can then make decisions regarding the affairs of the vulnerable adult, within certain limits but in this directive the vulnerable adult can also express their wishes regarding the management of their affairs (Dethloff, Leven 2023, 47). Germany is an example of a European country where citizens are advised in different ways and in simple language on how the custodianship directive can be given and on which issues. Using the Internet and various other sources, citizens are advised of what is possible to specify in a custodianship directive, such as, that grandchild should receive a certain amount of money for their wedding, to be cared for at home as an outpatient for as long as possible (Verbraucherzentrale 2024[17]), where and how to live, whether to undergo certain medical procedures (e.g., the insertion of a gastric tube), that relatives should receive presents for Christmas (Familienratgeber 2024[18]), etc. It is also possible to determine general criteria for appointment of a custodian without specifying a particular person, e.g., whether the custodian should be appointed by a church institution, a care association or a welfare organisation, or whether a woman or a man as custodian is preferred (Göbel, Hünefeld 2020, 8), etc.

It is important to point out that there are no special requirements in terms of form and capacity to understand when it comes to a custodianship directive; a declaration by the vulnerable adult is sufficient (Dethloff, Leven

[16] See BGB § 1827.

[17] Explanation available at *https://www.verbraucherzentrale.de/wissen/gesundheit-pflege/aerzte-und-kliniken/vorsorgevollmacht-und-betreuungsverfuegung-warum-sie-so-wichtig-sind-46972*, last visited April 13, 2024.

[18] Explanation available at *https://www.familienratgeber.de/rechte-leistungen/recht-gesetz/betreuungsverfuegung*, last visited April 13, 2024.

2023, 49; Göbel, Hünefeld 2020, 14). However, it is safer to write it when person is still fully capable for understanding because problems can arise if relatives or friends do not agree with decisions made in the custodianship directive. They may then try to have the custodianship directive declared void in court (Familienratgeber 2024).

The custodianship directive must be transmitted to the custodianship court without delay by a person in possession of such a document, when the custodianship proceedings are initiated (Dethloff, Leven 2023, 49–50). The court and the custodian are generally bound by what is stated in custodianship directive, provided that: a) it does not conflict with the best interests of vulnerable person, b) it is reasonable for the custodian to accept it, and c) it is not apparent that the wishes have changed in the meantime (Göbel, Hünefeld 2020, 8).

Custodianship directives (as well as continuing powers of attorney and living wills) can be registered in the Central Register of Continuing Powers of Attorney (*Zentrales Vorsorgeregister*). Dethloff and Leven clarify that this registration is neither a prerequisite nor proof of effectiveness, but instead serves the purpose of discoverability (Dethloff, Leven 2023, 51).

In the context of making advance binding declaration in relation to the child guardian, it is important to note that the BGB foresees the possibility of appointment or exclusion guardian for child by parents (*Benennung und Ausschluss als Vormund durch die Eltern*).[19] It is proscribed that parents may, by means of a last will and testament, name a natural person as guardian or spouses as joint guardians or exclude them from guardianship if they are entitled to care for the child's person and property at the time of their death. The will is a unilateral act, so the parents cannot declare it jointly. The question then arises as to what happens if the parents in their wills state conflicting wishes about the person of the child's guardian. The BGB proscribes that if the parents have made contradictory last wills and testamentary dispositions to name or exclude guardians, the disposition made by the parent who died last applies.[20]

The possibility of appointment or exclusion of a guardian for a child by parents is not recognised as a form of advance directive of vulnerable persons in German family law probably because it can only be declared in a will and because it is declared for case of death, not for case of impossibility of exercising parental responsibility during one's lifetime.

[19] BGB § 1782.

[20] BGB § 1782 (2).

3.2. Slovenia

Protection of vulnerable adults in Slovenia is mainly regulated in the Slovenian Family Code[21] (DZ). Novak (2023, 2) highlights that new family legislation in Slovenia pays special attention to the protection of vulnerable adults. The new regulation has brought great changes in this area, the most notable of which is the abandonment of the possibility of deprivation of legal capacity. Vulnerable persons are still protected through the institution of guardianship for adults, but only and exclusively in those areas where they really need guardianship assistance and protection. As the purpose of guardianship for adults DZ determines the protection of their personality, which is realised primarily by arranging matters that these persons cannot do alone, and by striving for treatment and training for independent living as well as the protection of their property and other rights and interests.[22] The court places a person under guardianship and appoints a guardian if, due to a disorder in mental development or mental health problems or another cause that affects the ability to reason, that person is unable to take care of their rights and benefits by themselves without harming themselves.[23]

Slovenian family law does not provide for any form of a binding directive given in advance referring to the appointment of a guardian. Regarding respect for the will of the ward, it is only prescribed that when appointing a guardian, the social welfare centre or the court take into account the wishes of the ward, if they have expressed them and if they can understand their meaning and consequences, and if it benefits the ward.[24]

Article 144 of the DZ provides for the prior expression of the will of the parents, in the event of death or permanent incapacity to exercise parental responsibility, by which the parents express their will in advance regarding:

- the person entrusted with the care and upbringing of their child;
- the relative who will have parental responsibility;
- the adopter; or
- the guardian.

[21] Družinski zakonik (DZ), *Official Gazette of the Republic of Slovenia* Nos. 15/2017, 21/2018, 22/2019, 67/2019, 200/2020, 94/2022, 5/23.

[22] DZ Art. 239 paras. 2 and 3.

[23] DZ Art. 262 par. 1.

[24] DZ Art. 243.

The validity of the parents will expressed in advance is evaluated in the same way as the validity of the will in accordance with the law regulating inheritance, and if the expressed wishes of the parents are different, the court decides on the validity of the will. A precondition for the court to take into account the will of the parents expressed in advance is that the will of the parents does not conflict with the interests of the child.

As can be seen, when it comes to the expression of the parent's will in advance regarding the person responsible for the child, Slovenian legislation, unlike the German one, provides for giving such an advance statement also in the case of the impossibility of exercising parental responsibility, not only in the case of death. However, Slovenian legal theory also does not consider it as an advance directive in the sense of a voluntary measure for vulnerable adults (see Novak 2023, 30–34; Ahlin Doljak 2023).

3.3. Czech Republic

In order to have a clearer understanding of Czech law in this area, it is first important to emphasise that the protection of vulnerable adults in Czech by the institution of guardianship is not regulated in the second book of the Czech Civil Code[25] (hereafter: OZ) which refers to family law matters but in Book I – General Provisions. Králíčková *et al.* (2023) point out three options of voluntary measures for empowerment of vulnerable adults regulated in a first Book of the OZ, Title II (Persons), Chapter 2 (Natural persons): continuing power of attorney (*předběžné prohlášení*)[26], assisted decision-making (*nápomoc při rozhodování*), and representation by a household member (*zastoupení členem domácnosti*). The authors do not label any of these measures as advance directives. However, continuing power of attorney has elements of what is considered in some legislation to be an advance (guardianship/custodianship) directive.

When it comes to continuing power of attorney, Králíčková *et al.* (2023, 67–77) state that it functions as a preventive measure. It is a unilateral legal act of an individual who anticipates their own future inability (which may or may not occur) to make legal acts autonomously. A continuing power of attorney can include both property and personal matters. A person can

[25] *Občanský zákoník*, 89/2012 Sb.

[26] Czech institute *předběžné prážní* authors Králíčková *et al*. (2023) translate as continuing power of attorney, so we also use the same translation of this term later in this paper.

express their will as to how or by whom their affairs are to be managed if they are unable to express such a will in the future. The range of issues on which it is possible to express will is diverse and can include: housing and residence, property, health care, social care, business plans, taxes and fees, representation before courts, authorities and other institutions. A person can express the wish to live in their own house, or, conversely, an instruction to rent out their house and be placed in a facility providing social care services. It is also possible to express preference regarding a specific social care service that the person wants or does not want to receive (Kittel 2018, 16). It is not possible to authorise, or designate, any person to act in matters related to conclusion or dissolution of marriage, the exercise of parental responsibility and disposition *mortis causa*, including disinheritance.

Whether a person will be limited by the court in their autonomy is not as important as the fact that they will lose the ability to legally act independently and manage their affairs (Kittel 2018, 13). The cause of the loss of legal capacity is also not decisive. It can be a mental disorder, but also a physical illness or injury. Kittel further explains that it is not necessary for a person to anticipate loss the legal capacity for a specific reason, as it might seem from the diction of Article 38 of the OZ. It could be a person who is in the early stages of a disease with a prognosis of losing the ability to act legally (e.g. Alzheimer's disease, dementia), and a completely healthy person who wants to adjust the management of their affairs in the case of an unexpected event (e.g. severe head injury during sports). It can be made by a person with full legal capacity, 'but legal doctrine also allows for the power of attorney to be made by a minor without full legal capacity, or an adult who is already experiencing symptoms of a mental disorder, but whose condition still makes it possible for him or her to make the power of attorney, since he or she is fully aware of its effects' (Králíčková *et al.* 2023, 72).

A continuing power of attorney must be in a written form, as a public document, i.e. a notary deed, or a private document attested by two witnesses.[27] Legal theory recommends a notarial deed because it 'constitutes full proof of the will against everyone and because, in addition, the writing of the notarial deed is associated with the provision of legal advice, and the expression of will is formulated by a legally educated expert' (Kittel 2018, 15, translated by author). A continuing power of attorney written in the form of a notarial deed will be deposited with the drafting notary, who can also issue copies to persons designated in the notary deed. This reduces the risk of the document being lost and improves the ability of its intended circulation. If the content of a notarial deed is the determination of the person who is to

[27] OZ Art. 39 par. 1 and Art. 3026 par. 2

become the guardian, such declaration will additionally be registered in the List of declarations on the appointment of a guardian kept in digital form by the Chamber of Notaries of the Czech Republic (Kittel 2018, 16; Králíčková *et al.* 2023, 73).

3.4. Serbia

Serbia is an example of a European country whose family legislation does not recognise any form of advance directives. It is pointed out in legal theory that even in the field of health care they have not taken root and that the notion of self-determination needs to be revisited in Serbian law. Speaking in the context of protecting patients' rights, Mujović (2020, 137–145) explains that Serbian law recognises the condition of progressive diseases, where it is understood that in such circumstances the patient loses the ability to decide for themselves, so it is possible to appoint a substitute decision maker, i.e. to write an advance directive. However, the author criticises the vagueness and ambiguities of the law. She points out that it is necessary to adopt legislation that will be more precise with regard to the circumstances and condition of terminally ill patients and that will foresee a clear and unequivocal obligation of health professionals to inform their patients about advance directives. 'Although there are some provisions for advance directives in Serbian law, these provisions need to be revisited and strengthened, because as it stands, many patients are not aware of the option of creating advance directives, and many physicians are confused about whether and how to apply them. As a result, they are rarely implemented' (Mujović 2020, 144).

In the family law context, it is important to stress that the Serbian Family Code[28] (PZ) recognises the institute of guardianship for the protection of vulnerable persons, but as previously stated, it does not recognise any form of making advance binding statements as the measure of their empowerment (see Kovaček Stanić, Samardžić 2023, 36–39). The PZ proscribes that a child without parental responsibility (minor ward) or an adult who has been deprived of legal capacity (adult ward) will be placed under guardianship.[29] A ward that has reached the age of 10 and is capable of reasoning has the right to propose a person, who will be appointed as their guardian,[30] but it is not prescribed in what form and before which authority such a proposal

[28] *Porodični zakon*, *Official Gazette of the Republic of Serbia* Nos. 18/2005, 72/2011 – other law, and 6/2015.

[29] PZ Art. 124.

[30] PZ Art. 124.

can be stated, nor to what extent is it binding. Thus, in terms of family law, the protection of the right to self-determination through the institution of advance directives or other forms of voluntary measures is completely neglected in Serbia. However, Serbia is not an exception when viewed in the European context. Some other European countries have also not developed, or have just started developing, the institute of advance directive in their family legislation. It is to be expected that the Serbian legislator will also introduce standards for the protection of the right to self-determination in future amendments to family legislation, and that advance directives will not remain restricted only to medical law for very long.

4. CROATIAN LAW

In Croatian legislation, as well as in legal theory, there are no clear terminological demarcations between different forms of anticipated decision-making. Legal theory generally tends to call them advance directives (*anticipirane naredbe*), which include various forms of decision-making in advance (on issues of health protection and medical matters, issues of appointing a guardian for an adult or a child, etc.) regardless of whether such directives are given in case of impossibility for independent decision-making due to, for example, loss of legal capacity, or in case of death.

However, as in many other legal systems, in the Croatian legal system regulation of advance directives first developed in other areas of law, and later in family law. Outside the Family Act[31] (FA), certain forms of advance directives are still recognised by other regulations. Thus, for example, the Act on the Protection of Patients' Rights[32] provides for the right to accept or refuse a diagnostic procedure, and the Ordinance on the consent form and declaration form on the refusal of a particular diagnostic procedure[33] prescribes the mandatory content of such statements.

[31] *Obiteljski zakon*, *Official Gazette of the Republic of Croatia* Nos. 103/15, 98/19, 47/20, 49/23, 156/23.

[32] *Zakon o zaštiti prava pacijenata*, *Official Gazette of the Republic of Croatia* Nos. 169/04, 37/08.

[33] *Pravilnik o obrascu suglasnosti te obrascu izjave o odbijanju pojedinog dijagnostičkog, odnosno terapijskog postupka*, *Official Gazette of the Republic of Croatia* No. 10 /08.

Furthermore, the Act on the Transplantation of Human Organs for Medical Purposes[34] and the Act on the Use of Human Tissues and Cells[35] are guided by the assumption that every person is a potential donor after their death, unless the potential donor during his lifetime, in writing, validly objected to the donation. Such a written statement can be given by any adult, legally capable person, to their chosen doctor of medicine of primary health care or to the ministry responsible for health (for persons who do not have legal capacity, the written statement should be given by the legal representative or guardian, who must submit the statement to be solemnised by a notary public).

Speaking outside the context of family legislation, it is particularly important to mention the Act on the Protection of Persons with Mental Disabilities[36] (APPMD), which regulates the so-called binding statements (*obvezujuće izjave*). This Act stipulates that each person can authorise only one person, who agrees to do so, to act as a trusted person on their behalf, after the legal prerequisites are met, to give or withhold consent to certain medical procedures.[37] A binding statement applies only if the person who gave it is no longer capable of giving consent for the medical procedures specified in that statement. The purpose of binding declarations is that a person who is temporarily incapacitated due to illness or mental disorders is not deprived of legal capacity and placed under guardianship only for the purpose of treatment. A binding statement can be made by any person, regardless of whether or not they have a diagnosed mental disorder, if the person is not deprived of legal capacity to make decisions about medical procedures.[38]

Family law theorists have emphasised the need to introduce advance decision making into family legislation, in order to guarantee that a person's wishes will be respected and taken into account as long as they are capable of expressing them (Korać Graovac, Čulo 2011, 10; Milas Klarić 2010, 473 and 479). The institute of advance directives was first introduced into family

[34] *Zakon o presađivanju ljudskih organa u svrhu liječenja*, *Official Gazette of the Republic of Croatia* No. 142/12.

[35] *Zakon o primjeni ljudskih tkiva i stanica*, *Official Gazette of the Republic of Croatia* No. 144/12.

[36] *Zakon o zaštiti osoba s duševnim smetnjama*, *Official Gazette of the Republic of Croatia* No. 76/14.

[37] APPMD Art. 68.

[38] APPMD Art. 72.

legislation by the Family Act of 2014,[39] and the same forms of advance directives are recognised by the current FA, which will be discussed in the continuation of this chapter.

4.1. Advance Directives in Family Legislation

Under the term '*anticipirana naredba*', the FA recognises four types of advance directives: the advance directive for the appointment of a guardian for a child, the advance directive for the appointment of a guardian in case of legal incapacity, the advance directive for the appointment of a special guardian, and the advance directive for undertaking medical procedures.

4.1.1. Advance Directive for the Appointment of a Guardian for a Child

Article 116 par. 5 of FA proscribes that '[a] parent who exercises parental responsibility can during his lifetime in a will or in the form of a notary document (advance directive) name the person he/she believes would best take care of the child in the event of his/her death'.[40] When a guardian is named for a child in the event of a parent's death, the will of the parent expressed in the advance directive is taken into account, unless it is assessed that this would not be consistent with the child's welfare.

Although this is a parent's statement, in which they express their opinion and preferences about the person of the child's guardian in the event of their own death, and not in the case of the impossibility of exercising parental responsibility, in legislation and legal theory it is designated as an advance directive. Therefore, this form of advance directive does not correspond to the concept of advance directive in the sense of the Recommendation. It should be emphasised that the right of the parents to express their preferences about the guardian for the child in the event of their death also appears in other European legal systems. However, in 2018 the European Committee on Legal Co-operation commissioned a report on the follow-up actions by member states in regard to the implementation of the Recommendation (Ward 2018). In this report, only Croatia was mentioned as a country where an advance directive may be applied to appoint a person to look after their

[39] *Obiteljski zakon*, Official Gazette no. 75/14.

[40] Translated by author.

children in the event of their death (Ward 2018, 62). It can be assumed that this is so precisely because in other systems such statements by parents are not defined as advance directives.

The FA does not give a clear answer to the question whether the granting of an advance directive is reserved only for one parent exercising parental responsibility independently (because the other, for example, is not alive or is deprived of parental responsibility or the legal capacity to exercise parental responsibility) or whether both parents who jointly exercise parental responsibility can declare an advance directive. If both parents exercising parental responsibility can declare an advance directive, then the question arises as to whether they must declare it together. Furthermore, if each parent can declare their own directive, and if in those directives they designate different persons as potential guardians of the child, the question arises as to which of these persons should appointed as the guardian of the child by the competent authority.

4.1.2. Advance Directive for the Appointment of a Guardian in Case of Legal Incapacity

The FA regulates the institute of guardianship for adults, as a measure for protecting vulnerable persons.[41] An adult who is deprived of legal capacity will be placed under guardianship. A guardian is a person appointed by the Croatian Institute for Social Work who has the qualities and abilities to perform guardianship and who agrees to be a guardian, if it is in the welfare of the ward. More than one guardian can be appointed to the ward, and it is possible to appoint a deputy guardian.

Article 247 par. 5 of the FA proscribes that '[i]f the person deprived of legal capacity, prior to the deprivation of legal capacity, in the form of a notarial document, designated a person or more persons whom they would like to be appointed as guardian or guardians, as well as persons whom they would like to be appointed as their deputies (advance directive), the Institute for Social Work shall appoint that person or persons as a guardian or guardians and deputy guardians, if the other requirements for appointment as a guardian prescribed by this Act are met'.[42]

41 FA Art. 232–269.

42 Translated by author.

4.1.3. Advance Directive for the Appointment of a Special Guardian

The Croatian Institute for Social Work will propose to the court the initiation of proceedings for deprivation of legal capacity when it assesses that this is necessary due to mental disorders or other reasons that render the person unable to take care of any of their rights, needs or interests, or that threatens the rights and interests of other persons. A special guardian is appointed for a person for whom proceedings to deprive them of legal capacity have been initiated, unless the person has authorised an attorney.[43] Article 236 par. 6 of the FA proscribes that 'if the person in relation to whom the procedure for the deprivation of legal capacity is conducted has designated in the form of a notary document, the person they want to represent them in the procedure for the deprivation of legal capacity (advance directive), the Institute for Social Work will appoint that person as a special guardian if they fulfil the other prerequisites for the appointment of a guardian prescribed in this Act'.[44]

4.1.4. Advance Directive for Undertaking Medical Procedures

The FA specifically prescribes which medical issues cannot be decided by the guardian, but only by the court in a non-litigation procedure, and only at the proposal of the ward. Pursuant to Article 260 these are: a) sterilisation of the ward, b) donation of tissues and organs of the ward, and c) life support measures. In the same provision, it is prescribed that a court decision is not required 'if the ward, at the time they were legally competent, decided on the procedures and measures from paragraph 1 of this Article, in the form of a notary document (advance directive)'.

The importance of the legal regulation of this form of advance directive in Croatian family legislation is unquestionable, but the relationship between the provisions of family legislation and legislation in the field of medical law remains open when it comes to giving advance orders related to medical procedures.

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[43] On the problems of applying the provisions of the FA regulating the institution of a special guardian for children (and at the same time adults), see Lucić 2021.

[44] Translated by author.

4.2. Content and Registration of Advance Directives

In accordance with the Ordinance on the manner of keeping records and case files of persons under guardianship, the manner of inventory and description of their property, submission of the guardian's report on the work and submission of the report on property management, and the content and form of advance directives,[45] the advance directive is drawn up in the form of a notarial deed and must contain:

- personal data of the provider of the directive;
- a statement specifying the person whom they would like to be appointed as a guardian, i.e. a deputy guardian in the case of deprivation of legal capacity, or a statement by the parents on the choice of a guardian, if the prerequisites for the appointment of a guardian for the child are fulfilled;
- a statement agreeing to appoint this person as their special guardian;
- a statement by the order provider regarding medical procedures and measures;
- personal data of the named person.[46]

In the legal sense, this provision is not precisely defined because its wording implies that every anticipated order must contain all the listed elements, which is not the case because this provision refers to different types of anticipated orders and their content will certainly not be the same.

In the case of advance directives for the appointment of a guardian for the child, this regulation does not resolve the doubt as to whether such a directive can be given only by the parent who is exercising parental responsibility independently or by both parents, individually or jointly. The determination that the mandatory content of such a directive is the parents statement on the choice of a guardian is also problematic 'in the case where the prerequisites for the appointment of a guardian for the child are fulfilled'.[47] The FA foresees the possibility of declaring such a directive only when, in the event of death, there is a need to appoint a guardian for the child, and not if such a need arises due to some other reasons.

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45 *Pravilnik o načinu vođenja očevidnika i spisa predmeta osoba pod skrbništvom, načinu popisa i opisa njihove imovine, podnošenju izvješća i polaganju računa skrbnika te sadržaju i obliku anticipiranih naredbi*, Official Gazette no. 19/21.

46 FA Art. 27.

47 Translated by author.

An advance directive may be revoked at any time, using the same form in which it was given. The 2017 Decision on the organisation of the register of advance directives and powers of attorney in electronic form[48] established the register as an electronic database, 'which contains records of binding statements that are kept for persons who have given or revoked a binding statement'.[49] This document also contains evident terminological inconsistency likely caused by the need to enter all types of pregiven binding statements into a same register –those recognised by the FA, as well as by other regulations. However, this document should definitely be clearer and more precise in its wording.

5. CONCLUSION

Like many other European countries that respect international standards of protection of the right to self-determination and autonomy of will, Croatia has developed the institute of advance directives in its national law. The development of this institute began in medical law, and after family legal theory called for its introduction into the family law system, this was done with the family law reform of 2014/2015. In addition to the obligations assumed by international and European treaties, when introducing advance directives into family law, the Croatian legislator was also guided with good practices that other family law systems, such as the German and the Austrian, already had at that time (Rešetar 2022, 505).

Although the Croatian system of advance directives can be considered good in many respects, there is still plenty of room for further improvement. First of all, it is necessary to harmonise the various regulations governing advance directives. Namely, if we look at the Croatian system of advance decision making as a whole, we will conclude that there is a lack of clarity between regulations and a lack of terminological uniformity. Different regulations provide solutions for making advance decisions, and these solutions are sometimes mutually exclusive, while at the same time the legislation does not say anything about the legal relation between them. In the context of family legislation, it is necessary to consider providing the possibility for a parent to appoint a guardian for a child, by way of an advance directive, in the event of their inability to provide parental responsibility, not only in the

[48] *Odluka o ustroju registra anticipiranih naredbi i punomoći u elektroničkom obliku*, Official Gazette no. 20/17.

[49] Decision, Art. 1 par. 3. Translated by author.

event of their death. Likewise, it is necessary to specify in the legislation whether only one or both parents can declare an advance directive, together or separately. A model for further reforms in this area could be German legislation, which gives both parents the option of appointing a guardian for the child in the event of their death, and the competent authority then chooses the guardian appointed by the last deceased parent.

In addition, it is important to point out what other authors have already noted that advance directives are not used as much as they could be. After almost ten years of existence of advance directives in family legislation, and much longer in other branches of law, they have not sufficiently taken root in practice. We believe that further efforts are necessary to promote advance directives, familiarise the public with what they are, how they can be declared, and how they contribute to the protection of a person's right to self-determination.

Attention is also drawn to the fact that Croatia lacks sufficient scientific interest in this area. The importance of developing clear and harmonised mechanisms for respecting personal wishes and needs, in situations when the ability to decide for oneself becomes questionable, is undeniable. The most important part of the path to building a system of empowering vulnerable persons is scientific research, which should precede future more intensive legislative changes. In this sense, it is important to give advance directives more attention in legal theory, in order to provide proposals for a clearer and consequently more efficient system of advance deciding.

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*THE HYBRIDIZATION OF THE REGULATORY FRAMEWORK OF INSURANCE CONTRACT LAW: ELEMENTS OF A NEW SETTING****

This article aims to highlight the phenomenon of hybridization of insurance contract law, which started with its emancipation from contract law. The next phase included its internal stratification, stemming from obvious differences between commercial and consumer insurance, and various contractual positions of contracting parties in these different insurance contracts. Two features of insurance contracts regulation are addressed, based on Serbian law as it currently stands, as well as comparative legal analysis. The first feature is that the legislatively envisaged unified regime for insurance contracts is incomplete and inadequate for all manifestations of this contract. The second feature is that regulation of this matter must enable balancing of interests between insurers and insureds, especially consumers. The authors conclude that insurance regulation can only be conducive when simultaneously ensuring protection of the weaker party, protecting insurers from the negligent actions of the insured, while facilitating conduct of insurance business.

Key words: *Contract Law. – Insurance Contract. – Consumer Protection. – Commercial Insurance. – Hybridization.*

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"What do they know of the law of insurance who only the law of contract know."[1]

1. INTRODUCTION

Insurance products have come a long way since Genoa and the year 1347, when one of the first insurance policy was issued in response to the need to protect goods in transit (Masci 2011, 30). The insurance industry has continuously expanded, to the extent that it now represents every risk management tool indispensable to society. Yet, the development of both the regulatory and contract insurance law legal frameworks has been anything but straightforward. The process has been lengthy and surprisingly is still ongoing, which results in certain answers being sought due to the rapid pace of development in the insurance industry and to which legislation sometimes lacks an immediate response. This phenomenon is particularly noticeable in the context of insurance contract law, which constantly faces the aforementioned challenge of adapting to the evolving nature of insurance business. At various stages of insurance development, contracting parties have essentially created something entirely new, namely a new form of transaction that was not governed by existing legal frameworks or any other rules (Cousy 2017, 32). It was only after a while that the specific rules of *lex mercatoria* emerge, adapted to this new type of legal transaction known as *lex assecurationis* (Cousy 2017, 32). However, even this development did not proceed at a uniform pace due to the speculative and aleatory nature of insurance,[2] which caused the legal aspect of these transactions to be sidelined for a long time, i.e., marginalized in terms of obtaining concrete legal form. Rules applicable to the legal transaction, whereby the insurer

[1] The question posed by Woodruff back in the 1920s, when commenting insurance case law (Woodruff 1924, v).

[2] At the core of both insurance and gambling lies the uncertainty of whether a certain event will occur. Although it is clear that these two phenomena differ because insurance premiums are paid to reduce uncertainty, while stakes in gambling are placed to increase uncertainty, insurance and gambling share a common history. In fact, the first insurance contracts were essentially forms of gambling. Namely, there was a long-standing practice of betting on whether a person would reach a certain age. It wasn't until the early 20th century that the English legislature reacted by prohibiting insurance policies containing elements of gambling. Furthermore, it was necessary to legally establish and regulate the differences between gambling and insurance. This was done by requiring that there must be a certain interest of a contract party, who would bear the financial consequences of the risk being, realized (Ćurković 2009, 18–20).

promises the insured coverage against specific risks for a certain premium over a period of time, could *only* be found in insurance policies drafted by insurers themselves.[3]

Today, the situation is different because the functioning of the entire insurance industry is subject to a series of laws and regulations, which, although separate, are part of the broader field of financial regulation. Although the body of topics covered by the insurance industry is extremely broad, this paper focuses on the contractual aspect of insurance law and analyzes how the insurance contract has approached and distanced itself from civil law and general contract law, as evidenced by the sources of law regulating this matter.[4]

In an increasingly comprehensive and detailed regulatory environment, both at the national and supranational levels, the subject of insurance contract law is of great practical and scientific importance for monitoring the evolutionary processes accompanying legislative developments in this field, especially considering the intersection of contractual and regulatory insurance law and its implications on the contractual position of the insured. Moreover, there is a growing perception, both in academia and in practice, that the specificities of insurance contracts require a special legal regime that would differ from the general contractual regime. Depending on the type of insurance contract, the distinctions between consumer and commercial insurance contracts and the consequences for the contractual parties require a more detailed consideration of the adequacy of the existing legal regime of the insurance contract law. Additionally, the insurance industry faces the question of how to maintain consumer trust – whether it is more effective to do so through industry self-regulation, insurance contracts, or state regulation of market conduct. Or perhaps the answer lies in a combination of all these factors?

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[3] Certain rules relating to the insurers business operations could be found in corporate statutes, professional codes, and later in court decisions. An example of this is Lord Mansfield, who established the principle of utmost good faith in insurance law in one of his decisions – *Carter v Boehm,* 3 Burr 1905, 1909 (1766).

[4] Although from a comparative law perspective there are solutions where the matter of insurance contract law is regulated by different laws, there are also numerous solutions where provisions regarding insurance contracts can be found in laws dedicated to general contract law (Petrović Tomić 2015, 52–54). In Serbian legislation, this matter is regulated by the Law of Contract and Torts, *Official Gazette of the SFRY* 29/78, 39/85, 45/89; Constitutional Court Decision 57/89, *Official Gazette of the FRY* 31/93, *Official Gazette of SCG* 1/2003 – Constitutional Charter, *Official Gazette of the RS* 18/2020, Arts. 897–965.

2. GENERAL REGIME OF CONTRACT LAW AND INSURANCE CONTRACT: MYTH OR REALITY?

Perhaps the most dominant characteristic of the development of insurance contract law is the constant, albeit slow emancipation of the legal act of insurance, on one side,[5] and of the insurance contract law, on the other side, which has become independent and particularly distinguished from contract law. This is not yet the case with the Serbian insurance contract regulation, which is partly a result of sociohistorical circumstances.[6] The matter of contract law is regulated by the Law on Contract and Torts, which, as one of the fundamental principles, provides the principle of freedom of contracting, according to which the contracting parties are free to regulate their relationships according to their will within the limits of compulsory legislation, public policy, and good faith.[7] Although never fully accepted in its pure and complete form,[8] freedom of contract is a principle on which the entire contract law rests and which has inspired many legislative solutions. Every legal system, every legal order allows contracting parties a certain space in which they can independently and freely regulate their relationships. Depending on social circumstances and dominant ideas, the space in which contracting parties can independently decide and regulate their relationships is greater or smaller. As one of the limiting factors of freedom of action, there has always been a need to protect the general norms of the community, which cannot be compromised by the will and actions of individuals (Perović 1981, 153). For this reason, imperative norms are created and established with the aim of protecting both general and individual interests, although this may sound contradictory.

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[5] The emancipation of the legal act of insurance is discussed in the context of abandoning the notion that insurance is merely a game of chance and gambling, which was even prohibited during certain historical periods. In fact, for a long time, the development of this legal act was accompanied by a sense of mistrust and suspicion. At the same time the French Civil Code provided for the application of rules on aleatory contracts to insurance contracts (Beckmann 2008, 15).

[6] In this sense, Petrović Tomić (2020, 101 fn. 2) emphasizes the importance of adopting the Insurance Law (*Official Gazette of the RS* 139/2014, 44/2021) for the more prosperous and productive development of insurance contract law, although the said Law is dedicated to the matter of status law and insurer operations.

[7] Serbian Law on Contract and Torts, Art. 10.

[8] An exception in this regard is the theory of autonomy of will, which developed under the influence of the ideas of the French Revolution and is based on the notion that individual will is without any limitations (Perović 1981, 156).

However, when looking at insurance contracts and policies as integral parts of contracts, as well as general market trends, it is clear that the limitations on the actions of contracting parties extend far beyond the framework established in Article 10 of the Law on Contract and Torts. The limitations are such that we can actually speak of a completely new legislation, a law of insurance contracts. Legislative intervention in insurance contracts has reached such proportions that it is justified to introduce the term *regulatory private law*. Since these are private law relations between insurers and service users, characterized by inequality, and since during decades of implementing consumer protection standards we have encountered countless violations of consumer rights and interests, the legislative goal of regulating this legal transaction can only be achieved through private law using regulatory techniques.[9] It is our opinion that such a private law complements the regulatory and supervisory law of insurance, which *in ultima linea* leads to the impression that insurance is a highly regulated area.[10] Additionally, the diversity of insurance transactions clearly indicates that the legislatively prescribed unified regime for insurance contracts is insufficient and incomplete for all forms of this contract, requiring an additional response. The idea of application of different legal regimes to different insurance contracts leads us to the question – is insurance contract law ready for hybridization?

2.1. Two or Three Regimes of Insurance Contract Law

To clarify why we believe that insurance contract law is ripe for hybridization, let us recall that there are three classes of insurance buyers/users. Since the beginning of the insurance development, there has been a clear distinction in the legal regime of commercial insurance contracts (so-called "large risks" in EU terminology) and contracts concluded with individuals (so-called "consumer contracts"). Somewhere in between are

[9] The insurance market is not self-sustainable based purely on market principles, rather, it requires regulatory intervention.

[10] Such a stance fits the concept of the development of insurance contracts, which has transitioned from a highly suspicious aleatory transaction to a highly regulated financial transaction and is an integral and unavoidable part of modern economic and social life. The entire history of insurance is inspired by the struggle against the dubious nature of insurance transactions and distrust toward the insured. Even today, many insurance principles testify that such fear has not completely disappeared. Take, for example, the principle of indemnification and the principle of utmost good faith, which continue to inspire numerous rules aimed at protecting the institution of insurance and public order in insurance.

the contracts with SMEs, for which there is still a dilemma whether they can be classified as consumer or commercial insurance contracts. Considering two completely different legal regimes, as well as the third one which raises the most dilemmas, the question arises whether insurance contract law is uniform. The differences that exist in practice and which mostly affect the freedom of contracting in this part of legal transactions are the main reason why, from our point of view, insurance contract law is like a *chameleon*: it adapts and changes according to whom it provides protection. The principle of freedom of contracting flourishes within the area of contracts concluded by companies and of a corporate nature (Picard 1939, 137–155; Petrović Tomić 2017, 417–439). Indeed, this is confirmed by the Law on Contract and Torts, whose scope of application *rationae materiae* does not include transport insurance, reinsurance, and insurance of claims.[11] In all of these mentioned areas, not only is this legal principle dominant, but it is also what is collectively referred to as the rules of conduct. These are rules and principles characterized by the fact that they are the result of business practice that the legislator did not feel the need to restrict, since the parties to the contract are more or less equal in their legal positions.

When we move on to the realm of consumer contracts, autonomy of will and freedom of contracting become something to strive for and something that cannot be found easily (Petrović Tomić 2020, 100–125). Based on the knowledge of the part of the Law on Contract and Torts dedicated to insurance contract, the authors namely argue that the search for nonmandatory provision within this Law is a more difficult task. Unlike other contracts, where it is harder to find imperative and mandatory legal provisions, insurance contracts feature a completely different legislative method of regulation, which in a way takes a step back. Why? Because freedom of contracting emerged as a legislative response to the development of the market mechanism and has been celebrated for centuries as a triumph of freedom over rules. In the field of insurance, which regulates contractual relationships between unequal partners (implying not only economic but also professional inequality), we observe the supremacy of state interventionism over freedom of contracting.[12] It should be noted that the developmental path of protecting the weaker party is highly instructive. The Law on Contract and Torts specifically, on one hand, perceives the insured as the weaker party and attempts to protect them, through a series of imperative rules, from the disproportionately stronger insurer. However,

[11] Serbian Law on Contract and Torts, Art. 899.

[12] Karanikić Mirić (2020, 114–136) uses the term "interventionist legislation", which we believe is also quite appropriate for the insurance contract relationship.

this protection is not enforced consistently. The legislator, in a very obvious way, fears what an unscrupulous insured could do to the insurer and/or the institution of insurance as a whole, and sporadically directs the protective function toward the insurer. This leads to an extremely inconsistent legislative policy.[13] The legislator sometimes protects the insured, and at other times applies measures primarily of a penal nature against them. As nicely observed in literature, early insurance legislation was influenced by a fear of the abuse of the insurance institution by the insured and by nurturing suspicion of their intentions toward the insurer.[14] The best examples of inconsistent legislative policy are the duty to disclose circumstances that are material for risk assessment and overinsurance, etc.

Finally, although most legislations do not introduce a separate regime for SMEs and entrepreneurs, there have been advocacies in theory for their separation from the regime of commercial risks (Petrović Tomić 2015, 71–75). This leads to the following conclusions. Firstly, insurance contract law is definitively emancipated in relation to general contract law. Historically speaking, insurance contract law features a *lex specialis* approach. In top-tier legal systems, the insurance contract has always been regulated by special laws, creating a unique and comprehensive regulatory system for legal relationships arising from insurance.[15] Secondly, over centuries of

[13] Herman Cousy (Cousy 2012, 86) mentions the phenomenon of "schizophrenia" in modern insurance law. He emphasizes that in most modern insurance legislations, it is not easy to determine whose interests are protected by certain norms: are they the interests of the insurer, the insurance institution, or the insurance service users?

[14] "In insurance law this attitude was translated into an attitude of systematic suspicion toward the policyholder and the insured. In fact, nearly all of the traditional basic principles of insurance contract law can (only) be understood and explained as originating in this basic suspicion of 'fear and abuse'." (Cousy 2013, 124).

[15] The best example of legislative technique concerning insurance contracts is the German Insurance Contract Act (Versicherungsvertragsgesetz, BGBl. 2024 I Nr. 119, hereinafter VVG) of 2007, which came into effect in 2008, and the French Insurance Code (French: Code des assurances) of 1989. The current law of Germany replaced the Insurance Contract Act of 1908, which had been in effect for an entire century. The semi-mandatory norms from the German Act of 1908 are such an invention that modern legislators have so far failed to find an institute to replace them. This speaks to the adaptability of these norms to insurance matters and the beneficial effects achieved through their implementation.

The Insurance Code of 1989, which, with amendments, constitutes the positive law of France, does not fundamentally change the 1930 Code, whose most important provisions are still in force. In an era of regulatory inflation and legal regulations in general, one might wonder how this is possible – especially in a matter so sensitive and significant for consumer protection. The answer is simple: the 1930 Code was

practice, the insurance contract has become a classic contract, deserving the epithet "hybrid" due to the differences in the legal regime of the contractual relationships it governs. Thirdly, today it is justified to introduce the term "special legal regime" with the intention of highlighting all the peculiarities of insurance contract law, which in some segments (for example, investment insurance services; Kostić 2018, 465–468) is increasingly exposed to the influence of European directives such as the MiFID.[16]

The transition from the realm of classical contract law to the prominent segment of consumer insurance contract law undoubtedly lasted an entire century. During this period, it became clear that civil codes/laws were not the most suitable tool for regulating contractual relationships that are distinctive both in terms of the parties involved and the subject matter (the aleatory nature as a key characteristic necessitating the application of a set of rules) (Mimoun 2017, 61–63; Bigot 2014, 206). If the stronger contractual party is obliged by the contract to fulfill a duty to the weaker party, who is also insufficiently informed about the service being procured (often because it is imposed on them by law), this cannot in any way be equated with cases where contracts are entered into by parties who are equal in knowledge and/or economic power, and when they conclude contracts that are common in legal and business transactions and fairly understandable.

What we can assert with certainty, regarding insurance contract law, is that it is neither homogeneous nor inalterable.[17] Certain patterns in the terms of response encountered in the domain of insurance contract law can be defined nonetheless. In this matter it is not surprising that the issues Lord Mansfield resolved in his decisions in the late 18th century haven't drastically changed in the 21st century.

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ahead of its time. The majority of norms were formulated to ensure and protect the contractual balance between insurers and policyholders. To give an example, according to the norm regarding clauses on excluded damages. such clauses are void if they are not drafted in a clear and limited manner and if they are not printed conspicuously. A similar norm did not exist in general contract law. Only half a century later, consumer law introduced a norm stating that contract clauses proposed by professionals to consumers or nonprofessionals should be drafted and presented in an understandable and clear manner. Therefore, the "old" insurance contract law constituted a comprehensive system for protecting policyholders as the weaker party (Bonnard 2012, 21).

16 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173 of 12 June 2014, 349–496.

17 In one of the most cited studies, Kenneth Abraham (Abraham 2013, 653–698) described insurance as four things in one: a contract, regulatory activity, a product, and corporate governance.

2.2. Inadaptability of the General Contract Law Approach to Insurance Contracts: Two Examples from the Law on Contract and Torts

Disclosure of circumstances significant for risk assessment is one of the fundamental duties of the insured, as it enables the insurer to form an opinion on the risk, categorize it, and determine the premium to be charged for the coverage. This duty is specific to insurance law because it directly results from the application of the principle of utmost good faith (Lambert-Faivre, Leveneur 2017, 280). In fact, provisions on precontractual duty to disclosure circumstances relevant for risk assessment can be found even in legal systems where the principle of good faith and honesty does not exist in the form it has in Continental Law, e.g., in Britain (Beale, Khanom 2007, 71–72). In Serbian law, the insured is obliged to disclose to the insurer, by the conclusion of the contract, all circumstances significant for risk assessment, known to them or which could not have remained unknown to them.[18] Regardless of whether it is an insured with consumer or professional status, they are obliged to provide the insurer with all this information. This duty of disclosure, as defined, is too broadly formulated and potentially unfavorable for the insured, taking into account the possible consequences. Apart from that, it is obvious that the logic behind the Serbian legal solution is inconsistent with contemporary trends. Namely, the Law on Contract and Torts is based on the idea that the party procuring insurance knows the risk and is obliged to share it with the party providing protection from the risk and which lacks sufficient data for risk assessment and business decision-making. One does not need to be an insurance expert to understand how much this logic is "twisted" nowadays.

The most drastic legal consequences arise from breaching the mentioned duty. The Serbian Law on Contract and Torts takes into account the insured's conscientiousness, on one hand, and the so-called materiality test, on the

[18] For the comparison's sake, in Belgian law, this duty is formulated as follows: "The insured is obliged to accurately disclose all circumstances of which they are aware and which they reasonably believe to be elements on the basis of which the insurer assesses the risk." Although in Belgian law, even after the 2014 reform, the system of spontaneous disclosure still applies, the formulation is such that a breach of the duty to disclose can only be attributed to the insured regarding circumstances of which they were aware and which are relevant to risk assess. This, therefore, opens the door to the possibility for the insured to prove that they could not reasonably have known that a certain circumstance should be reported to the insurer (Fontaine 2016, 210, translated by author).

other hand.[19] If the insured acted unconscientiously, i.e., deliberately provided incorrect information about circumstances "being of a nature which would induce the insurer, if he knew the real situation, not to enter into contract", or if they intentionally suppressed them, the insurer may seek the annulment of the contract within three months of becoming aware of the false declaration.[20] It should be noted that there is a deviation from the general rules of contract law regarding the right to claim nullity of a rescindable contract.[21] The Law on Contract and Torts limits to three months the subjective deadline by which the insurer can demand the annulment of the contract, but says nothing about the objective deadline. It can be inferred from this that the objective deadline is calculated according to the general rules of contract law, which means that it is three years from the day of entering into contract. After the annulment of the contract, the insurer is not obliged to refund the premium paid by the insured for the unused period of insurance. Furthermore, they are entitled to payment of the premium for the insurance period within which they requested the annulment of contract.[22] This regulation of the consequences of rescission deviates from the general rules of civil law. The insurer is not obligated to refund what they received from the other contracting party, which represents a sort of *punishment and sanctioning* of the insured. Viewed from the perspective of contractual balance, this is an example of an unfair legal clause. Thus, the Law on Contract and Torts leaves it to the insurer to assess whether they will sanction deliberately incorrect reporting of circumstances significant and relevant for risk assessment by nullifying the contract or by subsequently increasing the premium. They are given a three-month period to consider, starting from the day they became aware of the incorrectness of reporting or suppressing of the relevant facts. The inconsistency of the legislator in these cases should be noted. On one hand, annulment – which depends on the will and assessment of the insurer – leads to punishing of the insured (who cannot recover a portion of the insurance premium by applying the principle of premium divisibility); on the other hand, the same unconscientious

[19] It is worth mentioning that, unlike comparative law, the Serbian Law on Contract and Torts does not make a distinction in the terminological sense between circumstances significant for risk assessment and circumstances affecting the legal validity of the contract.

[20] Serbian Law on Contract and Torts, Art. 908, paras 1 and 3. The breach of the duty to disclose manifests in two forms: non-reporting and incorrect reporting.

[21] Serbian Law on Contract and Torts, Art. 117, paras 1 and 2.

[22] Serbian Law on Contract and Torts, Art. 908, para 2.

insured will not be left without insurance protection if the insurer decides that it is more rational to request an increased premium (which is more common in practice).[23]

Another example of the provision from the Law on Contract and Torts, which speaks to the inadequacy of the general contract law approach, concerns overinsurance, an institution that is quite outdated in Serbian law and contrary to the interests of the insured. The first deficiency of a provision in the Law is that it is not specified how disproportionate to the real value of the insured object the insured amount should be for it to be considered overinsurance. This can easily lead to the inconsistency between insurers and judicial practices. The second, even more significant, deficiency lies in the legal consequences of overinsurance. Regarding the regulation of this issue, the Law on Contract and Torts distinguishes between initial overinsurance (which existed at the time of contract conclusion) and subsequent overinsurance that arises in the course of the insurance period. In Serbian law, if overinsurance is the result of the insured's intention to deceive the insurer, the other party, i.e., the insurer, has the right to request the annulment of the contract.[24] Since intentionally caused overinsurance is connected to the risk of intentionally causing damage in order to obtain greater compensation and unjust enrichment, it is severely penalized according to the Law on Contract and Torts. Not only does the insurer have the right to annul the contract, but they are also entitled to retain the

[23] If the insured unintentionally provides incorrect information or fails to report circumstances significant for risk assessment, the insurer has the right to choose whether to demand unilateral termination of the contract (in which case they are obligated to refund a portion of the premium corresponding to the unused period of insurance) or to increase the premium in proportion to the increased insurance risk, within one month from becoming aware of the breach of the reporting duty. If the insurer opts for termination due to noncompliance, the contract is terminated 14 days from the insurer's notification of the insured of the termination. However, if the insurer chooses to increase the premium (which is more likely), and the insured does not accept it within 14 days of receiving the proposal, the contract is terminated. If an insured event occurs in the meantime, the insurer is obliged to pay compensation in proportion to the paid premium and the premium that should have been paid according to the actual risk severity.

[24] This is the case if, by concluding the insurance contract and setting an increased insured amount, the insured intended to obtain a higher compensation than the actual incurred damage. What triggers the sanction of contract nullity is the fraudulent intent on the part of the insured, who through such actions abuses the insurance institution. However, proving this is not easy. It is precisely for this reason that insurers rarely invoke contract nullity. They usually compensate the insured up to the amount of the incurred damage; and the mere fact that the insured paid an increased premium represents a form of sanction.

premiums received and have no duties if an insured event occurs.[25] If the insurer discovers the overinsurance after payment of the insurance claim, they have the right to demand reimbursement from the insured.[26] This is an example of inadequate regulation of the legal consequences of contract nullity. While the logic of not paying out the insurance claim, or returning it to the insurer if paid before establishing overinsurance, can be understood, the same cannot be said for retaining the premium. Adhering to insurance industry standards and the technical organization of this business, the insurer may only be entitled to the premium until the moment they become aware of the overinsurance contrary to good faith. Taking into account the manner of regulating the legal consequences of overinsurance contrary to good faith in Serbian legislation, it can be inferred that the legislator intended to introduce some form of punitive compensation by allowing the insurer to retain the premium even after the annulment of the contract.

If the overinsurance is concluded in good faith, each party has the right to reduce the sum insured and the premium. An insurer, even in the case of conscientiously concluded overinsurance, retains however the received premium and is entitled to a non-reduced premium for the current insurance period. From the insurer's perspective, therefore, it does not matter whether it is conscientious or unconscientious overinsurance: they have the right to collect the non-reduced insurance premium. The consequences of overinsurance concluded in good faith have been regulated by the Law on Contract and Torts in a manner that is not in line with the consumer protection principles.[27] An insured who has not acted unconscientiously,

[25] Taking into account the provisions of the Insurance Law, the settlement of claims and in general, the actions of insurers in this regard should be in accordance with the risk management rules. This means that they should adhere to legal provisions limiting their liability, as well as provisions of general insurance terms and conditions. If the insurer were to agree to pay a higher compensation than the amount of the damage or the value of the property, this would be grounds for the National Bank of Serbia to take supervisory measures.

[26] Unlike the Serbian legal solution, which excessively protects the insurer by entitling them to retain the received premiums and to an unchanged premium for the current period (Serbian Law on Contract and Torts, Art. 932). in German law, the intention of the insured to obtain an unlawful pecuniary advantage is sanctioned by the annulment of the contract, but without retaining the same premium for the current insurance period by the insurers. According to VVG § 74, the insurer has the right to the premium until the moment they become aware of the circumstances causing the contract nullity.

[27] In German legislation, the legal consequences of conscientious overinsurance are regulated in such a manner that each party can demand a reduction of the insured amount, with a proportional reduction in the premium with an *ex nunc* effect. VVG § 74, Abs. 1.

i.e., who has inadvertently contracted a higher insured amount, is treated very unfairly according to the Law on Contract and Torts. After discovering overinsurance, a conscientious insurer retains the premiums received and has the right to a non-reduced premium for the current insurance period. This norm is an example of *inappropriate protection of the insurer's interests*. Precisely the information on the conscientiousness of the insured, a layman and non-expert in insurance, demands a completely different approach.

3. NEED FOR REGULATION OF CONSUMER INSURANCE CONTRACTS

Although today an insurance contract serves as an illustrative example of limiting the principle of freedom of contracting, historically it has long been a fundamental one of regulating insurance contracts.[28] Stimulated by philosophical debates, as well as economic and social circumstances, the principle that everyone has the right to decide whether to conclude a contract, with whom they want to conclude it, and what its content will be, has become the fundamental principle in regulating economic activities in many European countries.[29] The necessary condition for achieving these values was not recognized in state intervention, but in the strength of the contract as an agreement reached between the contracting parties. In fact, the guiding idea was to limit the role of the state (MacQueen, Bogle 2017, 292ff.). Civil codes and emerging codifications, as well as special laws on insurance contracts that derived from them, started from the idea that freedom of contracting is a necessary condition for the functioning of the market, although there were no explicit provisions on this.

However, during the 20th century, the entire concept of the dominance of freedom of contracting, based on *laissez-faire, caveat emptor*, and the prominent importance of individual will begin to be questioned. It became clear that establishing and sustaining freedom of contracting required the correction of the established dominance of the stronger contracting party over the weaker one, either due to the economic circumstances or

[28] This principle originated in the 18th and 19th centuries, based on liberalism (Reich 2013, 19; Barral Viñals 2020, 47).

[29] The principle that contracts have the legal force of law between the contracting parties can be found in Napoleon's Civil Code. "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*" – Jacques Ghestin recognizes this principle in the Declaration of Human Rights of the French Revolution, while in England it is viewed as a "reasonable social ideal" (Beatson 1998, 4; Basedow 2008, 904).

possession of specialized knowledge (Canaris 2000, 273; Zöllner 1996, 35). Just as the ordoliberal theory had shown previously, market mechanisms inherently move toward self-elimination and self-distraction if they turn out to be unsustainable, while requiring significant and continuous state involvement to control the arbitrage of the market and its laws.[30] However, when it comes to insurance contracts, limitation of freedom of contracting has started to proliferate only in consumer insurance contract law, while in commercial insurance contracts, it has retained the form that exists in the rest of contract law. Numerous cases in the field of consumer insurance contract law have shown that when an approximate equality of bargaining power between parties is missing, a fair balance of their interests cannot be achieved solely by contract law, but corrective legislative measures are necessary. Therefore, the insurance contract has transitioned from being at the complete mercy of the will of the contracting parties to requiring additional legislative responses in order to ensure the necessary level of protection for the weaker contracting party who would otherwise be forced to accept the contract terms defined by the insurer.

It became obvious that such a position of the insurance consumer required an additional degree of state interventionism in consumer insurance contracts. Relying solely on existing legal provisions on insurance contracts did not and does not sufficiently consider the need to protect consumers, allowing continued exploitation the unawareness of consumers, whose indebtedness on various grounds has increased (Benöhr 2018, 687). Over the past two decades, we have witnessed a significant expansion of financial services, including insurance, which are becoming increasingly accessible to consumers, making them increasingly vulnerable to the risk of assessing the hazards and hidden characteristics of financial services. Apart from that, they are subjected to pressure from financially stronger parties to conclude contracts on the terms they were unable to negotiate (Ramsey 2015, 159; Benöhr 2013, 111ff.). Participants in the insurance market are no exception. Experiences from the insurance market have clearly shown that consumers require an additional level of protection, in addition to what the contract itself

[30] Two doctrines have influenced the legislature's will in the sense of regulating financial services. The first one is neoliberal, assuming that the consumer is a rational individual who can independently make decisions if provided with adequate information. It is clear that this approach advocates for the principle of autonomy of will to be given greater consideration than the principle of protecting the weaker contractual party. The other theory is based on the theory of the social market, which justifies greater state intervention in various forms (Garcia Porras, van Boom 2012, 23–24).

and statutory rules of contract law offer them.[31] The growing dissatisfaction and distrust among consumers, caused by the financial sector's inability to carry out and fulfill its basic societal role, can only be addressed this way.

The problem currently observed in modern insurance law, and Serbian insurance law is no exception, is the endeavor to protect the consumer on one hand,[32] while simultaneously not abandoning the traditional principles of protecting insurers and the insurance industry. Such a dual demand, attempted to be addressed by existing uniform norms, is unsustainable and undoubtedly will require legislative intervention. The question is whether legislative intervention in Serbian legislation will be proactive, by enacting new regulations or amending the existing ones, or whether the burden will be shifted to the judicial authority to retrospectively correct identified deficiencies. Considering the characteristics of the continental legal system, to which the Serbian legal order belongs, it is certain that changes to the regulations will be necessary. What is certain is that, despite all legal provisions, "contractual freedom to a certain extent is a surpassed category in insurance contract law" (Petrović Tomić 2020, 104, translated by author),[33] which will definitely be reflected either in new legal act on insurance contract

[31] The case law of the German Federal Constitutional Court is very interesting, as it has twice addressed life insurance (BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96, Neue Juristische Wochenschrift 2005, 2363; BVerfG 26 July 2005, 1 BvR 80/95, Neue Juristische Wochenschrift 2005, 2376). In both cases, the Federal Constitutional Court recognized the lack of substantive freedom of will of the insured and determined that the legislature was obliged to amend the Insurance Contracts Act to provide effective legal remedies for the insured. It is particularly important to emphasize that in the mentioned cases (1 BvR 782/94 and 1 BvR 957/96. 1 BvR 80/95), the insured were not disadvantaged based on age, education, lack of experience, or poverty. The contracts were also not unusually unfavorable to them. The lack of freedom of contracting materialized in the general inequality of the bargaining powers of the insurance companies and consumers, as well as in the overall lack of freedom of choice for each insured after concluding an insurance contract.

[32] As a result, legislative activities are emerging at both the national and international levels, aimed at providing appropriate mechanisms for economic and legal protection (e.g., G20 High Level Principles on Financial Consumer Protection and the UN Guidelines for consumer protection). Additionally, institutional activities are being undertaken, such as the establishment of the European Banking Authority and the European Insurance and Occupational Pensions Authority. The goal is to establish the ordoliberal concept of autonomy of will because in the case of consumer insurance contract law, freedom of contracting can provide its beneficial effects only through regulatory intervention (Basedow 2008, 906).

[33] Actually, even during the first half of the 20th century, revolutionary views could be found in literature stating that freedom of contracting plays no role in insurance contracts, which was subsequently confirmed in newly adopted codifications of insurance contract law (Picard 1939, 137, 139).

or in the amended legislation on the matter. This is the only way that the specificities of insurance contracts and the insured, as a consumer, can be taken into account. The existing interpretation of a consumer in insurance law is not enough or adequate and it definitely requires a more extensive approach (Petrović Tomić 2015, 124).

3.1. Arguments in Favor of Statutory Regulation of Consumer Insurance Contracts

Considering the quality and different capacity of the contracting parties, insurance contract law has evolved from being characterized as "ordinary" contract law to strictly regulated contract law. As we have hinted, it is not possible to adequately address insurance contract law theoretically without dividing it into at least two, and potentially three, segments. The perception of insurance contract law as a pure contract law, is limited to commercial insurance contract law. Every study on insurance can start with the assertion that insurance contract law is the segment of legislation that regulates contractual relationships related to risk. These are typical aleatory contracts that transfer risk from the endangered party to the party professionally engaged in risk protection (Petrović Tomić 2019a, 266–268). At the core of the contractual exchange is the payment of a certain amount of money by the insured to the insurer as consideration for the insurer's payment of a certain amount in the event of an uncertain event.[34] Another significant determinant of an insurance contract is that it is a service, not a goods contract. Thirdly, an insurance contract is exceptionally time-sensitive. Unlike other contracts, where it is common to exit the agreement with one contractual partner and enter into an agreement with another, in insurance, this is almost impossible. Why? Because by definition, risk is a future uncertain event that is not covered when it is certain to occur. In a way, an insured is racing against time because it is not predictable if, or when, a potentially adverse (harmful) event will occur, the consequences of which the insured wants to mitigate by entering into an insurance contract.

Based on the above, it is clear why the view that insurance is a typical product of neoclassical exchange is encountered in the earlier theory of insurance law (Daavey 2023, 5). Although it may sound interesting, it is only partially true, i.e., it applies only to commercial insurance because we

[34] Article 1:210 of the Principles of European Insurance Contract Law. Many authors have expressed their views on this issue (Basedow 2003, 2; Luik, Braun 2011, 195; Basedow, Fock 2002).

can only speak of exchange in the classical sense if the condition of equality of business partners is fulfilled. The differences between parties acting as buyers of insurance policies significantly influence the legal framework. Historically, commercial contract law, or in modern terminology the B2B contractual framework, was the first to develop, and this includes transport insurance, reinsurance, and all contracts covering large risks in terms of EU directives.[35] But after certain period of time, in all leading insurance cultures, the legislature "partitioned" insurance contract law by adopting separate legal sources during certain periods of the insurance institute development. The historical regularity is as follows: *the development of a particular type of insurance was accompanied by the development of insurance legislation applicable only to those types of insurance activities*.[36] Another regularity is: *the dominance of different insurance markets influenced the development of reference insurance legislation*. Thus, England features a highly commercial market for maritime and general transport risks, as well as reinsurance, while the European-continental area features the development of small and medium risk markets.[37]

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[35] The definition of large risks was first introduced by the Second Non-Life Insurance Directive (Directive 88/357/EEC, new Article 5(a)), later adopted in Directive 2009/138 on Solvency II. The purpose of introducing the category of large risks was to protect insurance policyholders through the choice of applicable law for insurance contracts. Only insurance policyholders in contracts covering large risks have the right to choose the applicable law. As emphasized in the preamble of the Second Non-Life Directive, these are risks where the policyholders, due to their legal status, size, or nature of the risk, do not require special protection from the state where the risk insured is located.

Large risks include: 1) classes of insurance for railway rolling stock, aircraft, ships, goods in transit, airline liability, and carrier's liability, as well as credits and guarantees when the insurance policyholder is professionally engaged in an industrial or commercial activity or one of the liberal professions, provided that the risks relate to that activity; 2) classes of insurance for motor vehicles, fire and natural disasters, other property damage, liability arising from the use of motor vehicles, general liability, and other financial losses, provided that the insurance policyholder exceeds at least two of the following three limits: a) balance sheet total of EUR 6.2 million; b) turnover of EUR 12.8 million; or c) an average number of employees of 250. Thus, large risks are determined based on the nature of the risk or the type of insured in relation to the nature of the risk.

[36] The development of legislative awareness regarding the regulation of insurance contracts through various legal instruments can be traced back to the English Marine Insurance Act of 1906.

[37] Historical reasons provide an explanation as to why the UK insurance consumer law was only adopted in 2012 (Consumer Insurance (Disclosure and Representation) Act 2012), while the Marine Insurance Act dates back to 1906. This certainly does not mean that there was no consumer protection in English law. The ombudsman

The need to provide an additional level of protection to the insured wasn't recognized for a long time. Main principles for regulating the relationship between contractual parties were established in line with this idea, as evidenced by the provisions of the Serbian Law on Contract and Torts. Over time, and through the adoption of consumer directives at the EU level, national legislators began to realize that the insured deserve certain and different levels of protection.[38] Comparative law nowadays knows numerous insurance contract laws containing provisions on cases where the position of the insured requires additional protection.

This however is not the case in Serbian law. Insurance as a financial service is subject to the Consumer Protection Act,[39] which provides that it will be always applicable to relationships between consumers and traders, except in cases where there are specific provisions with the same objective regulating those relationships, ensuring a higher level of protection in accordance with special regulations.[40] The Law on Contract and Torts does not contain specific provisions guaranteeing an additional level of protection to the insured. Furthermore, it does not contain any reference to the Consumer Protection Act. Despite all the praise for reintroducing insurance services to the scope of the Consumer Protection Act, the matter of consumers in insurance contracts still raises two questions: is the consumer concluding the insurance contract aware of the fact that there is a *lex specials* regulating their rights and duties pertaining to the insurance contract; and are they receiving the sufficient protection that their consumer status requires? The second question stems from the problem of clearly defining insurance consumers, which is by no means an easy task.

The answer to this question determines who will receive special treatment based on the insurance contract, in terms of the insurer's specific duties toward that contractual party. Even though an insurance contract is a synallagmatic one, it involves and concerns other parties who did not participate in the conclusion of the contract. For this reason, the concept of a consumer in insurance law should encompass the insurance policyholder, the insured, the beneficiary, and the third party suffering loss, who have not

played a particularly significant role, contributing to relieving the judicial system and serving as a warning system to the regulatory body about business practices that were unethical and/or unfair (Petrović Tomić 2024, 296–300).

38 This also applies to modern forms of concluding insurance contracts, which raise a series of questions related to consumer protection (Grujić 2024, 105–117).

39 Serbian Consumer Protection Act, *Official Gazette of the RS* 88/2021, Art. 4, para 5.

40 Serbian Consumer Protection Act, Art. 4, para 1.

acquired their status based on large-risk insurance contracts (Petrović Tomić 2015, 124). Moreover, in consumer insurance contracts, the same level of equality does not exist in all transactions. Let us demonstrate this with at least one example. Namely, a distinction should be made between contracts concluded directly between consumers and insurers and contracts involving an insurance intermediary. In the former case, there is a clear contractual imbalance, as the service buyer is economically and professionally weaker than the service provider. The latter case involves a different way of concluding contracts, namely, the involvement of three parties. Only when an insurance intermediary is present, bringing an element of contractual balance due to their expertise, can consumers expect adequate protection of their interests (the so-called broker meets underwriter situation). It is now widely accepted that the intermediary has a duty to advise the client and generally protect their interests (Petrović Tomić 2019b, 355–370). Therefore, we cannot equate service users, in terms of negotiating position and overall vulnerability, when a qualified intermediary is involved and when one is not.

It is clear that the Serbian legislature faces the obligation to modernize insurance contract law by providing an additional level of protection to various types of consumers in this contract. In legal systems like the French or German, the process of codifying insurance law was accompanied by the "integration effect", which involves incorporating rules on the protection of insurance consumers into laws dedicated to insurance contract law (Brand 2012, 58–59). This means that all issues related to insurance contracts, including the special provisions required by consumer insurance contract law, are regulated in a single statute. This is the only way that consumers under insurance contracts can be certain of their rights and obligations under mass risk insurance contracts involving non-large risks. This way general consumer regulations would still be applicable to issues not explicitly regulated by the law governing the matter of insurance contract law.

3.2. Further Humanization of Insurance Contract Law through Market Conduct Rules

Following the 2008 financial crisis, international supervisory bodies began analyzing the operations of financial institutions in order to identify shortcomings that indirectly or directly contributed to the economic downturn. One of the triggers identified were weaknesses in the corporate governance of financial institutions, particularly manifested in the lack of effective mechanisms for controlling them and dealing with clients

(Marzai Abliz 2019, 23). Consequently, the European legislator embarked on reforming the regulation of the market conduct of financial institutions with the aim of providing protection to clients from abuses or unfair treatment by financial service providers, as well as to empower supervisory authorities with appropriate powers (Prorowski 2015, 196–206). The result was the adoption of the MiFID and the IDD,[41] which dedicate a significant portion of their provisions to market conduct rules regarding interactions with clients (insureds and investors) during the necessary counseling and provision of necessary information.[42] By establishing new market rules of conduct, numerous new regulations were created for various participants in the insurance market that were not (and some still are not) regulated by insurance contract laws. A key requirement in both directives is the provision of appropriate and targeted advisory services to clients by timely disclosure of product portfolios, all product details and costs, and service costs.[43] For example, insurance distributors have been imposed new, extensive, and comprehensive obligations under market conduct rules, including fair, honest, and transparent dealings with clients, acting in the best interests of the client,[44] assessing the client's demands and needs, informing clients before concluding a contract, as well as new organizational requirements regarding effective product supervision and management policies.[45] At the same time,

[41] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26 of 2 February 2016, 19–59.

[42] At this point, the authors also mention the MiFID, which relates to the market for financial instruments, but not directly to insurance. However, the insurance industry has started to expand its business territory to other providers of financial services, such as investment firms and banks (Cousy 2017, 40), while at the same time banks are taking on an increasingly important role in distributing insurance products. In fact, there is a gradual despecialization of financial service providers, with the distinctions between them gradually disappearing. The ultimate results of this process are the distribution of insurance products by banks (bancassurance), the emergence of financial conglomerates consisting of various financial service providers, and the development of insurance products whose legal nature is subject to doubt, such as insurance with savings components and insurance linked to investment funds. This has opened up significant space for the application of this Directive to the business operations of insurers, which is particularly significant because national regulations contain almost no provisions regarding such mixed financial instruments (Cronstedt *et al*. 2021).

[43] Only the MiFID recognizes this duty, while the IDD prescribes the duty for distributors to identify and document the demands and needs of the client, which should then have implications when consulting on product selection.

[44] IDD, Art. 17.

[45] The Serbian Insurance Law recognizes rules of conduct by prescribing the obligation of precontractual information for the insured (Arts. 82–84), protection of the rights and interests of the insured (Art. 15), conducting activities in accordance

these established market conduct rules provide supervisory authorities the possibility to examine the behavior of insurance companies (and other insurance distributors), as well as their relationships with clients, with the aim of taking preventive action to preclude undesirable situations in which insurance users may be harmed, rather than just reacting to unwanted situations after they occur.[46] These rules are autonomous and directly addressed to insurers and insurance intermediaries, with a supervisory authority empowered to enforce and implement them, as well as to sanction noncompliant behavior, all with the aim of further humanizing insurance contract law by providing a higher level of protection to the insured, shifting the burden onto insurers in terms of duties that were previously solely on the insured.[47]

The significance of rules of conduct regulating relationships between participants in the financial market has begun to expand as a result of the adoption of these directives, as numerous provisions on market conduct by financial service providers have found their place in them. In this way, the concept of rules of conduct as a source of law entered the field of insurance contract law, albeit it lies on the border between contractual and regulatory or business law, as emphasized. Market conduct rules are nowadays gradually becoming a significant source of regulation for emerging relationships arising from insurance contracts (Cousy 2017, 45).

The National Bank of Serbia has issued Guidelines on Minimum Conduct Standards and Good Business Practices for Participants in the Insurance Market, in response to the solutions from the Insurance Distribution Directive and the obligations of the Republic of Serbia in the process of harmonizing regulations (Ćeranić Perišić 2023, 128). The content of these guidelines and similar rules now imposes certain duties on insurers or other financial service providers[48] that exceed the obligations and duties covered by insurance contracts and legal provisions of insurance contract law. Some

with the law, general acts, business policy acts, insurance profession rules, actuarial rules, good business practices, and business ethics (Art. 19).

46 This is the *Product and Oversight Governance* concept, a system of supervision and management of insurance products (European Bank Authority 2017).

47 In literature, this trend of acknowledging the significance of conduct rules as a source of substantive law is referred to as "Mifidization", since the rules of conduct expanded after the adoption of the MiFID (Cousy 2017, 45–48).

48 Thus, the Guidelines of the National Bank of Serbia on Minimum Standards of Conduct and Good Practice for Participants in the Insurance Market specifically apply to the operations of insurance companies, insurance intermediaries, insurance representation companies, insurance representatives, banks, financial leasing providers, and public postal operators who conduct insurance representation

of the duties now imposed on insurers include precontractual information and acting in the best interest of the policyholder (Radojković, Kostić, Gajić 2021, 93), all of which have implications for the performance of contractual duties under insurance contracts, although some of them are not yet part of the law.[49] The additional significance of the prescribed obligation to act in the best interest of the policyholder lies in the fact that it reflects Article 17(1) of the IDD, which is emphasized as mandatory. Consequently, insurers are deprived of the possibility to exclude this duty toward the insured through insurance contracts. Additionally, the rule of acting in the best interest is formulated in such a way as to serve to fill legal gaps in the absence of a norm regulating the insurer's relationship with the insured.[50] This opens up additional space for regulating relationships arising from insurance contracts through rules of conduct, which are necessary considering the position of the insured as a consumer and which are not integrated into legal frameworks. Market participants have recognized the need to establish an additional level of protection for policyholders, leading to the emergence of a new source of insurance contract law.

It is clear that the changing nature of the insurance market and the fundamentally different positions and needs of individuals purchasing insurance should be taken into account when conceptualizing insurance contract law and defining the regulatory framework. The question arises: is there one insurance contract law? Or are there more? The answer is apparent. Insurance contract law is an example of a branch characterized by fragmentation, accompanied by legislation fragmentation. In addition to the consumer and commercial aspects, it is possible to clearly distinguish between indemnity and sum insurance (Glintić 2022, 53–78), insurance and reinsurance, etc. Insurance contract law differs from general contract law, and there are also differences within insurance contract law that justify its treatment as a separate branch of law and legal discipline. What connects them into a meaningful whole is a special legal regime. Cousy's hybridization

activities based on prior approval from the National Bank of Serbia. See: Purpose of the Guidelines on Minimum Standards of Conduct and Good Practice for Participants in the Insurance Market.

[49] Currently, the Insurance Law also stipulates that supervision of the performance of insurance activities is carried out to ensure the protection of the rights and interests of policyholders. Insurance Law, Art. 13.

[50] Some of the current legal gaps include issues such as the conclusion of insurance contracts without verifying whether the insured event has already occurred, the method of calculating the refund of insurance premiums in case of termination of an insurance contract and insurance contract related a credit agreement.

of insurance law is an attempt to find a theory's response to numerous deviations from the general contractual regime and to the internal struggle within insurance law.

4. INSTEAD OF A CONCLUSION – THE HYBRIDIZATION OF INSURANCE CONTRACT LAW

We agree with the assertion that we are living in an era of hybridization of insurance contract law. As Herman Cousy noted, "modern insurance law has been contaminated with [...] a kind of 'hybridity', which may give rise to uncertainties in its interpretation, its application, and its implementation. Modern insurance law and legislation increasingly tend to protect the insurance consumer (i.e., the policyholder, the insured, and the third [party] beneficiary) by introducing several protective devices that draw their inspiration from the sphere and the logic of consumer law. But while so doing, legislators have not abandoned the basic principles of traditional insurance law, which were and are clearly inspired by a different logic and goal, namely the will to protect the insurer and to support and promote the insurance business" (Cousy 2023, 123).

Cousy's observations are significant for two reasons. First, he clearly points out changes in the very nature of insurance law. The center of gravity is shifting, leading to transformations that have, in turn, resulted in pluralism – not only in insurance contract law itself but also in the plurality of contractual obligations and duties. Thus, the obligation of precontractual disclosure of risks is conceptually different in consumer insurance compared to commercial risks. Second, and unavoidably, he brings us back to the paradigm of insurance contract law as a commercial law and to the key principles of protecting insurers from opportunistic behavior by insured parties, a principle that remains relevant even in the era of consumerism.[51] In fact, in commercial insurance, greater attention is paid to the duties of the insured, reflecting efforts to avoid moral hazard and/or inadequate risk selection. It is as if the legislator implicitly trusts the insurer more and expects them to protect the market mechanism in insurance. At the same time, in the consumer sector, the focus is on the obligations of the insured, which can be divided into two key subcategories. The first is related to maintaining the level of risk on which the insurer accepted the insured for coverage and

[51] Traditional insurance contract law actually started from a completely opposite assumption to that on which modern insurance contract law is based: namely, that the insurer is the party in need of protection (Cousy 2023, 124).

tariffed, and the second is related to submitting a claim for compensation. The guiding idea behind the legal regulation of these duties is to protect the insured from losing their rights under the insurance, as a sanction for the nonperformance of any of the insured's obligations and duties, and generally introducing the principle of proportionality of the sanction to the type of breach of the contractual duties, which undoubtedly influences consumer insurance law (Mayaux 2011, 242).

Therefore, insurance contract law is a mixture of classical contract law, insurance best practices, and legislative interventionism in relationships concluded between unequal partners. Modern insurance contract law is based on a balanced weighing of the interests of insurers and insured parties, especially those in a typical consumer position. This does not diminish the role and importance of high-budget commercial insurance. It is time to adopt a nuanced pluralistic approach to insurance contract matters, and thus insurance should be recognized for its societal and market significance. Insurance regulation cannot be called supportive if it does not simultaneously provide protection for the weaker contractual party, protection for insurers from the irresponsible actions of insured parties, and for conducting of insurance business.

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*HISTORY OF ECONOMIC SANCTIONS: KEY RESEARCH QUESTIONS (WITH SOME ANSWERS FOR 2022 SANCTIONS AGAINST RUSSIA)***

The paper proposes several key questions that should be unavoidable in the research on history of economic sanctions. Four key questions are identified. The first one is what the aim of the sanctions is; what are they supposed to achieve? The second question relates to the mechanisms of sanctions. The third question is, are sanctions effective, i.e. do they produce economic impact and what is its magnitude? The fourth question is, are sanctions efficient, i.e. has the aim been achieved? All these questions are further developed into several more specific questions. Crucial methodological obstacles to answering all these questions are identified and guidelines for overcoming them are provided. The answers to the proposed key questions should be only the starting point in research on history of economic sanctions. Some preliminary answers to these questions were given for the case of February 2022 sanctions against Russia, imposed after it invaded Ukraine.

Key words: *Economic sanctions. – Sanctions aim. – Sanctions mechanisms. – Sanctions effectiveness. – Sanctions efficiency.*

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'Pain is inevitable. Suffering is optional'

Attributed to Haruki Murakami

1. INTRODUCTION

Economic sanctions (hereafter – sanctions) are a predominantly modern historical phenomenon. Although sanctions have been recorded in Ancient Greece and can be traced back to the Megarian Decree (circa 432 BC), by which Athens barred trade with Magera and denied the Megarians access to Athenian ports (MacDonald 1983), with the unavoidable episode of sanctions in the early 19th century with Napoleon's Continental Blockade, modern sanctions emerged during the First World War and were introduced in international law in 1919 with the advent of the Covenant of the League of Nations. There has been a steady increase in the use of sanctions since the Second World War, but the surge of the sanctions came after the end of the Cold War. At the time this article going to press, there are comprehensive, although not thorough sanctions against Russia imposed since February 2022, following Russia's aggression against Ukraine.

The recent surge of sanctions has created additional academic interest in the history of sanctions, hence recently two books with significant academic impact have been published, one focusing on the global history of sanctions starting with the First World War and ending with the following one (Mulder 2022) and the other dealing exclusively with the sanctions imposed by the United States, which swelled after the end of the Cold War (Demarais 2022). Finally, two voluminous review articles dealing with sanctions from the economics point of view have been published recently (Morgan, Syropoulos, Yotov 2023; Cipriani, Goldberg, La Spada 2023), adding insights into the unavoidable previous contribution to the economics of sanctions (Hufbauer *et al.* 2007). Although the recent academic contributions in the field of sanctions are very valuable, what they as a group lack is a systematised, well-structured approach. This is quite understandable, as the topic of the sanctions is dealt with by different academic 'trades' (historians, political scientists, economics, lawyers, etc.). Accordingly, different questions are posed, sometimes the same questions in a different way, often due to differences in terminology, and distinctive answers are given. Because of the lack of a systematised, let alone standardised approach, the results of the different studies are either not comparable to each other or they can be compared only with substantial difficulties. The outcome of this constellation is that our knowledge about sanctions is relatively small, not well organised,

and we still do not understand this phenomenon very well, let alone that there are substantial differences in academic opinion of the sanctions and their features and merit.

Taking that into account, the paper aims to suggest several key research questions that should inevitably be addressed in the empirical research of the history of sanctions, irrespective of whether the research is a case study, or a study of the groups of cases selected according to a specific criteria (period, type/mechanisms of sanctions, countries that imposed sanctions, target countries, etc.). The additional aim of the paper is to provide some preliminary answers (or rather – hints) to these questions in the case of the sanctions imposed on Russia after February 2022 and Russia's invasion of Ukraine. The considerations in the paper start by defining that the sanctions are 'restrictive policy measures that one or more countries take to limit their relations with a target country in order to persuade that country to change its policies or to address potential violations of international norms and conventions' (Morgan, Syropoulos, Yotov 2023, 3).[1] Nonetheless, this definition is not quite precise, and it is obsolete for several reasons. First, for some time, sanctions have been imposed not only against countries but also against corporations, noncorporate organisations, economic sectors of a given country, and individuals. Those sanctions – rather self-servingly labelled as 'smart' or 'targeted' sanctions – are considered in this paper, as sanctions need not to be necessarily imposed only against countries. Second, the change in policies that is demanded must be effective – it is the change of behaviour of the political elite of the targeted country that is required. Accordingly, the term 'policies' in this paper is effectively considered only as effective policies, i.e. the behaviour of the political elite of the targeted countries. Furthermore, in some cases, sanctions are not aimed at policy change *senso strictu*, but rather are just weapons of war (Mulder 2022), aimed at undermining the enemy's war effort and contributing to the victory in war. Third, this definition is not precise – it is too wide because it includes relations that are not economic: suspending and severing military collaboration, embargo on the export of arms to the targeted country, suspending cultural cooperation with it, or embargo on athletes from the country under sanctions competing internationally, etc. Accordingly, only 'limiting' economic relations is considered to be a content of sanctions, as it is only economic sanctions that are considered in this paper. Finally, the February 2022 sanctions against Russia demonstrated that it is also companies that, for reasons of reputational risk, voluntarily (because they

[1] This definition of sanctions is based on the previous contributions by Morgan, Bapat, Krustev (2009) and Syropoulos *et al.* (2022).

are not obliged to) sever or limit their relations with countries under sanctions, i.e. with companies located in those countries or local consumers. Hence in this paper a somewhat modified definition of sanctions is accepted, although still based on the quoted definition (Morgan, Syropoulos, Yotov 2023, 3). On one hand, the new definition is wider, because includes all types of restrictions of economic relations, between all economic agents in the countries. On the other hand, it is narrower because it focuses only on economic relations, neglecting all others.

Four key research questions are identified as unavoidable in explorations in the area of the history of sanction, irrespective of the scope and the depth of the analysis. The justification for each of these questions and explanation about the possible ways to answer them are provided. Methodological problems associated with the answers are identified. There is a section of the paper dedicated to each of the four key questions. Some hints about the answers to them, in the case of sanctions imposed on Russia since February 2022, are provided in each section. The conclusion follows.

2. THE AIM OF SANCTIONS

The first key research question should be – what is the aim of the sanctions, i.e. what are they supposed to achieve?[2] This is the crucial question, as only the answer to it provides grounds for an unequivocal answer to the question of whether the sanctions are successful from the point of view of those who imposed them, i.e. whether the aim has been achieved.

The response to this key research question should be based on the answers to several specific questions. The first specific question is whether the aim of the sanctions is specified clearly and precisely. Only if the answer is positive, it can be unequivocally concluded whether the sanctions were successful or not. For example, the sanctions imposed on FR Yugoslavia (Serbia & Montenegro) by UN Security Council Resolution 757 provided very precisely specified aims (expressed in UN Security Council Resolution 752, which resolution 757 refers to), hence it was easy to conclude whether the aim was achieve or not. Contrary to that, the aim of the sanctions of the EU imposed on Russia in 2022, following the 24 February invasion of Ukraine, is not specified clearly since the official position is that the aim is 'to impose

[2] Although singular ('aim') is used in this question that does not preclude that sanctions can have multiple aims. Taking that into account, singular will be used throughout the paper. It is nine typical sanctions' aims, i.e. objectives that are usually considered in the literature reviews (Morgan, Syropoulos, Yotov 2023, 4).

severe consequences on Russia for its actions and to effectively thwart Russia's ability to continue its aggression'.[3] Such a specified aim, especially because of use of the term 'thwart', proved to be unclear and not precise at all. Nonetheless, it is evident that these sanctions have not been aimed at policy change (perhaps those who imposed them did not believe that such a change would be feasible), but rather an 'ability change' – a contribution to the war effort. In short, the February 2022 sanctions against Russia are a weapon of war.

The second specific question is whether the aim of the sanctions is specified to be narrow, focused on specific changes in the behaviour of the side that is under sanctions and sometimes very pragmatical issues, or is it broad, directed towards a change of political and economic constellation in the country under sanctions and the shift of its position, both economic and political, in the international community. An example of the former type of sanctions – narrowly aimed sanctions – is the US sanctions against Turkey in 2018, imposed in connection with demands for the release of an American citizen (a pastor) from the Turkish prison.[4] An example of the latter type of sanctions – broadly aimed sanctions – is the US sanctions on Russia following its aggression on Ukraine on 24 February 2022, since US Secretary of Defence US Lloyd Austin specified the very broad aim of the sanctions 'We want to see Russia weakened to the degree that it can't do the kinds of things that it has done in invading Ukraine' (Ryan, Timsit 2022). Such a formulation by a senior US official implies that the US sanctions against Russia are not related only to the war in Ukraine, but this war is just a pretext for achieve the strategic aim of 'weakening Russia', aiming to thoroughly undermine its future war efforts, including threats against any country. Again, no policy change request is specified, but the sanctions are about an 'ability' change, i.e. a weapon of war; this is not only about the war in Ukraine, but also other possible future wars.

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[3] According to the same source, 'Additionally, the EU has imposed sanctions against individuals and entities in view of the continuing deterioration of the human rights situation in Russia, and in particular over the death of Alexei Navalny'. This statement explains the grounds for additional sanctions against Russia, targeting 'individuals and entities', without specifying the aim that should be achieved. Source: *https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/*, last visited April 30, 2024.

[4] The sanctions were undoubtedly efficient: two months after the introduction of the US sanctions, the pastor was released for the Turkish prison (Demarais 2022, 61).

The third specific question is whether the aim of the sanctions is publicly declared or whether there are clandestine aims of the sanctions that even can contradict those that have been disclosed. In some cases, the aim of the sanctions is simply not disclosed. For example, the introduction of the US sanctions to Cuba on 19 October 1960 was justified by the Cuban nationalisation of three oil refineries owned by US oil companies, which took place about two months earlier. That was the pretext for the introduction of the US sanction, but the actual aim was a regime change and facilitation of the emergence of a US-friendly government (New York Times 1960; LeoGrande 2015, 941).[5] The regime change was not disclosed as the aim of the sanction, not even in the enhanced version of the sanctions introduced by the following US administration in 1962.[6] The aim of the US sanctions against Cuba was publicly disclosed only at the adoption of the Cuban Democracy Act by the US Congress in 1992, as the Act is to be suspended only if there is a change in the country's political and economic institutional framework; this legislation specified the regime change in Cuba, although indirectly.

Accordingly, retaliation against Cuba for the seizure of the plants was not the White House's real objective. Eisenhower's main aim was a regime change in Havana. The U.S. administration felt uncomfortable about the idea of having a close Soviet ally less than 100 miles from Florida's coastline. For Washington, fostering regime change in Cuba through sanctions was a top priority before other Latin American nations turned into hotbeds of communism (Demarais 2022, 21).[7]

It is important to distinguish the aim of the sanctions from the political motives for their introduction. At the time of the introduction of the sanctions into international law, at the Paris Peace Conference in 1919, there was no such significant distinction. US President Woodrow Wilson was an idealist

[5] Remarkably, it is still unclear what legal document was the grounds for these US sanctions, since nothing of the sort can be found in the available archives of the President of the United States or of the US State Department. Even LeoGrande (2015, 944) refers only to the *New York Times* report published on 20 October 1960, the day after the US sanctions were introduced (New York Times 1960).

[6] Presidential Proclamation 3447 of 3 February 1962, which introduced a full trade embargo against Cuba (the previous one did not include food and medicines), did not disclose the aim of the sanctions, but in the preamble only refers to the political context of the introduction of the enhanced version of the sanctions.

[7] The Kennedy administration went one step further, clandestinely supporting the Bay of Pigs military operation, but after the Cuban Missile Crisis in 1962 and the agreement between two superpowers of the time, the US administration stuck only to sanctions as a means for regime change in Cuba.

and visionary of liberal internationalism, an ideology that was supposed to bring democracy to the world and prevent wars. His political motives were these ideals, and to a great extent, these motives coincided with the aim of the sanctions specified in the Covenant of the League of Nations.[8] Nonetheless, Wilson's undisputable idealism and ardent ambition to change the world was not accompanied by political shrewdness, hence his plan for global progress was not ratified by the US legislators. Accordingly, the first episode of sanctions, now fully introduced in international law, demonstrated that the domestic political situation, with all the possible obstacles, should be fully considered when decisions are made (to do something or to refrain from doing) in the domain of international relations. This is the reason why the political motives of the sanctions are always inevitably related to the domestic political arena and, especially the perception of the constituency, because the (re)elections should be carried out, irrespective of whether it is the executive or legislative branch of power.[9] Accordingly, in modern times, the political motives for the imposing of the sanctions are quite distinctive from the aims. This is the era of mass media and social networks, to which a large proportion of constituency is exposed, hence it is beneficial for the political elite to demonstrate commitment and determination in solving an international problem – or at least something that is considered by the domestic public to be an international problem (Whang 2011), irrespective of whether the problem is actually resolved (Elliott 1997). This regularity is not valid only for democracies, but also for autocracies in which the political elite is obsessed with popularity.

A short review of the sanctions imposed in the past one hundred years or so has demonstrated that their aims were initially focused solely on war, irrespective of whether they were weapons of war and complementary military efforts (like, for example, sanctions imposed to the Central Powers during the First World War) or whether the aim was the prevention of war, as stipulated in the Covenant of the League of Nations, irrespective of whether they were implemented or not (just a threat), or how effective they were. The proliferation of sanctions aims started immediately after the Second World

[8] The sanctions were specified in Article 16, considered within the provisions of Articles 12, 13 and 15 of the Covenant, which itself is a segment of the Treaty of Peace with Germany (Treaty of Versailles), concluded at the Paris Peace Conference and signed in Versailles on 28 June 1919. The full text of the Treaty is available at: *https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf*, last visited April 30, 2024.

[9] This rule is not only applicable in democracies but also in modern autocracies, referred to as spin dictatorships (Guriev, Treisman 2022), as autocrats nurture their popularity, addressing the constituency by various means.

War and gained substantial momentum after the end of the Cold War. Today, the aims of sanctions are very diversified, and they include: improvement in human rights, release of political prisoners, promoting liberal democracy, struggle against international terrorism, undermining drug trafficking, controlling proliferation of nuclear weapons, regime changes, together with the change of political institutions, preventing wars or speeding up victories in them if they occur, and even achieving technological superiority (Demarais 2022; Morgan, Syropoulos, Yotov 2023). The list of the contemporary aims of sanctions remains open.

As to the aim of the 2022 sanctions on Russia, as it has been demonstrated early in this section, it is not clearly specified, and it is rather broad, but perhaps it is more important that the aim is vague.[10] From the very start of Russia's 2022 aggression and the beginning of the Russo-Ukrainian war, it was clear that direct military engagement of the West was out of question, due to the high estimated costs of war with a nuclear power and all the associated risks. In such a political constellation, the sanctions imposed on Russia have been a substitute for direct military engagement, i.e. they are a replacement of full war effort. Taking this into account, it is the political motive that is clear, rather than the aim of the sanctions. With the public opinion in Western countries strongly against Russia, and with the cry 'Do something and do it right now!', it was imperative for the Western political elite to demonstrate its determination to confront the Russian political elite, especially its leader, and to do so with a rather modest costs for their countries. Sanctions are a weapon of choice for such endeavours, especially as they can be presented as punishment for Russia.[11] Hence, the crucial aspect of the sanctions against Russia is that their main motive rests in the domestic politics of the countries that imposed them.

[10] Whatever the preferences of the Western political elite regarding the incumbent in the Kremlin, regime change has not been publicly specified as the aim of the 2022 sanctions against Russia. Furthermore, in the early stages of the sanctions (March 26, 2022) US President Biden gaffed, saying that 'For God's sake, this man [Putin – remark BB] cannot remain in power.' It was the US Secretary of State who hastily stepped in and clarified that the regime change was not the aim of the sanctions. Source: *https://www.npr.org/2022/03/26/1089014039/biden-says-of-putin-for-gods-sake-this-man-cannot-remain-in-power*, last visited April 30, 2024. It can only be speculated what are the preferences of the Western political elite regarding the regime change in Russia, especially considering the available replacements. Making political life more difficult for Russia's incumbent political elite will probably make Western governments happy, but this is rather a vague aim – if it is an aim at all.

[11] Source: *https://www.nytimes.com/2022/03/04/us/politics/russia-sanctions-ukraine.html*, last visited April 30, 2024. The other complementary efforts by the West, such as military support to the Ukrainian war effort in terms of supply of military hardware,

It is unlikely that the Western political elite although that imposing sanctions would be decisive for the outcome of the war. The Russian war effort has been undoubtedly, at least up to a point, undermined by the sanctions – but this is hardly decisive. In the long run, the West would like to isolate Russia, both economically and politically, in order to decrease its military potential. Both these processes have already started, with some effect, but this is hardly the precise aim. Therefore, the speculation is that the sanctions imposed on Russia are here to stay.[12]

3. SANCTIONS MECHANISMS

The answer to the key question regarding the mechanisms of the sanctions that have been applied should follow the pattern of the previous analysis of the aim of sanctions. Accordingly, several specific questions should be formulated.

The first of those questions is whether the sanctions are international (multilateral) or whether they are imposed by a single country (or group of countries). International sanctions are based on international law and, like the Covenant of the League of Nations or the Charter of the United Nations, they are introduced by international organisations and are binding for all the members of those organisations, i.e. for all the countries in the world. The sanctions imposed by UN Security Council Resolution 757 on FR Yugoslavia (Serbia and Montenegro)[13] or the threat of sanctions against the Kingdom of Serbs, Croats and Slovens by the League of Nations in 1921 (Mulder 2022, 123– 124), due to its military intrusion of northern Albania, are typical sanctions of the kind. International sanctions are both legal and legitimate, although they are not necessarily efficient in pursuing their aim.

training and intelligence, are rather difficult to present as punishment of Russia if there is no decisive defeat of the Russian side in the war. For the time being, at the time of this paper going to press, this has not materialised.

12 The motivation of Western countries ('The Collective West', in Kremlin's parlance) for long term isolation of Russia apart from its military potential are beyond the scope of this paper.

13 Resolution 757 was adopted on May 30, 1992. Source: *https://digitallibrary.un.org/record/142881?v=pdf*, last visited April 30, 2024.

Contrary to that, sanctions are imposed by countries, i.e. by the decision of the national political elite.[14] The United States is a country that has imposed most of the national sanctions worldwide (Early, Preble 2020; Eineman 2020). A typical example of sanctions as a national legal instrument are the (previously mentioned) US sanctions against Cuba, introduced in 1960. It is exactly those US sanctions that demonstrated the weaknesses of the effectiveness of national sanctions, as this type of sanctions leaves the room for the targeted country to reshape its international economic flows (trade and financial), to adjust its economy to the external shock, and therefore diminish the effects of the sanctions.[15]

The second crucial question is: who is the target of the sanctions? Sanctions can be against countries, but also against individuals and organisations, being corporative or not – terrorist organisations are prime candidates for sanctions in the non-corporative sector. For most of their history, sanctions have been imposed against nations, i.e. they have targeted countries as a whole. Nonetheless, in the past several decades, the direction of the sanctions has been diversified, with 'smart' or 'targeted' sanctions, due to, up to a point, the diversification of their aims, but also due to concerns about human rights violations (Lukić 2009). For example, if sanctions are focused on international terrorism, then it is obvious that the sanctions are or at least should be directed against the terrorist organisation and their leaders. Furthermore, one direction of the sanctions does not preclude the other. For example, the ongoing Western sanctions against Russia (those that were initially introduced in February 2022) include sanctions against persons from the Russian political, military and business elites, Russian corporations (from both the real and financial sectors), but they also include sanctions against Russia as a nation, including selective export bans and freezing of Russia financial assets deposited in Western banks.

[14] For this type of sanctions, it is irrelevant whether they are introduced by a single country or by a group of countries that are institutionally linked, such as the countries that are member states of the European Union. Accordingly, it is justified, for example, to consider the sanctions by the European Union against Russia that have been introduced since February 2022, but these sanctions are country-level sanctions, not international, i.e. multilateral sanctions as they are not binding for European Union member countries.

[15] Although it is unequivocal that international sanctions are more effective than national sanctions *ceteris paribus*, this does not mean that international sanctions are necessarily highly effective. A typical case is the international sanctions against (Southern) Rhodesia, formulated by a set of UN Security Council resolutions, but without enforcement mechanisms stipulated by these resolutions. This enabled countries with substantial interests in trade with Rhodesia to bypass the sanctions. Hence the enforcement zeal of sanctions differs in the case of international sanctions.

Finally, there is the question of the mechanism of sanctions in a strictly technical sense: what are the methods that are applied for the restriction of economic relations with those against whom the sanctions are imposed? These methods include reduction or breaking trade with the country under sanctions, meaning the selective or thorough halt of exports to the targeted country or imports from it,[16] restricting or severing financial flows and transactions, starting with current account transactions, i.e. payments, up to the barrier to access to the international capital market (for both sovereign and corporate borrowing), freezing of financial assets deposited in the country applying the sanctions (e.g. foreign currency reserves), severing financial and development aid to the sanctioned country (if it exists), etc. Detailed methods and the methods of their implementation are specified, depending on the aims of the sanctions, the most severe method being is the full trade and financial blockade of the country.

Financial sanctions, which focus on payments, i.e. current account transactions, are, up to a point, a substitute for trade sanctions. The point is that trade is exchange, hence there are inevitably two flows. One is the real flow – a flow of merchandise (goods and services) – and the other is financial flow – a flow of money. It is sufficient to sever only one of these two flows in order for exchange to be undermined. Accordingly, in principle, the implementation of the sanctions aimed at halting import and/or export can be achieved either by severing the real flow or by interrupting the financial flow. Nonetheless, sanctions evasion mechanisms in many cases are substantial, hence sanctions usually are imposed simultaneously on both real and financial flows. It has been noted that in the 21st century it is easier to monitor financial flow than the real flow, i.e. the flow of merchandise (Early 2015; Demarais 2022).

The sanctions imposed on Russia in February 2022 triggered a new distinguished development: companies voluntarily joining the sanctions. This is a case of voluntary business decisions by corporations that had business in the Russian market, either by exporting goods or services to Russia, importing for Russia, or investing in subsidiaries based in Russia. Severing exports or imports was followed by disinvestment, i.e. selling assets

[16] The rationale for the suspension of imports from the country under sanctions (for example, but not necessarily, oil and gas) is to undermine the country's export revenues, removing foreign markets as the source of revenues for domestic companies, reducing export-driven demand, and decreasing the level of economic activity accordingly, or at least slowing down economic growth, decreasing its budgetary revenues and reducing the purchasing power of the country for import; all these are desirable outcomes from the perspective of those who imposed sanctions.

owned by foreign companies in Russia. In most cases, the main motive for such moves was the reputational risk to which those corporations would have been exposed had they continued operation with/in Russia, since public opinion in the domicile countries and some important countries of operations was one of extremely adverse perception of Russia.[17] Accordingly, continuing operations in Russia would generate an adverse perception by their customers, which can result in a depleted reputation, potential boycott of the products, and decreased demand for the products, unfavourably impacting profitability. In short, the trade-off for these companies was between two evils. The first was an unavoidable drop in revenue and possible capital losses due to exiting the Russian market (regardless of the specific form of exit) and the consequential decrease in overall profitability; the second was a expected decrease in sales and revenues in all other markets, because of the undermined reputation due to continuing operations in the Russian market, which would also decrease overall profitability. Hence the question is which of the two estimated losses is greater.

In the case of divestment from Russian subsidiaries, it is reasonable to assume that companies would record capital losses, i.e. the positive difference between the present value of cumulative investments by the corporations and proceeds from selling the assets. However, since these losses are one-off events, substantial capital losses can have one-off impacts on both the balance sheet and the income statement (profit and loss statement) of the corporations, but leaving the Russian market has future recurring effects on the income statement, due to the loss of future revenues, although that can be compensated by increased revenues in other markets.

There are many mechanisms of sanctions against Russia that have been introduced since February 2022. These mechanisms are a combination of various export restrictions, import embargoes, freezing sovereign financial assets, as well as targeted sanctions against Russia's political and business elite. The sanctions are somewhat constrained, rather complicated, and new sanctions have been gradually introduced; at the time this paper goes to press,

[17] In some cases, such voluntary business decisions by Western companies can be encouraged by public recommendations from the executive and legislative branches of government of the country, such as the public political pressure by the UK Government and the legislative branch of government (including the opposition) to BP p.l.c. to divestiture, i.e. sell its 19.75% stake in Russian state-owned oil company Rosneft. Perhaps this political pressure was not decisive, but it definitely contributed to the voluntary corporate decision, managing substantial reputational risk. Sources: *https://www.nytimes.com/2022/02/27/business/bp-rosneft-oil-stake.html*, last visited June 1, 2024; *https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bp-to-exit-rosneft-shareholding.html*, last visited June 1 2024.

the 14th package of the sanctions by the EU is being considered. In short, the sanctions against Russia are massive, complicated, but not thorough. The main reason for such a development is that it is unprecedented to impose sanctions on a country/economy of that size, which is a big producer of many commodities, and thorough trade sanctions (i.e. no trade, whatsoever, no expert, no import) would generate substantial turbulence and adverse new equilibria in the global markets of many inputs for many industries. In short, the costs for those imposing sanctions could be substantial.

4. EFFECTIVENESS OF SANCTIONS

Since the word 'sanctions' is a shorthand for 'economic sanctions', the crucial analytical questions are do sanctions produce economic impact and how strong is it; what is the scale of the impact on the economy of a country? In short: what is the effectiveness of the sanctions? The answer to this question is a preparatory question for the next one, about the efficiency of sanctions, dealing with their political impact. If sanctions are not effective, then they cannot be efficient, meaning that they cannot achieve their political aim. In short, effectiveness of the sanctions is a necessary, although not sufficient condition for them to be efficient.

The answers about the effectiveness of sanctions should be framed by insights from economic theory. In principle, a country under sanctions is, in the case of full trade and financial blockade, excluded from the international economy, international division of labour, and international financial flows. The consequences are a decrease in allocative economic efficiency (the country itself produces merchandise that would have been more efficient to import and cannot export merchandise that it produces more efficiently than others), and decrease in the level of economic activity (Gross Domestic Product – GDP) and disposable income, especially in small open economies, that heavily depends on export demand and international supply chains. If there is no drop in the GDP of the country under sanctions, then the growth rate decreases, due to previously mentioned mechanisms and inability of foreign saving to be imported for funding investments.[18] Accordingly, the theoretical proposition is that by undermining free economic flows, sanctions have adverse effects on the economy of the country against which they are

[18] Only GDP-based economic indicators are sensible dependent variables for the empirical analysis of the economic impact of sanctions, i.e. their effectiveness. Using other variables, such as trade, FDIs or portfolio investments (Shin, Choi, Luo 2016), makes little sense.

imposed, decreasing disposable income, consumption and consequently the welfare of most of the population of the country. Hence, the question is not whether the sanctions have any effect, but what is the magnitude and pattern of these effects. The answer to these questions depends on the answer to several additional specific questions. Nonetheless, before those questions are formulated and elaborated, it should be pointed out that empirical research about the effectiveness of sanctions on the economy of a targeted country is demanding, because of the two basic methodological issues.

The first methodological problem is that counterfactual analysis should be applied, and the following question should be answered: what would have happened with the economy of the country had the sanctions against it not been introduced? The point is that the economic outcomes that were recorded after sanctions had been introduced are not necessarily caused by that introduction (e.g. such a causality does not necessarily exist), but generated by other factors, such as external shocks or continuous developments that have not been considered in the analysis. If counterfactual analysis is not applied, then the research would end up in the *post hoc ergo propter hoc fallacy*, i.e. mistaking the sequence of events for causality. For example, the Cuban economy dramatically changed after the introduction of the US sanctions in 1960. Nonetheless, it is reasonable to assume that a substantial part of these changes for the worse is the consequence of the bad economic and other policies pursued by the Cuban revolutionary government and that the country's economic backslide is the consequence of these policies, e.g. the nationalisation of privately owned firms, and not the result of the US sanctions, although the sanctions were, up to a point, caused by these policies. The relative strength of the causality remains elusive, since counterfactual analysis is methodologically a slippery slope, but that does not mean that it should be avoided, just that the answer about the magnitude of the effects of the sanctions on the economy of the country under them in many cases is not unambiguous.

In econometric research, this problem is usually solved by the proper specification of the regression model, encompassing all explanatory variables that can influence dependent variables, such as the level of the BDP or the growth rate of the economy, and therefore their impact is methodologically controlled. That is the way to obtain a methodologically correct estimate of the coefficient of the sanctions' economic impact – especially whether that estimate is statistically significant or not. The problem with this approach is that, for methodological reasons, it virtually cannot be applied in the

specific case of a single country,[19] but rather only in the research of the overall economic impact of sanctions, using the sample of countries that were exposed to sanctions during different periods.

The second methodological problem in the empirical study of the effectiveness of sanctions, basically econometric research, is reverse causality, i.e. the endogeneity of the explanatory variable. For the econometric study to be methodologically correct, and hence valid, it is necessary that the dependent variable, the one that should be explained by the regression model, does not influence any of the explanatory variables in the regression model.[20] Accordingly, if it is about estimating a regression model in which the dependent variable is something that is assumed to be the result of the sanctions (i.e. a dependent variable in the model), for example, the level of the GDP or economic growth rate, it is important that the explanatory variables in the regression model do not depend on the dependent variable. Nonetheless, in many cases such dependence exists, as sanctions are usually introduced at times of political crises, and those crises generate disturbances in economic activities, reducing the level of GDP or slowing down its growth. Accordingly, it is reasonable to assume that there is an endogeneity of sanctions as an explanatory variable in regression models. There are econometric procedures that can sort out this problem, but in much of econometric research into sanctions has not even been recognised this problem (let alone solved it), hence the results of such research should not be accepted as valid. In general, the endogeneity of the explanatory variables causes overestimation (upward bias) of the effects of the sanctions; hence the estimate of the impact of the sanctions is accepted as statistically significant in cases when it should not be.

If these two methodological problems are solved in one way or another, the question about the effectiveness of the sanctions, i.e. the explanation why some sanctions are effective and some are not, can be answered by responding to a set of specific questions. The first of those questions is: were the sanctions international or were they introduced by a single country? Intuitively, international sanctions are more likely to be effective

19 In principle, it can be done by specifying a time-series econometric model, but the problem is limited number of observations to accommodate u substantial number of explanatory variables, needed for a proper specification of the regression model, decreasing number of freedoms of the model, hence decreasing the probability for statistically significant estimate of the coefficient of sanctions impact (Stock, Watson 2012, 116).

20 Econometrically speaking, endogeneity does not exist only if explanatory variable is not correlated to the error term of the regression model (Stock, Watson 2012, 462–463).

compared to the sanctions introduced by a single country, since the country under sanctions can redirect its international economic relations to other countries, those that did not introduce sanctions against it, and adjust to the sanctions in that way. This is exactly what happened in the case of the US sanctions against Cuba, since the country enhanced its international trade relations with other countries, since even countries with friendly relations with the US, such as Canada, for example, did not introduce sanctions against Cuba. That is not to say that the US sanctions against Cuba were completely ineffective, but only that the effects were reduced. From the other viewpoint, the effects of the sanctions against Cuba would have been much more devastating had they been international.

Following the disappointing results (from the US viewpoint) of the national sanctions against Cuba, as well as the substantially decreased probability of introducing international sanctions in line with the political preferences of the US, under the auspices of the UN Security Council at the beginning of the second decade of 21st century,[21] the US started to introduce secondary sanctions. Those are sanctions against the companies from third countries, who do not have legal obligations (national or international) to sever business relations (trade or financing, for example) with companies or countries that are under US sanctions. Secondary sanctions are based on banning the companies from the US market and prohibiting them from using (directly or indirectly) US dollars in their financial transactions (Demarais 2022). The threat of these sanctions is credible since they are quite feasible, i.e. they can be easily implemented by the US authorities if the political will exists.

From the other point of view, the question of the national/international character of the sanctions can be generalised to the following question: to what extent can the economy of the country under sanctions adjust to the new conditions brought about by the sanction? The following questions are a follow-up to this one.

The second specific question is: how deep and in which way the country under sanctions is integrated into the international economy? If the country under sanctions is an autarkic economy, without deep economic links with

[21] This is due to the changed constellation of international relations in the early 21st century, in which the US administration cannot expect collaboration of Russia in China, permanent members of the UN Security Council, with veto power. In short, contrary to the international relations that have emerged after the end of the Cold War and existed for a decade and half, the UN Security Council is not US friendly international forum anymore and there is no full and generous understanding of American international political agenda and domestic politics.

other countries, with a low level of integration into the international division of labour, then the effects of the sanctions are expected to be modest or even negligible. Contrary to that, if the economy of the country under sanctions is deeply integrated into the international economy, then it is expected that the effect of the sanctions will be substantial. It is the country's global supply chains and the global markets for its products that will be harmed and its position in the global value chains will be undermined. The country's integration into the international economy depends, among other things, on the size of the country (measured by the level of its GDP). The bigger economy is, it more relies on domestic markets, with firms purchasing more domestic inputs and selling more products on the domestic market. The share of the combined imports and exports in the GDP, as an indicator of the country's integration into the international economy, declines with the increase in the country's size. This is why sanctions are in principle more effective against small countries, deeply integrated into the international economy. From the other viewpoint, economies of small countries are more vulnerable to sanctions.

Another related question is: is the economy of the country under sanctions well diversified or is it focused only on a few industries, aimed at maximising its comparative advantage in international trade.[22] If the economy is diversified, then there is more room for adjustment to the sanctions, i.e. the adjustment would be easier and more effective. This is, for example, the key difference between the Soviet Union and Russia. The Soviet economy was not significantly included in the international division of labour, while it was also very diversified, producing a wide scope of goods and services for the domestic market. Contrary to that, Russia has become deeply integrated into the global economy, specialising and exporting primarily energy production and, up to a point, military hardware. Accordingly, the scope for Soviet economic adjustment to sanctions was much greater than the scope of modern Russia.[23]

[22] The integration of a country into the international division of labour does not necessarily mean that its economy is not diversified. Many countries with much diversified economies have vibrant trade relations exporting and importing products from the same industry (intra-industrial exchange, due to product differentiation) and, generally, very well-developed economic relations. This regularity, thoroughly explained in economic theory, has not been brought about by the latest wave of globalisation but has existed for a long time. For example, The United Kingdom and Imperial Germany, both much diversified economies by the standards of the time, were the biggest trade partners ahead of the First World War (Ferguson 1998, 234).

[23] This has very little to do with the change of the size of the country, despite Russia being smaller than the Soviet Union, but with it is related to the change of economic institutions, especially economic policies. It is the advent of capitalism

Furthermore, a very important question is related to the magnitude of spillover effects, i.e. the ripple effects of the sanction: are the unintended and undesirable effects considerable? The most important question is: can the country that introduces sanctions expect considerable adverse effects on its own economy?[24] This question becomes even more important in contemporary conditions of ubiquitous globalisation, especially considering global supply chains, within which there are substantial interdependencies. Accordingly, removing one of the suppliers from some of those chains due to the sanctions, especially if this is the case of a large supplier located high upstream in the chain of supply, creates unintended and adverse effects not only to the producers located in the country that introduced the sanction, but these effects become widespread throughout the world in its companies in other countries and even the allies of the country that introduced the sanctions experience those adverse effects. In such cases the complexity of the global supply chains and the low possibility of foreseeing the way economic agents within these supply chains will adjust to the change induced by the sanctions make it virtually impossible to *ex ante* grasp all the unintended consequences.[25]

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that integrated Russia into the world economy, not slightly scaling down the country.

[24] A typical example of this are the US sanctions introduced by President Carter's administration in 1979 to the Soviet Union after the Soviet invasion of Afghanistan, which partially banned (effectively severely restricted) the export of American wheat to the Soviet Union. As a consequence of that embargo, American farmers lost their traditional customers, the decrease in effective supply increased the grain prices on the international market, and other wheat-producing countries compensated (at the higher price) for the lack of supply of grain from the United States. It is estimated that the total damage suffered by US farmers (hence the US economy) was 2.3 billion USD, while the damage to the Soviet Union due to the increase in wheat prices was 225 million USD. Accordingly, it is not surprising that in the first year of its first term President Regan's administration abolished the embargo on wheat export to the 'Empire of Evil', in Regan's own words. Details about the episode are available in the literature (Hovi, Huseby, Sprinz 2005, 481; Demarais 2022, 69–71).

[25] A typical example of such a situation is the US sanctions introduced to Russia's company Rusal, one of the largest producers of aluminium in the world. The sanctions created such substantial disturbances on the world market, and not only the aluminium market but also downstream markets, on the markets in which operating companies directly or indirectly use aluminium as input. For example, the sanctions on Rusal impacted global beer producers, since a substantial segment of their production is shipped in aluminium cans. The unintended and adverse effects of the sanctions on Rusal were so substantial and widespread that the US authorities quickly modified and effectively cancelled the sanctions, especially being aware that Chinese aluminium producers moved into the market, attracted by an increase in price due to curtailed supply (Demarais 2022, 118–124).

Finally, the sheer possibility that sanctions can be introduced, irrespective of whether they will be introduced in the end, increases uncertainty in the business environment, increases the risk of virtually all investments and, accordingly, decreases expected returns – all of which generates adverse economic effects that extend beyond the country that is under sanctions. The point is that due to the sanctions many business opportunities are missed, not only in the country under sanctions and in the country that has imposed the sanction, but across the world, in the third countries, most of them friendly countries to the one that imposed the sanctions. Free trade is the first best solution for economic outcomes. Sanctions undermine free trade, curbing unrestricted economic cooperation, and undermining globalisation. Sanctions are effective – they move the world away from the first best economic solution. To what extent they are effective is an empirical question and the answer can be given on a case-by-case basis, albeit with substantial methodological constraints. Intuitive answers about the increasing probability of sanctions' effectiveness are provided in the survey of empirical studies (Hufbauer *et al*. 2007), but the reader is hardly any wiser.[26]

The expectation at the time that sanctions were imposed on Russia, in February 2022, was a substantial drop in Russia's GDP. Nonetheless, the expectations proved to be false. Russia's economic growth rate in 2022 was –3.1 per cent and in 2023 it was 3.6 per cent (IMF 2023; IMF 2024), bringing the level of GDP to around what it was before the war. The rather limited decline of Russia's GDP could be explained by the size of Russia's economy, solid public finances and autocratic governance system (Simola 2023). Furthermore, as already pointed out, the sanctions imposed on Russia are not thorough and some of them were implemented with a transition period to minimise the costs for the imposing countries (due to ripple effects), providing time for imposing countries, as well as for Russia's economy to adjust. Furthermore, the sanctions against Russia are not international sanctions and many countries have not joined them, hence trade diversion was a reasonable option for Russia, although export revenues have been

[26] These conditions are: (1) the goals of sanctions are limited, (2) the target country is already experiencing economic difficulties, (3) there are generally friendly relations between the two countries (meaning that there is substantial exchange between them), (4) sanctions are forcefully implemented in one step, (5) sanctions entail significant costs for the target country, (6) the costs for the countries imposing sanctions are modest, (7) the sanctions are not accompanied by covert action or military operations, (8) few countries are needed to implement the sanctions. All of these conditions are rather intuitive. Furthermore, it seems that the sanctions against Russia do not fulfil the majority of those conditions. A similar list is provided in Felbermayrer *et al.* (2020).

undermined by discount prices. Finally, the dynamics of the Russia's economy since February 2022 should be considered not only to be the consequence of the sanctions and sanctions-related adjustments, but also the consequence of the Ukrainian war, its economic consequences and growing militarisation of Russia's economy (Gorodnichenko, Korhonen, Ribakova 2024).

It seems that the most effective sanctions mechanism against Russia is an import embargo. Although it is reasonable to assume that there are sanction-busting mechanisms in place, there is some evidence (Borin, Paolo, Mancini 2022; Demertzis *et al*. 2022; Simola 2022) that there is a lack of high-technology inputs for Russia's manufacturing, especially the military-related industries.

As to divestments by foreign companies in their Russia subsidiaries, and by the end of November 2022, only 8.5 per cent of the foreign companies had divested their assets and left Russia (Evenett, Pisani 2022). Although the sheer number of companies can be misleading, it seems that this result is far below expectations, considering the huge publicity that was given to these capital transactions. Perhaps huge capital losses are the reason for the initial slow pace.[27] Nonetheless, by July 2023, 42.7 per cent of foreign companies had divested their assets.[28] Obviously, the process has got the pace, and it is irreversible– at least for the foreseeable future.

5. EFFICIENCY OF SANCTIONS

The question of the efficiency of sanctions can be asked in another way: have the aims of the sanctions been achieved? As was the case with the previous question, about sanctions effectiveness, i.e. about the impact on the economy of the country the sanctions are imposed against, the answer

[27] In the case of already mention BP's divestiture in Rosneft, which materialised as a buyback operation by Rosneft of 19.75 per cent of its shares, BP's capital loss was USD 24 billion, producing a USD 14.7 billion decrease in the company equity that year. Furthermore, since BP's annual profit from the stake in Rosneft was USD 600 million that was a forgone profit in perpetuity. Since the amount paid to BP in the buyback operation was not disclosed, it is unknown what share of the loss of future revenues was compensated by the capital value, but it is reasonable to assume that it was negligible. Source: *https://www.ft.com/content/f7ed840a-0630–4131–95f5–0a7631b07d32*, last visited June 8, 2024.

[28] *https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain*, last visited June 8, 2024.

to this question is linked to methodological issues, and inevitably there are additional detailed and specific questions and answers to them that enable more precise consideration of the possible success of sanctions.

As in the previous case, counterfactual analysis is necessary. This analysis answers the following question: if the aim of the sanctions is achieved, is it achieved because of the sanctions or due to some other causality? Would the same outcome have been recorded if there had been no sanctions at all? Finally, there is another question: could the aim have been achieved by some other policy rather than sanctions and what would have been the relative costs of that policy for both sides? In short, questions are abundant even in the first step of consideration of the efficiency of sanctions.

Still, as in the case of the question of sanctions effectiveness, the issue of the endogeneity of sanctions as the explanatory variable in regression models remains. Nonetheless, if researchers are aware of it, there are econometric solutions for it. However, the econometric analysis of the sanctions efficiency contains another significant methodological issue. As it has been pointed out (Hovi, Huseby, Sprinz 2005, 483–485), even the threat of sanctions, specified as a possibility for sanctions to be introduced to a country, creates incentives for the political elite of that country not to engage in acts that may bring about the sanctions. In short, the most efficient sanctions are those that have not been introduced, but the sheer possibility of their introduction produced results by deterring the country from acts that should be prevented from the point of view of those who consider imposing sanctions. From the other viewpoint, sanctions are introduced only in cases when the threat of sanctions fails to produce deterrence. Accordingly, there is a selection bias in empirical analysis, as the sample includes only the cases in which the threat of sanctions failed, and sample does not include all the cases in which the threat of sanctions worked, i.e. when sanctions were successful in achieving their aim, even without being introduced.[29] This sanctions bias means that in empirical analysis the efficiency of sanctions is underestimated (downwards bias), i.e. their efficiency is greater than such empirical analysis founds.

[29] There are two main reasons why the mere threat of sanctions is not enough for the political elite of a country to change its behaviour, making the introduction of sanctions necessary (Hovi, Huseby, Spritz 2005, 484–486). The first reason is that the political elite of a country under threat of sanctions has estimated that the threat is not credible, i.e. that sanctions will not be imposed if the country's political elite continues with its policies. In other words, there is an asymmetry of information between the two sides, and the side that is under threat of sanctions is less informed. The other reason is the estimate of the political elite of the country under threat of sanctions that the sanctions will not the effective, i.e. that the introduction of the sanctions will not create incentives for the change in behaviour of the country against which the sanctions are imposed. In the second

Two identified methodological errors have opposite, even possibly countervailing effects. While avoiding counterfactual analysis and neglecting endogeneity of explanatory variable overestimates (upwards bias) the efficiency of sanctions, selection bias underestimates that efficiency. Hence it is uncertain, depending on the relative strength of these two biases, what will be their compound effect. It seems that the methodological errors that create upward bias (overestimation) are more intensive than the one created by selection bias; hence it is reasonable to infer that the efficiency of sanctions in empirical research is overestimated.[30]

Nonetheless, the analysis should go back to the additional specific questions, to the main one about sanctions efficiency. These are the questions already asked when the issue of the aims of the sanctions was further developed. A necessary condition for an unequivocal answer to the question whether the sanctions are efficient is that the aim of the sanctions is clearly and precisely specified, so a straightforward conclusion can be drawn about whether the aim was achieved. Furthermore, there is substantial anecdotal evidence, basically mini case studies, that a narrow, quite focused aim increases the probability of the success of the sanctions, the achieving their aim increases, as does the efficiency (Demarais 2022, 118–124). In the case of broad, diffused and nebulous sanctions aims, the probability of success decreased, but because of the character of the aim, it is very difficult to distinguish whether the aim is actually achieved or not.

As already pointed out in this paper, the effectiveness of the sanctions is a necessary condition for their efficiency. It is precisely the effectiveness of the sanctions and economic deterioration of the country, undermining the welfare of its population, which is the crucial mechanism that, in principle, generates the pressure on the country's political elite to change the policies, to change its behaviour and comply with the demands of the side that imposed the sanctions, so that the sanctions would be removed, allowing for the economy to recover. For that pressure to be generated and

case, it is estimated that the political costs for the domestic political elite to change their policies, to please the side that imposed the sanctions, would be higher than the political costs of the introduction of the sanctions. In this case, there is also the asymmetry of information, only in this case, the side that is under threat of sanctions is better informed.

[30] It has been demonstrated, through case-by-case analysis (Pape, 1997; Pape 1998), based on the results of the most comprehensive empirical study on the impact of sanctions (Huffbauer *et al*., 2007), how great the upward bias is, and it is highly improbable that the downward bias, due to selection bias, is stronger. Of course, selection bias remains elusive and there is no hard data on the effects of sanctions as a deterrent.

be effective, it is necessary for the general population to feel the adversity due to the sanctions. Some level of suffering of the population of the country under sanctions is necessary for the widespread misery that will produce strong public pressure on the political elite to comply with the demands of the side that imposed the sanctions. Taking that into account, it is evident that targeted sanctions, an instrument by which sanctions are focused on individuals from the political and business elites, and companies, with the rationale being to prevent the suffering of the (innocent) population, are simply not effective. The first reason for the lack of effectiveness is that in the case of sanctions such as freezing of financial assets in the country that introduces sanctions, the targeted individuals have already been able to prepare for this scenario and have withdrawn their assets (if any were deposited in sanction-prone countries) to some safe haven. If the targeted sanctions freezing assets are accompanied by denial of entry to the country that introduced sanctions, it does not represent a significant disadvantage for them. Accordingly, targeted, personalised sanctions focused on individuals have only symbolic value for the country that introduces them, demonstrating to the domestic public, i.e. to the constituency, that a harsh posture has been taken toward the people whose policies and behaviour are considered undesirable. The second reason for the ineffectiveness of targeted sanctions is that the general public of the country under sanctions is indifferent towards this type of sanctions, as they affect only the political elite of their country, i.e. a small number of people. Since there is no pain for the population, there is no political pressure, hence there are no incentives for the political elite to change the policies and behaviour. In short, targeted sanctions are not effective, and that is the reason why they are not efficient.

Nonetheless, the effectiveness of sanctions – those that create pain for the population – although necessary, is not a sufficient condition for sanctions efficiency, i.e. for achieving the sanctions aim. The question is whether the pain for the population and general dissatisfaction of in the country create strong enough incentives for the political elite of the country under sanctions to change their policies and behaviour. In short, the dilemma is whether the political costs of the government due to the change its policies are greater than their political costs due to the misery and dissatisfaction of the population. The answer to this question is empirical, and it can go one way or the other, depending on a specific case.[31] This answer, for example,

[31] Sanctions can even solidify the grip on power of the incumbent political elite of the country under sanctions if, through government propaganda, the population is convinced that it is someone else, those who imposed sanctions, are responsible for all the suffering of the people of the country. This propaganda manoeuvre can strengthen the position of the incumbent political elite, lead to patriotically

depends very much on what is the aim of the sanctions. If, for instance, the aim of the sanctions is regime change, then it is evident that the political costs to the leader of the regime are prohibitively high, so they have no incentives to change their policies and collaborate with those who imposed sanctions on their country.[32]

An intriguing question is why sanctions persist almost indefinitely, despite it being unequivocally demonstrated that they were not efficient and that they did not manage to achieve their aim, for example, the US sanctions on Cuba. *Prima facie* this regularity is counterintuitive but there are convincing explanations. The first one is related to the distinction between the aim and the motivation of the sanctions. Most often, the motivation of the sanctions is to demonstrate to the domestic public the determination of a powerful country to stand up against something happening in the world, which is considered dangerous or injustice or at least it is perceived by the public as such. In the political environment labelled as 'do something', it is the political elite that is doing that 'something' by imposing sanctions and being persistent and relentless in that, since the sanctions have lower costs to the country that is imposing them compared to other options, such as military action, for example. Accordingly, irrespective of the any reaction by the political elite of the country that the sanctions are imposed to, i.e. irrespective of the results of the sanctions, lifting the sanctions without achieving the aim would be perceived as a sign of weakness by the domestic public, i.e. the constituency.

The second reason for keeping inefficient sanctions is the loss of credibility in international relations by the side that lifts them if they are inefficient. Countries, usually big powers, need to demonstrate determination in international relations, even if that determination proves to be inefficient.

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driven mobilisation around the government, increase social cohesion based on the feeling of national pride, breed xenophobia, and prove to be a general excuse for all disasters that occur in the country mainly due to the bad policies of the incumbent government.

[32] This does not necessarily mean that in this case there will be no turmoil within the political elite of the country under sanctions and that some segments of the elite, those who consider themselves as future leaders, will not be cooperative with them in such situations, offering themselves to the country that imposed the sanctions as replacements for the incumbent leaders. Nonetheless, although this possibility exists, it will not necessarily materialise, because for this to happen a set of preconditions must be met, on both sides – the one that imposed the sanctions and the one on the receiving end.

The third reason is that lifting the sanctions that do not work would create adverse incentives for the political elites of the countries that are candidates for sanctions, or which already have sanctions imposed on them. The strategy of these political elites would be not to change any policy, not to accept any no demand for the change from the side that imposed the sanctions, not to change anything, they should do nothing and keep everything as it is – and then a few years later, the country that imposed the sanctions will get tired of them, the sanctions will be lifted, and everything will go back to normal. In short, lifting sanctions that do not work would create incentives that would lead to future sanctions achieving results in very few cases, if any. For these reasons, inefficient sanctions, i.e. sanctions that have not achieved their aim, stay in place.[33]

Considering the rather vague aim of the February 2022 sanctions against Russia, it is rather difficult to evaluate whether they have been efficient so far. Since the aim of the EU sanctions is to 'effectively thwart' the Russian capacity to wage war in Ukraine, it is reasonable to conclude that specific import restrictions have somewhat thwarted this capacity and have restricted Russia's ability to wage war (Simola 2023). It is evident that this ability would have been greater had sanctions not been imposed. Nonetheless, it is obvious that there is no change in Russia's policy, i.e. that the sanctions will not stop Russia from continuing the war in Ukraine and that the outcome of the war will be decided on the battlefield. Many factors will influence this outcome. Sanctions are definitely one of them, but it is apparent that they are not among the crucial factors.

Nonetheless, for the time being, the February 2022 sanctions against Russia have proven to be efficient regarding domestic political motives, satisfying the demand of the public in the countries imposing the sanctions and making the constituency pleased. Again, this is not the only mechanism that makes this possible, as it is important to provide effective military support to Ukraine, but it is difficult to imagine that such an accomplishment regarding constituency could have been achieved without imposing sanctions and the strong PR efforts surrounding them.

[33] According to an analysis that is very benevolent towards sanctions and is methodological incorrect, only a quarter of the sanctions imposed in modern history achieved their aim – 'the glass is a quarter full' (Morgan, Syropoulus, Yotov 2022, 24). Sanctions have been suspended or lifted only in such cases.

6. CONCLUSION

Regardless of whether considering the general history of sanctions, the history of the period, the history of specific types of sanctions, or a case study – four key research questions have been identified. The questions that should be asked and hopefully answered are: what is the aim of the sanctions; what are their mechanisms; are the sanctions effective; are they efficient? It seems that it is likely that the most precise answers to these questions can be given by the case studies. From the international policy point of view perhaps the most import answer is the one about the efficiency of the sanctions, i.e. whether the sanctions can achieve their aim.

The answers to these four key research questions should only be the starting point for in-depth research on sanctions. The answers to these questions should be used to formulate new questions, would enable us to better understand the phenomenon of sanctions, to fully grasp what happens, and what outcomes should be expected under the given conditions. By learning about the past, perhaps we will have more elements to answer questions about the future of sanctions.

The hints about the February 2022 sanctions on Russia indicate that they aim to undermine its war effort rather than to change its policy, that they are not thorough but complicated and balanced, considering the costs to the countries that imposed the sanctions, that they are effective, although not as effective as intended, and that some results have been achieved, but that these results are definitely not decisive for the outcome of the war in Ukraine.

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BLANKO MENICA KAO SREDSTVO OBEZBEĐENJA POTOŠAČKOG KREDITA

U radu se razmatra smisao upotrebe blanko menice kao sredstva obezbeđenja potrošačkog kredita, a istovremeno se sumnja u njenu svrhu kao sredstva obezbeđenja takvog kredita. Polazna hipoteza je obesmišljenost blanko menice kao sredstva obezbeđenja, pri čemu se ukazuje da se ona sastoji u tome što je isto lice dužnik po dva osnova – menici i ugovoru o kreditu. Štaviše, to isto lice je, suštinski, jemac samome sebi tako što potpisom na blanko menici jemči za svoj dug iz ugovora o potrošačkom kreditu.

Takva postavka deluje tautološki, s obzirom na to da jedno lice po dva pravna osnova a istom imovinom jemči za svoje ispunjenje obaveze u osnovnom poslu. U tome se, upravo, sastoji besmisao upotrebe blanko menice kao sredstva obezbeđenja. Da bi, kao takva, zbilja predstavljala sredstvo obezbeđenja, nužno je da se uz potpis korisnika kredita na njoj pojave i potpisi avalista. U suprotnom, takva menica nije sredstvo obezbeđenja.

Ključne reči: *Blanko menica. – Potrošački kredit. – Apstraktnost. – Aleatornost.*

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1. UOČAVANJE PROBLEMA

Imajući u vidu poslovnu praksu banaka da od korisnika kredita kao sredstvo obezbeđenja potrošačkog kredita bez izuzetka zahtevaju potpisanu blanko menicu, čini se neophodnim kritički razmotriti takvu pojavu, njenu opravdanost, tačnije korisnost, i pravnu važnost. Treba analizirati upotrebljivost takve menice za poslovnu banku, ali i rizičnost potpisa korisnika kredita na ispravi koja bi u budućnosti mogla da figurira kao menica. Osnovnu hipotezu rada, upravo, čini pravni besmisao upotrebe blanko menice kao sredstva obezbeđenja, a besmisao se uočava ne samo na strani banke kao korisnika takvog obezbeđenja već i na strani primaoca kredita kao davaoca obezbeđenja.

Posmatrano iz ugla banke kao davoca kredita i primaoca sredstva obezbeđenja u vidu potpisane blanko menice, pravni besmisao se sastoji u tome što suštinski kao poverilačka strana ne stiče ni u čemu bolji položaj. Smisao blanko menice je u tome da se popuni u skladu sa ovlašćenjem (ugovorom) o popuni ako se posao koji obezbeđuje ne ispuni na očekivan način. To u slučaju potrošačkog kredita znači da je banka ovlašćena da popuni blanko menicu sa ostalim bitnim sastojcima i iznosom koji odgovara nevraćenom dugu iz takvog kredita. Međutim, banka time ne poboljšava svoj položaj jer je prema klijentu u skoro istom pravnom položaju kao i kada nema menicu. Između njih (konkretnog klijenta i banke) ne dejstvuje menična apstraktnost i svi prigovori koje je klijent mogao da uputi banci po osnovu ugovora o kreditu opstaju i kao menični prigovori ako bi banka popunila menicu u skladu sa tim ugovorom (o kreditu). Ako je banka ne bi popunila u skladu sa tim ugovorom, onda bi klijent stekao dodatni prigovor nepopune blanko menice u skladu sa ovlašćenjem za popunu i ujedno ukazao na bančinu nesavesnost (V. Jovanović 1958, 342). Dakle, ako klijent nema novčanih sredstava da vrati kredit koji mu je dat, položaj banke je praktično isti i postojanje (nepostojanje) menice kao sredstva obezbeđenja ne utiče na njegovo poboljšanje. Ona prema klijentu ne bi mogla da se namiri jer on novca nema. Doduše, činjenica je da joj prethodno popunjena blanko menica, kao verodostojna isprava, omogućava upotrebu skraćenog izvršnog postupka, ali se time u stvarnosti položaj banke ne poboljšava ako klijent nema novčanih sredstava na bankarskim računima (Nikolić 2020, 281 i dalje). Upotrebom takve popunjene menice u skraćenom izvršnom postupku banka stiče samo dodatno proceduralno pravo na promptnost, brzinu prinudnog ostvarenja svog prava, ali ako klijent nema novčanih sredstava na tekućem (dinarskom ili deviznom) računu, takvo dodatno pravo se čini besmislenim jer je neupotrebljivo. Tačnije, ne postoji objekt, novčana masa spram koje bi se

ostvarilo, a sama menica ne donosi novu vrednost kao sredstvo obezbeđenja ako nema imovine na koju bi se ona mogla osloniti, referisati u izvršenju, odnosno u ostvarenju meničnog, poverilačkog prava.

S druge strane, položaj kreditnog dužnika koji vraćanje kredita obezbeđuje potpisanom (blanko) menicom može se značajno pogoršati zloupotrebom takve hartije od vrednosti u nastajanju. Potpisivanje meničnog obrasca bez ostalih bitnih meničnih sastojaka i same sume na tom obrascu vodi potpisnika u neizvesnost i neodređenost. On je, naime, u situaciji da čeka način i vreme dalje upotrebe takvog obrasca (koji je on potpisao), a koje zavisi u meničnom smislu samo od imaoca, tačnije držaoca takvog obrasca, a ne i od potpisnika. Iako je smisao blanko menice da bude popunjena u skladu sa ovlašćenjem koje potpisnik daje njenom držaocu, takav držalac, ipak, može da odstupi od takvog ovlašćenja prekoračivši ga ili se uopšte ne osvrćući na njega i da popuni menicu prema nahođenju (Allcock 1982, 21). Naravno, takvoj menici bi njen potpisnik mogao da prigovori, ali samo ako bi njen držalac bio njegov neposredni poverilac (banka kao ugovorna strana iz ugovora o kreditu) ili neko drugo nesavesno lice koje je znalo za takvo odstupanje od ovlašćenja za popunu. U suprotnom će potpisnik meničnog obrasca, odnosno blanko menice morati da trpi takvo pogrešno popunjavanje (najpre menične svote) u sadejstvu sa savesnošću drugog sticaoca menice.

Kako bi se hipoteza o besmislu ili čak nepotrebnosti korišćenja takve blanko menice kao sredstva obezbeđenja kredita potvrdila ili opovrgla, neophodno je funkcionalno razmotriti ugovor o potrošačkom kreditu i blanko menicu, njihove pravne režime i mogućnosti zloupotrebe. Nakon takve analize, moći će da se izvede zaključak o smislu i potrebi takve menice u nastajanju kao podršci i obezbeđenju osnovnog posla potrošačkog kredita.

2. POJAM I PRAVNO ODREĐENJE POTROŠAČKOG KREDITA

2.1. Pojam

Ugovor o potrošačkom kreditu predstavlja posebnu vrstu, varijantu klasičnog ugovora o kreditu, imajući u vidu, pre svega, svojstva ugovornih strana i pojedine druge sastojke takvog ugovora (Brown 2019, 155–157). Tako, ugovor o potrošačkom kreditu se zaključuje između profesionalnog

trgovca, s jedne strane (banke ili platne institucije), i fizičkog lica koje ima svojstvo potrošača, s druge strane.[1] Osnovna svrha potrošačkog kredita je povećanje kupovne moći korisnika kredita (Vasiljević 2012, 362).

Od drugih odlika koje potrošački kredit čine posebnom vrstom u odnosu na klasični kredit, izdvajaju se rok, vrste obezbeđenja i sam iznos.[2] Tako, pravilnost je da potrošački kredit ne bude predmet ugovora u kome je rok vraćanja duga duži od pet godina. To, dakle, upućuje na svojevrsnu kratkoročnost potrošačkog kredita (ako se ima u vidu srednjoročnost i dugoročnost stambenih, hipotekarnih i investicionih kredita).

S druge strane, u pogledu sredstava obezbeđenja, potrošački kredit odlikuju posebno prilagođena sredstva obezbeđenja poput jemstva (u kolokvijalnom diskursu čuveni „žiranti"), administrativne zabrane i menice

[1] *Objašnjenje*: Sama činjenica da se ugovor o potrošačkom kreditu zaključuje između neravnopravnih strana ukazuje na potrebu pravne zaštite strane koja je slabija. U slučaju takvog kredita, strana je slabija po dva osnova – prvo, kao fizičko lice, neprofesionalac, netrgovac, a drugo, kao lice koje, spram banke, kao davaoca kredita, nema ista znanja o bankarskoj delatnosti. Moguće je razlikovati dve vrste korisnika kredita – potrošača. Prvo, one koji su u stanju koliko-toliko da zaštite svoja prava – tzv. prosečni potrošači, i druge koji to nisu – tzv. ranjivi potrošači (Brown 2019, 122). Istorijski, do polovine 20. veka, korisnici bankarskih usluga su u većem obimu bili privrednici, profesionalni trgovci, a manje obični građani. U savremenom rasporedu odnosa, skoro 90 procenata odraslog stanovništva ima neki oblik odnosa sa bankom (uslužni, kreditni ili depozitni). Zbog toga se stvorila udaljenost u znanjima i ekonomskom položaju između banke i korisnika usluga i potreba za zaštitom slabije ugovorne strane (Elinger, Lomnicka, Hare 2011, 115). Otuda, u srpskom pravu postoji poseban propis, Zakon o zaštiti korisnika finansijskih usluga, ali i u Evropskoj uniji niz direktiva koje su posvećene potrošačkom kreditu, odnosno zaštiti korisnika takvog kredita kao slabije ugovorne strane. Upor. Zakon o zaštiti korisnika finansijskih usluga, *Sl. glasnik RS* 35/2011 i 139/2014 i Direktiva EU 87/102 (*Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit*), Direktiva EU 2008/48 (*Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*) i Direktiva EU 2023/2225 (*Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC*).

[2] Direktivom EU 2023/2225, kojom je na nivou Evropske unije uređen potrošački kredit, predviđeno je da se neće primeniti na kredite koji imaju, u osnovi, odlike potrošačkog, ali čiji iznos premašuje 100 hiljada evra. Izuzetno, iznos potrošačkog kredita može da bude veći od 100 hiljada evra ako je uzet namenski za obnovu domaćinstva (kuće, stana), a da pri tome nije obezbeđen stvarnim pravom (hipotekom) na tom domaćinstvu koje je predmet obnove. Vid. Direktiva EU 2023/2225, čl. 2, st. 2, tač. c; čl. 2, st. 3.

(najčešće blanko sa trasiranim ili sopstvenim meničnim izrazom).[3] To znači da se u ugovoru o potrošačkom kreditu ne upotrebljavaju, po pravilu, stvarna sredstva obezbeđenja (poput hipoteke ili ručne zaloge), iako takvu mogućnost ne bi trebalo isključiti naročito kada je u pitanju registrovana zaloga na pokretnim stvarima.[4] Najzad, osiguranje (kredita) kao vrsta obezbeđenja pojavljuje se neretko i istovremeno sa blanko menicom kada davalac kredita proceni da postoji povećan rizik nevraćanja potrošačkog kredita (najčešće je to slučaj sa starijim generacijama potrošača poput penzionera ili drugim potrošačima za koje banka proceni da blanko menica kao sredstvo obezbeđenja nije dovoljna).

2.2. Pravno određenje

Ugovor o potrošačkom kreditu se zaključuje, kako je već pomenuto, između trgovca, s jedne strane, i fizičkog lica – netrgovca, kojem je novčani iznos kredita potreban zbog zadovoljenja nekih svojih, rečju, potrošačkih potreba koje se ne svode na profitabilnost.[5] Osnovna činidba banke se sastoji u stavljanju na raspolaganje određene sume novca (neposrednom predajom sume novca ili omogućavanjem njenog korišćenja putem tekućeg računa), dok se osnovna činidba korisnika kredita sastoji u vraćanju sume novca koja

[3] Jedna od retkih država u svetu koja izričito isključuje upotrebu menice kao sredstva obezbeđenja potrošačkog kredita je Federacija Bosne i Hercegovine (Petrić 2006, 109). Moguće je da je do takvog radikalnijeg rešenja zakonodavac Federacije BiH došao usled ugledanja na zakonodavca Evropske unije koji je u jednom trenutku uređivao mogućnost da menica bude sredstvo obezbeđenja potrošačkog kredita. U docnijim verzijama propisa kojima se uređuje potrošački kredit uklonjena je norma koja se odnosi na menicu, čime je stvorena svojevrsna nedoumica da li je takvo sredstvo obezbeđenja moguće (iako nije uređeno više) ili je potpuno isključena njegova upotreba (poput zabrane u BiH). Upor. Direktiva EU 87/102, čl. 10 i Direktiva EU 2008/48 lk. 5, st. 1, tač (n) i Direktiva EU 2023/2225, čl. 21, st. 1, tač. (o) i Zakon o zaštiti potrošača u Bosni i Hercegovini, *Sl. glasnik BiH* 25/2006 i 88/015, čl. 62, st. 2. S druge strane, u Republici Srbiji je mogućnost upotrebe menice kao sredstva obezbeđenja potrošačkog kredita izričito moguća na osnovu Zakona o zaštiti korisnika finansijskih usluga, *Sl. glasnik RS* 35/2011 i 139/2014, čl. 17, st. 8.

[4] O različitim sredstvima obezbeđenja, a naročito o jemstvu, zalozi i hipoteci, postoji raznovrsna pravna književnost (Hiber, Živković 2015, 138 i dalje, 225 i dalje i 275 i dalje; Cranston, Avgouleas, van Zwieten, Hare, van Sante 2017, 544 i dalje).

[5] U pitanju je, dakle, posebna vrsta namenskog vanprivrednog kredita koja je namenjena isključivo fizičkim licima (Jankovec 1999, 609). S druge strane, pozitivno srpsko zakonodavstvo korisnikom takvog kredita određuje ne samo klasično fizičko lice bez privredne delatnosti već i fizičko lice koje je preduzetnik ili poljoprivrednik (Jovanović, Radović, Radović 2021a, 467).

mu je prethodno data i plaćanju naknade, cene za njeno korišćenje u vidu kamate. Ugovor o potrošačkom kreditu predstavlja formalan, dvostrano-obavezujući, imenovani posao, sa srednjoročnim trajanjem ispunjenja činidaba, komutativan i teretan.[6] U pogledu pravne prirode, u osnovi je ugovor o zajmu sa posebnošću u vidu vrste predmeta i subjekta davaoca. Tako se kao predmet pojavljuje samo novac (dakle, ne i druge telesne, pokretne zamenljive stvari), a kao davalac banka ili drugi, poseban subjekt koji je za takve poslove ovlašćen od centralne banke (Jovanović, Radović, Radović 2021a, 466).

2.3. Obezbeđenje potrošačkog kredita

Kako je već uočeno, pravilnost je da ugovor o potrošačkom kreditu nije obezbeđen stvarnopravnim sredstvima obezbeđenja poput hipoteke ili bilo kog drugog oblika zaloge, uključujući i ručnu. Potrošačkom kreditu su svojstvena lična sredstva obezbeđenja poput jemstva ili avalirane menice, a u savremenom bankarskom poslovanju preovlađuje upotreba blanko menica i administrativne zabrane kao sredstva obezbeđenja (Jankovec 1999, 609–610).[7]

Jemstvo je jednostrana formalizovana izjava trećeg lica kojom se obavezuje da će vratiti punovažni dug glavnog dužnika.[8] Zavisno od toga da li je supsidijarno (kakvo se pretpostavlja u građanskopravnim odnosima) ili solidarno (kakvo se pretpostavlja u trgovinskopravnim poslovima), jemac se obavezuje da će ispuniti obavezu glavnog dužnika ako je on prethodno ne izvrši ili čak jednovremeno sa njim (u slučaju solidarnog jemstva).

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[6] Posebno važna osobina takvog potrošačkog kredita jeste da se zaključuje tehnikom ugovora po pristupu. To ima posledicu na sužavanje prostora za izražavanje korisnikove volje te njeno svođenje na pristanak ili odustanak (eng. *take it or leave it*). Osnovna učenja o ugovorima po pristupu u srpskoj pravnoj književnosti pružio je profesor Borislav T. Blagojević (Blagojević 2013, 39 i dalje).

[7] *Napomena*: U radu se obrađuje menica kao tradicionalno sredstvo obezbeđenja, odnosno posmatra se kao sredstvo koje doprinosi povećanju verovatnoće namirenja osnovnog, obezbeđenog potraživanja. Nasuprot sredstvima obezbeđenja postoje sredstva učvršćenja obligacija, koja imaju cilj da „pomognu poveriocu u slučaju neurednosti ili nediscipline dužnika" u ispunjavanju obligacije, ali ne i da povećaju verovatnoću njenog namirenja (Hiber, Živković 2015, 17–18).

[8] Opširnije o jemstvu kao sredstvu ličnog obezbeđenja pisali su profesori Pravnog fakulteta u Beogradu (Hiber, Živković 2015, 275 i dalje).

Avalirana menica kao sredstvo obezbeđenja je (najčešće sopstvena) menica koju je izdao korisnik kredita, a za ispunjenje menične obaveze je, na samoj menici (najčešće na njenom licu), jemčilo neko treće lice – menični avalista. Avalirana menica je, dakle, sredstvo obezbeđenje kredita u kome je korisnik kredita već prethodno izdao menicu u korist banke, a ispunjenje menične obaveze je potvrdilo, garantovalo, jemčilo neko treće lice (treće u pogledu osnovnog posla potrošačkog kredita između banke i korisnika), postavši menični avalista.[9]

Administrativna zabrana je svojevrsna tehnika umanjenja zarade koju poslodavac čini zaposlenom sa njegovim pristankom. To je, naime, anahrona ustanova i relikt vremena društvene svojine i državnih preduzeća u kojima su takva preduzeća predstavljala produženu ruku države u organizaciji društvenih odnosa (Uzelac, Zeljko 2022, 56–57). Zaposleni koji bi zaključio ugovor o kreditu sa bankom kao sredstvo obezbeđenja bi pružao administrativnu zabranu, odnosno svojevrsni dodatni ugovor između njega i poslodavca na osnovu koga se poslodavcu daje pravo da umanji deo zarade

[9] Položaj meničnog avaliste u takvom rasporedu odnosa je, čini se, istovetan položaju meničnog izdavaoca, korisnika kredita, imajući u vidu pre svega menične prigovore koje može da ističe prema meničnom povoriocu (Jankovec 1999, 700). To deluje i logično jer se time davalac kredita obezbeđuje obavezom još jednog lica, avaliste, sa dodatnim proceduralnim prednostima koje menica kao verodostojna isprava ima, ali ne dobija više prava nego što ima prema licu za koje se avalira (honoratu u meničnoj terminologiji). Vid. Zakon o menici – ZM, *Sl. list FNRJ* 104/46, *Sl. list SFRJ* 16/65, 54/70, 57/89, *Sl. list SRJ* 46/96, *Sl. list SCG – Ustavna povelja* 1/2003, čl. 31, st. 1. S druge strane, postoji suprotno tumačenje da avalista, iako, načelno, ima istovetan položaj kao honorat, ipak nema pravo da ističe prigovore koje bi mogao da ističe honorat (Jovanović, Radović, Radović 2021a, 643). Ako bi se na osnovu takvog tumačenja primenila ustanova avala kao jemstva potrošačkom kreditu, onda bi kreditor imao bolji položaj jer bi u slučaju nevraćanja kredita mogao da ima samostalno, apstraktno i puno menično pravo prema avalisti. Pri tome, ostvarivanje kreditorovog meničnog prava ne bi bilo ugroženo prigovorima koje, po menici, prema njemu ima korisnik kredita (predstavljen kao izdavalac u menici). Čini se da se time, u kontekstu potrošačkog kredita, stvara dodatna neravnopravnost i poboljšava položaj davaoca kredita jer mu se, u sadržinskom, materijalnopravnom smislu, daje dodatak na pravo koje ima prema korisniku kredita predstavljenom u menici kao izdavaocu. Dodatak kreditorovom pravu se sastoji u tome što po kvalitetu dobija više postojanjem takvog avaliste u odnosu na položaj korisnika kredita. Konkretno i uprošćeno, ako je korisnik kredita u iznosu od 1 milion dinara, kao izdavalac menice vratio, na primer, 700 hiljada dinara, onda bi on kao izdavalac mogao da istakne meničnom poveriocu svoj lični prigovor da je isplatio 700 hiljada i da duguje samo 300 hiljada dinara. Ako bi u menici bio upisan iznos od 1 milion dinara, onda avalista, prema takvom, za kreditora povoljnijem tumačenju, ne bi mogao da istakne prigovor koji bi mogao njegov honorat (korisnik kredita, a izdavalac menice) da je već vraćeno 700 hiljada kreditne sume. Na taj način bi se menični aval učinio neopravdano samostalnim (neakcesornim) oblikom jemstva. Vrhovni kasacioni sud, Rev. 1367/2021 od 24. novembra 2022.

u visini mesečne rate kredita. Poslodavac se, istovremeno, obavezuje da će to učiniti svakog meseca i tako omogućiti kreditoru da namiri svoje mesečno potraživanje. Važno je uočiti da takva poslodavčeva obaveza (obećanje banci) ne predstavlja jemstvo niti garanciju (poput one koju daju banke) kao vid jednostrane izjave volje poslodavca učinjene prema i u korist banke već samo jednu tehničku radnju umanjenja mesečne zarade zaposlenom koji je u tom rasporedu odnosa još i korisnik kredita. Na taj način, poslodavac ne može da bude, u krajnjem ishodu, odgovoran prema banci ako nije uspela u konkretnom mesecu da namiri svoje mesečno potraživanje po kreditu jer su prema zaposlenom postojala neka prioritetnija potraživanja (obaveza po osnovu zakonskog izdržavanja, na primer).[10] Dakle, administrativnom zabranom kao tehnikom obezbeđenja potrošačkog kredita zaposleni se onemogućava da raspolaže delom zarade koja je u visini mesečne rate kredita. Iz perspektive banke, kao davaoca kredita, ona predstavlja samo sredstvo kojim se omogućava da se banka namiri na tom obustavljenom delu zarade. Poslodavac se, dakle, ne obavezuje da će banci kao kreditoru zaposlenog isplatiti iznos mesečne rate kredita već samo da će u tu svrhu umanjiti iznos mesečne zarade svom zaposlenom i tako, posredno, omogućiti kreditoru da ostvari svoje mesečno potraživanje.[11]

Najzad, kao sredstvo obezbeđenja potrošačkog kredita koristi se i sama blanko menica. Za razliku od jemstva i meničnog avala u kome se treća lica pojavljuju kao lični „garanti“ vraćanja kredita, blanko menica, slično kao i administrativna zabrana, ne uvodi treća lica kao dodatne „garante“ ispunjenja obaveze već banka pred sobom ima istog, jednog, dužnika koji se, u slučaju blanko menice, preceduralno čini pouzdanijim dužnikom zbog menice kao verodostojne isprave.

[10] Zakon o izvršenju i obezbeđenju – ZIO, *Sl. glasnik* 106/2016, 113/2017, 54/2019, 9/2020, 10/2023, čl. 297.

[11] Administrativna zabrana može da se učini unekoliko sličnom sa certificiranim čekom jer u oba slučaja dolazi do „blokiranja“, rezervisanja, čuvanja sredstava dužnika na bankarskom tekućem računu u svrhu plaćanja duga. Međutim, razlika je u tome što se kod certificiranog čak prilikom postupka „blokiranja“ klijentovog novca na računu banka jednostrano obavezuje čekovnom poveriocu da će ta blokirana sredstva sačuvati do trenutka podnošenja čeka na isplatu. Razlika je, dakle, u tome što se kod certificiranog čeka banka koja blokira klijentova sredstva sa ciljem naplate čeka, zapravo, jednostrano obavezuje po čeku, kao čekovni dužnik. Suprotno, u slučaju administrativne zabrane, poslodavac koji „blokira“ deo zarade zaposlenog čini to samo tehnički, ne i pravno, jer se ne obavezuje banci, kao poveriocu zaposlenog, da će mu tu mesečnu ratu kredita i isplatiti. Više o certificiranom čeku su pisali profesori Pravnog fakulteta u Beogradu (Bartoš, Antonijević, Jovanović 1974, 226; M. Radović 2016, 183–185; Janković 2018, 59).

3. BLANKO MENICA KAO SREDSTVO OBEZBEĐENJA POTROŠAČKOG KREDITA

3.1. Pojam

Blanko menica (nem. *Blanko Wechsel*) predstavlja hartiju od vrednosti u nastajanju jer u trenutku njenog izdavanja nisu popunjeni svi bitni sastojci, ali postoji sadržina osnovnog posla iz koje se može sa izvesnošću zaključiti kako će biti određeni i popunjeni sastojci koji nedostaju (Assies 2002, 52).[12] Izraz izdavanje blanko menice treba tumačiti u kontekstu načina njene upotrebe (Büdiger 1934, 181). U tom smislu, izdavanje se svodi na predaju potpisanog praznog meničnog obrasca sa namerom obezbeđenja ispunjenja obaveze iz osnovnog posla i ujedno ovlašćivanje na popunu takvog obrasca sa sastojcima koji su u skladu sa tim poslom.[13] Predajom takvog potpisanog obrasca se, iz meničnopravnog ugla posmatrano, izričito, namerno propušta unos bitnih sastojaka u menicu, dok se njen imalac prećutno ovlašćuje da je skladno predmeničnom dogovoru popuni ako za to bude bilo potrebe (Jankovec 1999, 694). Konkretno, banka ima to pravo u slučaju kada korisnik ne vrati kredit.

[12] Čini se da je najtačnije pravno određenje blanko menice pružila M. Radović ukazavši da je reč o privatnoj ispravi sa rečju menica na sebi, u koju nisu uneti bitni menični sastojci već postoji samo potpis i namera meničnog obavezivanja lica koje je sačinjava (Jovanović, V. Radović, M. Radović 2021a, 659). Zbog toga se može zaključiti da blanko menica nije menica već samo isprava, hartija od vrednosti u nastajanju, u koju će, eventualno, biti upisani menični sastojci u skladu sa namerom njenog izdavaoca. U tom smislu, čini se da je ispravno odrediti takvu ispravu samo terminološki kao menicu jer ona to u tom određenju, bez bitnih sastojaka, nije menica već samo mogućnost da to i postane. Takva isprava predstavlja samo potvrdu njenog potpisnika da želi da se obaveže menično, ali ne i gotovu, potpunu menicu (Jacobi 1956, 477–478). Tek popunom bitnih sastojaka takva isprava „dostiže" kvalitet da bude određena menicom, a sama popuna se vrši u skladu sa ugovorom o popuni, odnosno osnovnim poslom koji je preteča takvoj ispravi. Međutim, čini se da je pravilnije odrediti da se popuna nedostajućih bitnih sastojaka vrši u skladu sa namerom potpisnika isprave, a ne u skladu sa ugovorom koji predstavlja samo pravni oblik za izražavanje potpisnikove namere i ujedno davanja ovlašćenja drugoj strani da popunu učini prema potpisnikovoj nameri (ali, ujedno i u popunioočevom interesu). Osnov takve tvrdnje se nalazi u tome da je menična obaveza u osnovi uvek jednostrana izjava volje, a ne i ugovor (Vasiljević 2012, 471).

[13] Blanko menica kao pojmovna odrednica nastala je kao posledica primene teorije propuštanja (teorija omisije), a nasuprot teoriji jedinstvene popune (lat. *unitu actu*) prema kojoj su u trenutku izdavanja morali da budu popunjeni svi bitni menični sastojci, pa čak i jednim rukopisom i mastilom (Jankovec 1999, 694).

Blanko menica, kao institut, nije potpuno zakonski uređena već je nastala iz potrebe poslovne prakse. Jedino pravilo koje se na nju odnosi i otuda joj daje, uopšte, pojmovnu mogućnost da kao takva postoji odnosi se na naknadnu popunu bitnih sastojaka koji nisu bili prisutni na obrascu prilikom izdavanja. Pravilom o naknadnoj popuni takve blanko menice teži se skladu sa apstraktnošću i samostalnošću u menici na način da će prethodno nepopunjena menica imati pravnu važnost kada se docnije popuni, pa čak i ako su bitni sastojci popunjeni suprotno ovlašćenju na popunu (Jankovec 1993, 640–642). Jedino ako su takvi sastojci popunjeni nesavesno, odnosno kada je imalac znao da su sastojci uneti u obrazac suprotno ili drugačije od ovlašćenja, odnosno osnovnog posla, moći će da se istakne prigovor da tako popunjena ne može da ima pravno dejstvo.[14]

3.2. Funkcionisanje blanko menice

Blanko menica ima rasprostranjenu primenu kao sredstvo obezbeđenja potrošačkog kredita na način da korisnik kredita potpisuje menični obrazac i predaje ga banci, a banka ima pravo da popuni taj obrazac u skladu sa ugovorom o kreditu ako korisnik ne vrati kredit na ugovoreni način. To znači da je banka kao davalac kredita ovlašćena ne samo da popuni bitne sastojke

[14] *Analiza propisa*: pravilo koje na krnji, oskudan način uređuje blanko menicu ustanovljeno je još u Ženevskom jednoobraznom meničnom zakonu iz 1930. godine, a preuzela su ga doslovno nacionalna zakonodavstva koja pripadaju ženevskom meničnom krugu, među njima i Srbija i Nemačka. Interesantno je da su zakonopisci država potpisnica Ženevske menične konvencije doslovno prepisali i preveli to pravilo, ne želeći da ga prilagode svom pravnom sistemu ili eventualno učine jasnijim i lakšim za primenu. Tako, izraz u srpskom Zakonu o menici „*....osim ako ju je stekao zlomisleno ili je pri sticanju menice postupio sa velikom nemarnošću*“ ukazuje na uskraćivanje (negaciju) prava koja bi imalac tako nevaljano popunjene menice inače imao da je bio savestan, odnosno da nije znao da je tako popunjena. Deluje da bi pravilo bilo jasnije i nespornije da je upotrebljen izraz savesnost koja utiče na svest o mogućnosti nevaljane popune ili znanje da je tako popunjena jer bi težište takvog bilo upravo na onom smislu koji se imao u vidu prilikom stvaranja takvog pravila. Istovetno navedenom izrazu srpskog meničnog zakona je i pravilo u nemačkom meničnom zakonu i pomenutoj Ženevskoj meničnoj konvenciji (nem. „*...es sei denn, daß er den Wechsel in bösem Glauben erworben hat oder ihm beim Erwerb eine grobe Fahrlässigkeit zur Last fällt*“; eng. „*...unless he has acquired the bill of exchange in bad faith or, in acquiring it, has been guilty of gross negligence*“). Upor. ZM, čl. 16, st. 2. i nemački Menični zakon (nem. *Wechselgesetz*), art. 10, dostupan na adresi: *https://www.gesetze-im-internet.de/wg/BJNR003990933.html*, 8. januar 2024, i Ženevski menični zakon (eng. *Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes, Geneva, 7 June 1930*), par. 10.

već i da u menicu unese i svotu koja odgovara nevraćenom iznosu potrošačkog kredita. Takvo ovlašćenje banka je prećutno stekla kroz potpisanu ispravu sa naznakom menice koja joj je predata, a u kojoj je propušten unos ostalih bitnih meničnih sastojaka. Sadržina ovlašćenja je određena prema osnovnom poslu, tačnije prema činidbi potpisnika meničnog obrasca iz ugovora o potrošačkom kreditu.

Tako, blanko menica će biti popunjena ako korisnik kredita i ujedno potpisnik takve menice ne vrati kredit o dospelosti ili makar neki deo svoje ugovorne obaveze. Tada će banka popuniti blanko menicu sastojcima koji svoj izvor imaju ugovor o kreditu i sumom novca koja u svom iznosu odgovara nevraćenom delu kredita i eventualno pripadajućih kamata. U suprotnom, ako bi potpisnik meničnog obrasca vratio kredit, onda bi banci prestalo da važi ovlašćenje na popunu takve isprave (tačnije, dopunu ranije započetog unosa meničnih sastojaka) i stvorila bi se obaveza vraćanja takvog, potpisanog obrasca.

Funkcionisanje blanko menice ima, dakle, dva odnosno tri moguća scenarija. Prvi, ukoliko korisnik ne vrati kredit, banka će popuniti menični obrazac u skladu sa ugovorom o kreditu i ovlašćenjem na popunu nedostajućih meničnih sastojaka i iznosa svote nevraćenog kredita, u tom slučaju menične obaveze. Drugo, u slučaju da korisnik vrati kredit, banci prestaje ovlašćenje na popunu i ustanovljava se obaveza vraćanja potpisanog meničnog obrasca revnosnom korisniku kredita. Treći scenario se odnosi na zloupotrebu bančinog ovlašćenja kada banka popunjava menične sastojke protivno ugovoru o kreditu koji obezbeđuje takva isprava i prekoračenjem svojih ovlašćenja (Jankovec 1999, 695). To je slučaj kada je korisnik vratio jedan deo kredita, a banka u menicu upiše svotu koja odgovara celini kredita ili čak i veći iznos, odnosno ne upiše iznos na koji je imala pravo koje joj je dato prećutnim ovlašćenjem potpisnika blanketa (Vićić 2014, 400–401). Tada dolazi do sukobljenosti osnovnih meničnih pravila o njenoj kauzalnosti i apstraktnosti, odnosno relativnosti (lat. *inter partes*) i apsolutnosti (lat. *erga omnes*) a koje joj, upravo obezbeđuju vrednost trgovačkog papira u koji pravni sistem ima poverenje dajući mu odliku verodostojnosti.[15]

[15] U svakom slučaju, predajom potpisane blanko menice, kao svojevrsne neodređene i apstraktne garancije, povećava se rizik njene zloupotrebe (Bülow 2007, 294).

4. APSTRAKTNOST I ALEATORNOST BLANKO MENICE

4.1. Apstraktnost

Menica kao privatna isprava predstavlja vrlo strogu i formalnu hartiju od vrednosti koja ima svojstvo verodostojne isprave, što joj omogućava, proceduralno, znatno lakše ostvarenje prava koja u sebi sadrži. Takvo olakšano ostvarenje prava sadržinski potiče iz menične asptraktnosti jer je menično pravo, koje je opredmećeno u novčanoj činidbi, izuzeto iz konteksta predmeničnih odnosa (Gursky 2007, 32). Naznačena suma i raspored odnosa i lica naznačenih i potpisanih u menici imaju svoju samostalnost jer se iz same isprave ne može spoznati istorijski okvir i razlog njenog nastanka (Jacobi 1954, 275–276). U krajnjem ishodu, moguće je samo naslutiti, prepoznati, ali ne i izvesno utvrditi predmenično poreklo odnosa izraženih na samoj menici potpisima i naznačenjima.

Prema tome, menično pravo je otporno na uticaje iz predmenične sredine, odnosno pravno izraženo, na njega nije moguće uticati prigovorima koji imaju svoj osnov u nekom predmeničnom odnosu, to jest u osnovnom poslu (Jankovec 1993, 640). Jedino odstupanje od takve apstraktnosti, a to istovremeno predstavlja i meničnu kauzalnost, jeste slučaj odnosa između neposrednih ugovornika iz osnovnog posla (u predmeničnom odnosu) koji su, u meničnom nivou odnosa, menični poverilac i dužnik. Tada će jedan prema drugome moći da ulažu prigovore ne samo iz menice (na šta ukazuje njena apstraktnost i apsolutnost) već i iz njihovog međusobnog, predmeničnog odnosa (na šta ukazuje usko tumačena kauzalnost i relativnost menice). Takođe, nesavesnost imaoca menice će za posledicu imati kauzalnost, to jest relativizaciju menice time što će menični dužnik moći da mu ističe prigovore iz predmeničnih odnosa drugih meničnih dužnika.[16]

Imajući u vidu kakve obrise menice predstavlja blanko menica, može se zaključiti da je u njoj apstraktnost pravnih odnosa još više izražena. S obzirom na to da su propušteni skoro svi bitni sastojci, osim potpisa izdavaoca i menične naznake, čini se da takva, potpisnikova obaveza na menici ima odliku ne samo apstraktnosti već i neodređenosti. Doduše, u odnosu na držaoca takve isprave, to jest banku, davaoca kredita, postoji kauzalnost i relativnost odnosa. No, ako bi davalac kredita kao imalac takve menice nesavesno raspolagao njome i preneo je trećem savesnom licu, tada bi

[16] *Objašnjenje*: Takvo pravilo je u skladu sa negatornim dejstvom načela savesnosti i poštenja prema kome se uskraćuje pravno dejstvo pravilima na koja bi, inače, imao pravo savesni imalac menice. Dakle, upravo je svojom nesavesnošću imalac menice učinio da prestane dejstvo i uopšte mehanizam menične apstraktnosti.

se umesto uskraćivanja dejstva apstraktnosti, što je, kako je prikazano, očekivana posledica, javila suprotna posledica. Menična apstraktnost bi tada, nesavesnom popunom i raspolaganjem blanko menicom, pojačala dodatnu otuđenost izvornog potpisnika meničnog obrasca od obaveze koju je planirao, to jest imao u vidu potpisivanjem takvog obrasca. Čak bi se i menična neodređenost (svojstvena blanko menici i ne toliko opasna kada se koristi u skladu sa ovlašćenjem i svrhom) izrazila u njenom najneželjenijem obliku, na primer, upisivanjem znatno više sume nego što je iznos kredita koji je potpisnik dobio na početku ugovorom o kreditu od banke.

Takvom, mogućom zloupotrebom blanko menice i nesavesnom, ali nesankcionisanom upotrebom mehanizama apstraktnosti u menici stvara se prilična pravna nesigurnost i neizvesnost ne samo za potpisnika (no najviše za njega) već i za ceo pravni i finansijski sistem. Deluje da se u takvom slučaju sama nesavesnost popune blanko menice, pravno ojačana i zaštićena apstraktnošću, preobražava u svojevrsnu aleatornost u meničnom pravu.

4.2. Aleatornost

Kao što je već uočeno, popuna blanko menice je neizvesna, odnosno zavisna od ispunjenja činidbe iz osnovnog posla. Konkretno, kod ugovora o potrošačkom kreditu, zavisi od toga da li će korisnik kredita (potpisnik meničnog obrasca) ispuniti svoju obavezu na vraćanje kredita i u kojoj meri. Tako, ako je ne ispuni ili ne ispuni u celini, davalac kredita će popuniti blanko menicu sastojcima i svotom koja odgovara nevraćenom kreditu.[17] Međutim, moguće je da imalac blanko menice (davalac kredita) ili pak neko treće lice na koje menica bude preneta popune menicu prema svom nahođenju i dalje je indosiraju na savesno lice, tako da krajnja posledica bude opstanak takve, za izvornog potpisnika blanko menice, neplanirano velike (uopšte drugačije) obaveze.[18]

[17] Upravo takva situacija odgovara svojevrsnom osiguranom slučaju (nem. *Sicherungsfall*) nakon čijeg nastanka se stvara bančino pravo na popunu i ostvarenje menice koja je do tada služila kao sredstvo obezbeđenja (nem. *Sicherungsmittel*) (Gursky 2007, 37).

[18] *Objašnjenje*: U sučaju kada je blanko menica tako zloupotrebljena od davaoca kredita kao ovlašćenog lica na njenu popunu, ona će, kako je uočeno, opstati u dejstvu ako je izvorni menični ovlašćenik indosira na savesno lice (ono koje nije znalo da je takva menica bila ranije blanko ili koje nije znalo da su njeni sastojci popunjeni u suprotnosti sa sporazumom i ovlašćenjem na popunu) (Prenkert *et al*. 2021, 32–38). Čini se da takva pojava liči na pravni režim memoranduma u trgovinskim odnosima, ali i na svojevrstan agencijski problem (Boucher 1950, 103).

Suština pravnog režima blanko menice se sastoji u tome da njen izdavalac može da istakne prigovore iz osnovnog, predmeničnog posla samo njenom

Najpre, neovlašćeno lice može upotrebom memoranduma, kao poslovnog papira sa otisnutim podacima o privrednom subjektu, i simulacijom potpisa ovlašćenog lica da proizvede valjane pravne posledice u pravnom saobraćaju samo ako je lice kome je memorandum upućen savesno (Jovanović, V. Radović, M. Radović 2021a, 90–91). Takvim pravilom se želi zaštititi poverenje u pravni saobraćaj, ali i sankcionisati trgovac za nemarnost u čuvanju svog poslovnog papira. Tačnije, trgovac se opterećuje rizikom zloupotrebe memoranduma. Ako se takva pravna situacija uporedi sa blanko menicom, onda je sličnost očigledna naročito u delu u kome se pruža pravno dejstvo zloupotrebljenoj odnosno neovlašćeno popunjenoj menici koju stekne savesno treće lice. Dve osnovne vrednosne potpore, koje postoje u režimu memoranduma, postoje i kod blanko menice. Prvo, poverenje u pravni saobraćaj i zaštita treće savesne strane i, drugo, doduše neopravdano, opterećivanje potpisnika obrasca na trpljenje takve posledice. Međutim, tamo gde počinju razlozi za opravdanost opterećivanja rizikom imaoca memoranduma prestaju da postoje razlozi za takvo opterećivanje potpisnika blanko menice. Memorandum je stvar trgovačka, dakle lica koja se bave trgovinom, dok je menica, posebno u 20. veku, prestala da bude isključivo stvar poslovanja trgovaca već je dobila i svoju građanskopravnu primenu (Bartoš, Antonijević, Jovanović 1974, 3–7). Upravo kada je koristi potrošač kao korisnik kredita, ona gubi trgovačku narav i mogućnosti koje joj pružaju mehanizmi samostalnosti i apstraktnosti postaju neželjeni i neopravdani pravni teret takvom potpisniku, odnosno izdavaocu. Čini se da je rešenje u pravilnom tumačenju propisa o prekoračenju zastupničkih ovlašćenja tako što kada se prekorači ovlašćenje trgovca-nalogodavca štiti pravni saobraćaj i takvi poslovi opstaju, dok u slučaju građanina-nalogodavca takvo prekoračenje ovlašćenja ne bi smelo da proizvodi pravna dejstvo, osim ako bi ga on naknadno odobrio (Jovanović, V. Radović, M. Radović 2021b, 159). Čini se da menica ne bi smela da bude izuzetak u tome, bez obzira na njenu strogost i formalnost koje joj, kao svojevrsni relikti starorimske stipulacije, omogućavaju samostalan, autonoman, režim i pravni život (Zimmermann 1990, 68–72). U suprotnom omogućavalo bi se i, dodatno, pravno osnaživalo zaloupotrebljavanje prava (Đurović 1995, 387).

S druge strane, čini se da banka, kao davalac potrošačkog kredita i kao ovlašćenik na popunu blanko menice, prilikom zloupotrebe prava na popunu obrasca utiče na stvaranje svojevrsnog agencijskog problema. Agencijski problem, kao izvorno kompanijskopravna ustanova, postoji kada dođe do odstupanja od ovlašćenja koja je zastupani dao zastupniku (agentu). S obzirom na različiti nivo odnosa i vrste subjekata u pitanju, postoje u osnovi tri kompanijskopravna agencijska problema (uprava – akcionari, većinski akcionar – manjinski akcionar, kompanija – ostali nosioci interesa, pa i društvo u širem smislu) (Vasiljević 2009, 5–8). Međutim, osnova i mehanizam agencijskog problema mogu da postoje i u drugim pravnim okvirima poput menice, odnosno blanko menice. U tom smislu, čini se da imalac blanko menice (banka-davalac kredita) stvara agencijski problem kada odstupi od datog joj ovlašćenja na njenu popunu. U tom smislu, ako bi se takva bančina radnja shvatila kao stvoreni agencijski problem, bilo bi celishodno pristupiti njegovom rešavanju, tačnije njegovom sprečavanju tzv. strategijom ovlašćenja (Vasiljević 2009, 10–11). U meničnom, pravnom, okviru to bi moglo da bude uskraćivanje mogućnosti da se menica kao celina, delovanjem menične apstraktnosti prenese neadekvatno popunjena na treće savesno lice. Čini se da bi najdelotvornije bilo unošenje tzv. rekta klauzule u blanko menicu tako što bi se u obrascu dodala rečca „ne“ ispred odrednice „po naradbi“, čime bi se svaki indosament koji bi banka kao

prvom imaocu, a ujedno i njegovom saugovorniku iz osnovnog posla (banci davaocu kredita), ali ne i potonjim savesnim sticaocima (indosatarima) menice. Zbog toga je potpisnik meničnog obrasca u neodređenom i neizvesnom položaju jer u trenutku potpisivanja nije izvesno hoće li i kako će menični obrazac biti popunjen. Otuda se može naslutiti da blanko menica ima pravnu osobinu aleatornosti. Sa njom je, međutim, veoma povezana, pa i poistovećena uslovnost popune blanko menice. Aleatornost i uslovnost u sebi nose neizvesnost ostvarenja, ispunjenja nekog posla, jer im je u osnovi buduća neizvesna okolnost (Van Niekerk 1998, 94–97). Takva okolnost je za meničnog potpisnika svojevrstan rizik koji se sastoji u tome hoće li se ili neće popuniti blanko menica i, još neodređenije, kako će se popuniti. Aleatornošću se smatra neizvesnost ispunjenja posla koja zavisi od buduće neizvesne okolnosti koja ne zavisi neposredno i odlučujuće od ugovornih strana.

S druge strane, uslov u ugovoru znači okolnost koja najčešće zavisi od volje ugovornih strana. Imajući to u vidu, deluje da je pravna narav blanko menice bliža njenom uslovnom, a ne aleatornom određenju jer se aleatornost, po pravilu, određuje kao okolnost koja je van kontrole stranaka. To se posebno uočava u redovnom načinu popune blanko menice, kada se ona popunjava u skladu sa pravnim poslom koji joj je u osnovi (ali, i u kauzi).[19] U takvom slučaju, menični uslov se može odrediti kao potestativni jer njegovo ispunjenje zavisi isključivo od volje strana u pitanju (Stojanović, Antić 2004, 342). U skladu sa time, popuna menice zavisi isključivo od volje njenog izvornog potpisnika (korisnika potrošačkog kredita) u smislu hoće li vratiti pozajmljeni iznos, ali i od volje banke, kao imaoca menice (davaoca kredita), u smislu hoće li popuniti menicu ako mu njen potpisnik ne vrati kredit o dospelosti. Najzad, popuna blanko menice može da ne zavisi samo od volje pomenutih strana u pitanju već i od volje trećih kada se nađe u njihovoj

izvorni imalac blanko menice učinila smatrao građanskopravnom cesijom (Vićić 2014, 402–404). Na taj način bi se potpisniku blanko menice omogućilo da svakom daljem meničnom sticaocu (ma kako bi savestan) ističe prigovore koje ima prema banci (pa i one iz osnovnog posla sa njom).

Najzad, iako poistovećivanje zloupotrebe prava na popunu sa agencijskim problemom ima logičnog osnova, ipak se, uže pravno posmatrano, to ne može tako pravno odrediti. Banka kao imalac menice je u slučaju nevraćanja kredita, istina, popunjava sa ovlašćenjem i u skladu sa osnovnim poslom, ali to čini u sopstvenom interesu, a ne u interesu davaoca ovlašćenja što je, po sebi, nužno za agencijski, zastupnički, posao (Kelly *et al*. 2011, 100, 107). Na taj način se takva pojava udaljava od koncepta agencijskog problema, iako sa njim ima znatnu izražajnu sličnost.

[19] Takav uslov se može odrediti i kao izričit jer je uočljiv u osnovnom poslu koji prethodi menici i koji predstavlja svojevrstan nacrt popune takve menice (Corbin 1918, 743–744)

državini, kada se usled dejstva načela savesnosti ima smatrati punovažnom iako nije popunjena u skladu sa ovlašćenjem koje je njen potpisnik dao. Tada se čini da je više određuje kauzalni uslov jer njena popuna ne zavisi od volje izvornih strana u pitanju već od volje trećih lica. Međutim, to je samo privid jer je i treće lice koje docnije popunjava menicu zapravo strana u menici, sa težnjom da izvuče određeno pravo iz nje. Zbog toga, i kada blanko menicu popunjava treće lice (a ne banka kao davalac kredita i izvorni ovlašćenik na popunu), opet se ostvarenje meničnog prava svodi na volju onoga koga se to pravo i tiče (trećeg lica), pa se ne može smatrati da je takav uslov kauzalan već samo potestativan. Imajući to u vidu, može se zaključiti da je u osnovi ostvarenja blanko menice potestativan uslov. Međutim, sama neodređenost uslova blanko menice ukazuje na to da se kao takav u pojedinim situacijama preobražava u aleatornost tako što, ipak, ostaje neizvesno kada će, ko i kako popuniti blanko menicu, kojoj se i tako popunjenoj daje pravna snaga (Curbin 1918, 754). Zbog toga se može zaključiti da je priroda blanko menice uslovna samo ukoliko se ona popunjava u skladu sa osnovnim poslom, a da svaka drugačija popuna utiče na udaljavanje od uslovne prirode i približavanje aleatornoj prirodi.

5. NEDOSTATNOSTI BLANKO MENICE KAO SREDSTVA OBEZBEĐENJA

5.1. Nedostatnost iz bančinog ugla

Kada se blanko menica posmatra kao sredstvo obezbeđenja koje banci treba da pruži sigurnost naplate, tačnije vraćanja kreditne sume, onda se dolazi do zaključka da blanko menica uopšte i nije sredstvo obezbeđenja kakvim se smatra. Prvo, menični potpisnik, to jest dužnik jeste bančin klijent, odnosno korisnik kredita, te se iza uloge dužnika te dve, formalno različite obligacije nalazi isto lice. Upravo takav identitet lica pokazuje da banka, zapravo, nije obezbeđena blanko menicom jer ako dužnik kroz pravni osnov osnovnog posla ne vrati dugovani kreditni iznos, velika je verovatnoća da neće isplatiti ni menični iznos, po drugom osnovu. Jedino što banka kao menični korisnik dobija jeste proceduralna olakšanost i ubrzanost naplate u skraćenom izvršnom postupku, što se sastoji najčešće u blokadi tekućeg (ili bilo kog bankarskog) računa tog dužnika (Nikolić 2020, 281 i dalje). Međutim, ako on nema novčanih sredstava na računu ili pak imovine uopšte, onda se za banku obesmišljava obezbeđujuće svojstvo takve blanko menice. Banka, doduše, ima mogućnost da takvom menicom raspolaže na način da je eskontuje ili „utržiši, unovči“ na bilo koji drugi način, kroz radnju

njenog prenosa (indosamenta, pre svega), no time ulazi u rizik da postane nesavesna jer bi, znajući za imovinsko stanje dužnika, praktično namerno oštetila novog meničnog sticaoca (Tatalović 1987, 24–25).

Drugo, banka bi imala upotrebnu vrednost menice kao sredstva obezbeđenja samo kada bi se uz potpisnika (trasanta / akceptanta) na menici našlo i još nekoliko lica u regresnom meničnom (dužničkom) svojstvu. To je u prošlosti bila skoro redovna bankarska praksa kada se korisniku kredita kao uslov za njegovo davanje tražila menica obezbeđena potpisima još dva žiranta.[20] Upravo, menica predstavlja sredstvo obezbeđenja samo kada u sebi sadrži i druge dužnike (avaliste, intervenijente, indosante) koji će isplatiti menicu ako je ne isplati glavni menični dužnik. To znači da je menica lično sredstvo obezbeđenja jer se njen dug obezbeđuje obavezama lica, te što je više takvih lica u menici, veći je potencijal menice kao sredstva obezbeđenja.[21] Blanko menica, utoliko pre, nije sredstvo obezbeđenja jer nema kapacitet za to, odnosno nedostaju joj druga lica koja bi stajala kao mogući dužnici iza meničnog duga. U blanko menici se isto lice pojavljuje u dva svojstva / položaja – kao dužnik iz osnovnog posla (ugovora o potrošačkom kreditu) i kao menični dužniik. Banka u takvoj situaciji ima jedno lice kao dužnika po dva različita osnova – jednom iz konkretnog, osnovnog pravnog posla, a drugom iz apstraktnog meničnog posla (Jankovec 1993, 639–640).

Zbog toga se ne može govoriti o tome da je banka putem blanko menice obezbeđena jer ako se blanko menica shvati kao lično sredstvo obezbeđenja, što ona uvek i jeste, onda se dolazi do zaključka da isto lice istom, svojom, imovinom obezbeđuje isplatu svog, ranijeg, duga po istom osnovu. To je svojevrsna tautologija jer se ispunjenje jednog bančinog potraživanja prema klijentu obezbeđuje stvaranjem novog bančinog potraživanja prema tom

[20] *Objašnjenje*: Da bi se banka potpuno obezbedila, u takvoj situaciji je tražila da se menicom stvori privid određenih meničnih radnji kako se ta dva žiranta ne bi ispoljila kao menični avalisti, a u tom slučaju bi imali istovetan položaj kao korisnik kredita (odnosno i njegove prigovore bi mogli da istaknu). Zbog toga se stvarao privid određenih meničnih radnji poput izdavanja ili indosiranja menice, što bi za pravni rezultat imalo da žiranti formalno budu predstavljeni na menici kao trasant ili indosanti, a ne kao avalisti. Takav, „sakriveni" aval ima povoljan učinak za banku kao meničnog korisnika jer tada dobija čiste, nove, originarne dužnike, poput trasanta i indosanata, a ne derivirane poput avaliste koji imaju položaj svog honorata, odnosno lica za čije ispunjenje obaveze su jemčili (Bartoš, Antonijević, Jovanović 1974, 89–90). U krajnjem slučaju, to bi značilo da sakriveni avalisti ne bi mogli da ističu prigovore korisnika kredita prema banci, dok bi klasični avalista to mogao.

[21] To znači da imalac menice ne stiče stvarno pravo na imovini meničnog dužnika, pa čak ni na novčanim sredstvima sa njegovog računa koji su izvorno namenjeni za menično pokriće (Aigler 1924, 859).

istom klijentu. Obrnuto, klijent se pojavljuje kao dužnik prema banci po dva različita osnova, s tom razlikom što se u drugom, menično dugu, pojavljuje kao svojevrstan jemac samome sebi za ispunjenje duga iz osnovnog posla potrošačkog kredita. Budući da takva menica ne pruža banci nijednu prednost u namirenju potraživanja osim proste proceduralne (u smislu olakšane i ubrzane naplate prema klijentu), jasno je da kada klijent nema imovine (pa zato ne vraća dug iz osnovnog posla), banci poverilačko svojstvo po blanko menici ništa suštinski neće značiti. Tada neće postojati imovina spram koje bi se menica mogla namiriti, odnosno neće postojati prostor (imovinski) za manevar, pokret (menični).

5.2. Nedostatnost iz ugla korisnika kredita

Usko pravno posmatrano, fukcionisanje blanko menice može delovati vrlo neodređeno i nesigurno jer banka kao ovlašćeni popunilac nedostajućih sastojaka može prema svom nahođenju da popuni menično pismeno i tako optereti njegovog potpisnika obavezom koju u trenutku potpisivanja meničnog praznog obrasca nije želeo. Korisnik kredita i ujedno potpisnik meničnog (blanko) obrasca se takvom menicom unapred obavezuje da će isplatiti menični dug bilo u svojstvu trasanta (izdavaoca) u slučaju da blanko menica bude izražena, docnije, kao sopstvena, bilo u svojstvu akceptanta ako bi ona bila izražena kao trasirana. Uglavnom, jedini izvestan sastojak takve menice je obaveza njenog potpisnika. Ostali sastojci se, kako je već uočeno, popunjavaju u skladu sa odredbama osnovnog posla.

Međutim, uvažavajući delovanje apstraktnosti u menici u sadejstvu sa savesnošću docnijih sticalaca, moguće je da se volja izvornog potpisnika otrgne od njegove, izvorne, namere da bude menično obavezan samo na onaj novčani iznos koji ne vrati na osnovu osnovnog, kreditnog, posla.[22] To je i osnovni nedostatak i bojazan takvog lica jer je moguće da banka, kao trenutni imalac takvog potpisanog obrasca ili neko drugo lice na koje ona menicu prenese, jednostavno popuni ostale bitne sastojke i sumu na drugačiji način od dogovorenog, odnosno od onog na koji je banka izvorno ovlašćena od „izdavaoca“ blanko menice. Kada bi tako, suprotno sporazumu, popunjenu menicu steklo savesno treće lice, onda bi ono steklo, shodno meničnoj apstraktnosti, originerno, izvorno, menično pravo na koje ne utiču raniji

[22] U više navrata spominjana savesnost docnijeg sticaoca (blanko) menice sastoji se u njegovom neznanju o tome da je menični obrazac popunjen suprotno, uopšte, drugačije od osnovnog posla čije ispunjenje obezbeđuje (Prenkert *et al*. 2021, 32–12).

odnosi, a pre svega odnos osnovnog posla koji je trebalo da bude osnova za buduću sadržinu takve, blanko menice (Krepold, Fischbeck 2009, 168–169).[23] Takva vrsta neizvesnosti za potpisnika blanko menice ukazuje na svojevrsnu aleatornost jer je moguće da više različitih scenarija popune dobije pravnu važnost bez obzira na izvornu volju izdavaoca takve menice. Da bi se takva aleatornost, tačnije pravno dejstvo, izbegla moguće je „izdavaoca" blanko menice zaštititi samom menicom, to jest odredbom sa meničnopravnim dejstvom. Unošenje tzv. rekta klauzule u menični obrazac proizvelo bi pravnu posledicu da menica ne može da se otrgne u docnijem prometu od osnovnog, kreditnog posla (Vićić 2014, 402–404). Samo dejstvo rekta klauzule se sastoji u tome da se menica preobražava od zakonski pretpostavljene hartije po naredbi u hartiju na ime (Bartoš, Antonijević, Jovanović 1974, 81–82). To dalje znači da će menični potpisnik (korisnik kredita) moći da ističe svakom daljem imaocu menice sve prigovore koje je mogao da upotrebi prema izvornom, prvom imaocu menice, odnosno čije je ime imao u vidu prilikom izdavanja. To je svakako banka od koje je dobio potrošački kredit, a kojoj bi po tom poslu, ali i drugim međusobnim poslovima sa bankom, mogao da ističe, eventualno, prigovore. No, takav pravni učinak bi mogao da se stvori samo ako bi se prilikom potpisivanja i predaje meničnog obrasca upisalo bančino ime, kako bi se meničnopravni odnos vezao za pravni položaj banke kao prvog meničnog poverioca – remitenta. U suprotnom, ako se prilikom

[23] Kod klasične, trasirane menice, prenos indosamentom povlači za sobom posledice deravativnog i originarnog načina sticanja u isto vreme. U pogledu forme, menica se indosamentom prenosi derivativno jer je nije moguće tako preneti ako prethodnik, indosant, nije bio formalno, tačnije fizički predstavljen na samoj menici kao poverilac. S druge strane, kada se menica prenese na indosatara, to ne znači da je on stekao potpuno ista prava kao njegov prethodnik, indosant. Moguće je, čak, da stekne i više prava ako se ispostavi da je indosantov osnov imanja menice bio nevaljan ili pak da je njemu moglo da se istakne više prigovora nego docnijem sticaocu – indosataru. U tom smislu, menični sticalac je dobio izvorno menično pravo, odnosno stekao ju je originarno (Jovanović, V. Radović, M. Radović 2021, 620). To znači da se pravo *na* menicu (kao svojevrsno stvarno pravo) prenosi derivativnim putem jer je nužno da je takvo isto, u traženoj formi, imao prethodnik, a da se pravo *iz* menice (kao svojevrsno obligaciono pravo) stiče originarnim putem jer se, shodno apstraktnosti, inkorporiranosti, neposrednosti, samostalnosti i savesnosti meničnoj, stvara privid izvornog, novog imaoca meničnog prava. Kada se ima u vidu blanko menica, jasno je da je ona u svom postanku hartija na donosioca pa je prosta predaja dovoljna za prenos prava na njoj. S druge strane, pošto u njoj nisu ispunjeni bitni sastojci, ali ni menični iznos, jasno je da ih docniji sticalac može popuniti po nahođenju i preneti nekom trećem licu koje će biti savesno i tako je, svojom savesnošću, sterilisati, pravno osnažiti i osloboditi mogućih prigovora njene neprikladne popune. Postoje, doduše, oprečna mišljenja o režimu prenosa blanko menice u smislu da li se ona prenosi kao takva bez sporazuma o popuni vezanog za nju ili se prenosi ujedno i istovremeno sa sporazumom o popuni (Tatalović 1987, 24–27).

„izdavanja“ blanko menice ne bi upisalo ime remitenta, odnosno banke davaoca kredita, postojala bi mogućnost da banka prenese menicu prostom predajom na neko treće lice koje bi, u krajnjem ishodu, upisalo svoje ime, čime bi se učinak rekta klauzule u celini obesmislio. U takvom, neželjenom scenariju, potpisnik bi mogao docnijim imaocima da ističe samo one lične prigovore koje ima prema upisanom remitentu, a ne i prema banci sa kojom je u osnovnom poslu jer njenog imena na takvoj menici uopšte i nema.

6. ZAKLJUČAK

Imajući u vidu da menica, a naročito blanko menica u široj pravničkoj, ali i laičkoj javnosti predstavlja skoro neizostavan instrument, sredstvo obezbeđenja raznih poslova, a najčešće ugovora o (potrošačkom) kreditu, činilo se da je nužno dublje razmotriti pravni režim takve menice. Došlo se do zaključka da blanko menica nije delotvorno sredstvo obezbeđenja potrošačkog kredita, iako svojim pojavnim oblikom i načinom upotrebe stvara privid da jeste. Privid se sastoji u tome što predaja potpisanog meničnog blanketa (obrasca) od korisnika kredita stvara mogućnost banci, kao davaocu kredita, da popuni takav obrazac shodno osnovnom kreditnom poslu. Ona bi trebalo to da učini tako što bi upisala menični iznos koji odgovara nevraćenoj sumi sa kamatama i tako popunjenu, sa odlikom verodostojnosti, upotrebila izvršenjem prema njenom potpisniku, to jest korisniku kredita. Međutim, istina je da, kada se tako menica popuni, banka ne stiče dodatno obezbeđenje ni stvarne, a ni lične prirode, jer je menični dužnik u isto vreme i dužnik iz osnovnog, kreditnog, posla. To ima za realnu posledicu da banka spram sebe ima jedno lice koje je dužnik po dva osnova, tačnije jedno lice, sa jednom, svojom, imovinom, koje je prema njoj dužno po dva osnova. Pri tome, to isto lice potpisanom blanko menicom svojevrsno jemči za ispunjenje svoje obaveze iz osnovnog, kreditnog, posla. Rečju, postaje jemac samome sebi. Jedino novo pravo koje banka stiče na osnovu blanko menice sastoji se u proceduralnoj brzini ostvarivanja menice u skraćenom izvršnom postupku. Međutim, takvo pravo ostaje ogoljeno i nefunkcionalno ako menični, odnosno kreditni dužnik nema imovine iz koje bi isplatio kredit, odnosno menicu. Upotreba menice u skraćenom izvršnom postupku ima smisla samo ako menični dužnik ima neki drugi račun kod te ili druge banke pa da se na taj način, blokadom raspolaganja sredstvima sa tog računa, banka namiri. No, to je malo verovatno. Realno, životno posmatrano, nema razloga da korisnik kredita ne vrati taj kredit ako ima novca na računu, a pri tome je svestan da će banka u slučaju nevraćanja kredita „aktivirati“ menicu prema njemu i naplatiti se promptno u skraćenom izvršnom postupku. Uz to bi ga dodatno opteretila i troškovima izvršenja, ali i veće ugovorne, kaznene kamate.

S druge strane, banka kao imalac potpisanog meničnog obrasca može „trgovati“ na način da ga kao takvog ili popunjenog prenese na neko treće lice. U slučaju da „oseti“ da korisnik kredita u perspektivi neće imati novca, banka bi mogla da popuni menicu bilo u skladu sa osnovnim poslom bilo drugačije od osnovnog posla i da je takvu prenese na neko treće savesno lice. Tada bi takva menica zbilja predstavljala sredstvo obezbeđenja banke za „plasirani“ potrošački kredit, ali bi banka došla u rizik zloupotrebe prava ili pak krivotvorenja volje potpisnika meničnog blanketa. Oba slučaja su pravno neprihvatljiva. U prvom slučaju, banka ima pravo da popuni menicu u skladu sa ovlašćenjem o popuni, ali bi prenosom takve menice dovela u zabludu treće savesno lice da će je izdavalac isplatiti u potpunosti, što bi se svelo na to da ono može da je naplati samo od banke u regresnom postupku. Međutim, ako bi banka prenela na treće lice samu blanko menicu (zajedno sa ovlašćenjem na popunu), onda bi zaista zloupotrebila svoje pravo. Treće savesno lice bi na osnovu blanko menice steklo samo izdavaoca (korisnika kredita) kao dužnika, a ne i banku koja bi takvom blanko menicom raspolagala kao hartijom na donosioca i shodno tome ne bi se pojavila kao indosant prema trećem licu. Banka bi se tako nepošteno poslužila svojim pravom, na uštrb, pre svega, trećeg savesnog imaoca menice, jer bi on u krajnjem ishodu imao za dužnika samo izdavaoca blanko menice. Za njega je banka već znala da neće biti u stanju da vrati osnovni dug, odnosno kredit, pa je, svesna neupotrebljivosti menice prema njemu (jer nema imovine), prosledila menicu trećem licu od koga je najverovatnije dobila novčanu protičinidbu.

U drugom slučaju, kada banka krivotvori blanko menicu, odnosno volju njenog potpisnika, to čini najviše na štetu njenog potpisnika, odnosno korisnika kredita, a u svoju korist i u korist trećeg savesnog imaoca menice. U tom slučaju, da bi izbegla prigovor nepopune menice u skladu sa ovlašćenjem za popunu, banka takvu drugačije popunjenu menicu prenosi na treće savesno lice koje, shodno apstraktnosti, samostalnosti i inkorporiranosti meničnoj, stiče ono pravo koje je u njoj predstavljeno na samoj hartiji. Međutim, čak ni tada tako krivotvorena menica neće predstavljati sredstvo obezbeđenja ako njen potpisnik nema imovine iz koje bi ona mogla da se naplati.

Jasno je, dakle, da menica nema „obezbeđujući“ potencijal ako se na njoj i u osnovnom poslu samo jedno lice pojavljuje kao dužnik – prvo u ulozi korisnika kredita, a drugo kao trasant / izdavalac ili, eventualno akceptant. Zbog toga se zaključuje da (blanko) menica kao takva nije sredstvo obezbeđenja potrošačkog kredita već je to samo ako obuhvati i druga lica kao dužnike koji će različitim meničnim ulogama „jemčiti“ meničnom ispunjenju, a ujedno i ispunjenju obaveze iz osnovnog posla čije ispunjenje tada zaista i obezbeđuje.

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BLANK PROMISSORY NOTE AS A SECURITY INSTRUMENT FOR CONSUMER CREDIT

Summary

The paper considers the sense of using the blank promissory note as a means of securing of consumer loan, while also questioning its purpose as means of security. The initial hypothesis is the legal absurdity of the same person being a debtor under the two different legal basis – promissory note and consumer loan. The same person is the guarantor for themselves – by signing the blank note they guarantee the performance of the consumer loan contract.

That arrangement seems tautological having in mind that the same person, through two legal basis but with the same property, guarantees the performance of the underlying contract manifested in a consumer loan. This is the core proof of the absurdity of using the blank promissory note as collateral security.

Key words: *Promissory note signed in blank*. – *Consumer loan*. – *Abstractness*. – *Aleatority*.

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MOGUĆNOSTI REFERENDUMA U KONSOCIJATIVNOJ DEMOKRATIJI

U radu se analizira mogućnost primene referenduma u sistemima konsocijativne demokratije. Prema teoriji Arenta Lajpharta, svi demokratski sistemi se mogu podeliti u dve grupe: većinski i konsocijativni. Referendum se uobičajeno shvata kao mehanizam neposrednog odlučivanja naroda koji počiva na principu većine. U ovom radu pokušavamo da analiziramo koje kvalitete referendum mora da ima u sistemima konsocijativne demokratije – onim u kojima postoji podeljenost društva po brojnim osnovama, tako da bude zadovoljen najširi mogući broj interesa, a da taj mehanizam neposrednog odlučivanja naroda ne izgubi svoju institucionalnu fizionomiju i logiku. U analizi se razmatraju sva ona pitanja koja su u podeljenim društvima važna, i na teorijskom i na praktičnom planu.

Ključne reči: *Referendum. – Konsocijativna demokratija. – Deliberativnost. – Jasnost referendumskog pitanja. – Referendumska većina.*

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1. UVOD

Nakon relativno kratke „pauze“ od poslednjeg referenduma o otcepljenju pokrajine Kvebek od Kanade koji je održan 1980. godine, pitanje secesije Kvebeka se ponovo postavilo krajem osamdesetih i početkom devedesetih godina. Na drugom referendumu održanom 1995. godine za opciju „da“ glasalo je 49,42%, a za opciju „ne“ 50,58% građana, čime je pokušaj cepanja Kanade i drugi put doživeo neuspeh (Marinković 2002, 396). Međutim, time nije bilo zatvoreno veoma važno ustavno pitanje u Kanadi. Referendum je, čini se, izazvao još dublje podele, naročito imajući u vidu tako veliku podeljenost biračkog tela. Još ranije, 1992. godine, nije uspeo ni referendum o Dogovoru iz Šarlottauna (*Charlottetown Accord*), koji se ticao sveobuhvatnih reformi kanadskog ustavnog sistema. Komentarišući rezultat referenduma o Kvebeku, Čejmbers (*Simone Chambers*) navodi da iznošenje kompleksnih pitanja na referendumsko izjašnjavanje proizvodi uznemirujući rezultat: „nas koje smo pobedili“ i „vas koje ste izgubili“ (Chambers 1998, 159). S druge strane, govoreći o atmosferi pre glasanja koja je podrazumevala organizovanje „konferencija“ s ciljem razmene ideja i stavova o dogovoru iz Šarlottauna, autorka navodi da je debata koja je u početku bila vrlo sadržajna imala sve manje argumenata kako se održavanje referenduma približavalo da bi se pred sâm referendum jedno kompleksno ustavno pitanje svelo na borbu budućih pobednika protiv budućih poraženih (Chambers 1998, 159–160).

Osim razmišljanja o razlozima koji su doveli do takvih rezultata i nemogućnosti prevazilaženja krize, može se postaviti još jedno pitanje – koja je uloga referendumā u takvim situacijama i da li oni podstiču prevazilaženje krize ili su katalizatori još dubljih podela?

S druge strane, referendumsko odlučivanje ne mora nužno biti izraz većinske demokratije ako se sprovodi u složenoj proceduri koja uvažava činjenicu da jezička ili verska zajednica koja je u manjini na širem planu čini većinu na užem planu političko-teritorijalnog organizovanja. Naime, sedamdesetih godina prošlog veka ustavni sistem Švajcarske je izmenjen kako bi se omogućilo da nastane novi kanton. Primenom složene demokratske procedure, koja je uključivala i tzv. kaskadne referendume (Fleiner, Basta Fleiner 2009; videti i: Jovanović 2007), obrazovan je zaseban kanton tako što je Jura izdvojena iz kantona Berna.

Priroda referenduma je složena, a njegova uloga izaziva nemale nesuglasice. Dok jedni autori navode da je referendum neadekvatno sredstvo u podeljenim društvima koje može da izazove još dublje podele, drugi su nešto optimističniji u pogledu njegove primene (McEvoy 2018, 3). Uobičajeno isključenje manjinskih grupa u ustavotvornom postupku uzima

se kao osnovni nedostatak i kamen spoticanja tog postupka donošenja odluka (McEvoy 2018, 3). Slično rezonuju Batler (*David Butler*) i Reni (*Austin Ranney*), koji navode da baš zato što se putem referendumā ne mogu „meriti" argumenti, oni mogu biti opasniji po prava manjinskih grupa od odlučivanja u predstavničkim telima (navedeno prema Lijphart 1999, 231). Lajphart, „otac" teorije konsocijativne demokratije, nije imao koherentne stavove o referendumu. Iako je ukazivao na to da taj institut ima prirodu svojstvenu većinskoj demokratiji, referendum se, prema njegovom mišljenju, ne može smatrati elementom ni većinske ni konsocijativne demokratije (Setälä 1999, 78–79; Vatter 2000, 184–185). Naime, u pluralnim društvima vladavina većine, kao i principi i mehanizmi većinske demokratije opasni su jer trajno isključuju manjine (Lajphart 2003, 96; Qvortrup 2018, 177). Takav stav su kasnije potvrdili brojni autori. S druge strane, može se postaviti pitanje šta je alternativa referendumskom odlučivanju. Čejmbers navodi da je u podeljenim društvima ključno postići kompromis. Ona smatra da je referendumsku atmosferu poželjno zameniti stvaranjem javnog prostora u kome se mogu artikulisati različiti interesi (Chambers 1998, 158). Međutim, ima i autora koji navode da se upravo referendumom može prevazići kriza u konsocijativnim demokratijama, ukoliko ima određene kvalitete (Qvortrup 2018, 177; Fleiner, Basta Fleiner 2009, 525).

Šire posmatrano, pitanje je da li fragmentisano društvo može biti ujedinjeno dodatnim političkim i pravnim instrumentima i procedurama (Fleiner, Basta Fleiner 2009, 512). Da li je referendum u jednom takvom društvu sredstvo razjedinjavanja ili upravo „alatka" čijom se pravilnom primenom sukob može prevazići (Fleiner, Basta Fleiner 2009, 525)?

U centru pažnje ovoga rada je pitanje mogućnosti organizovanja referenduma u sistemima konsocijativne demokratije. U tim sistemima se podrazumeva da odlučujući princip nije vladavina većine već mogućnost da što veći broj različitih grupa vrši vlast, u uslovima podeljenosti društva po različitim osnovama. Premda postoje i terminološke i pojmovne rasprave kako treba označiti takve sisteme, osnovna premisa je da vlast ne može da se vrši kao prost zbir volja i da demokratija mora da počiva na argumentima, a ne samo na moći i na glasovima (Sunstein 2001, 7). I mada takav sistem može biti ocenjen kao poželjan u društvima koja su podeljena, a ona su u većini, čini se da je on i nužan.

Najpre će biti razmotreni pojam konsocijativne demokratije i njemu bliski koncepti, koji počivaju na istoj početnoj premisi. Potom ćemo pokušati da odredimo prirodu instituta referenduma, ali ne njegovim definisanjem već ukazivanjem na njegove ključne nedostatke iz ugla konsocijativne demokratije i, posledično, predlaganjem načina njihovog prevazilaženja. U trećem delu se nastavlja s analizom referenduma, ali na ovom mestu kroz sve faze toga

procesa, uz korišćenje praktičnih primera. Ti primeri nisu samo oni koji dolaze iz konsocijativnih demokratija, i to upravo zbog česte pretpostavke da je referendum nespojiv s konsocijativnom demokratijom, te takvih primera i nema dovoljno. Zato smatramo da su relevantni svi oni primeri koji mogu poslužiti kao „materijal" u procesu ustavnog inženjeringa jednog naizgled tipičnog instituta većinske demokratije, ali u novim i drugačijim uslovima. Na kraju, ključne kritike referenduma i mogući odgovori biće ispitani na primeru Kanade budući da smatramo da su u tom slučaju postavljena sva ona pitanja koja su značajna za organizovanje referenduma u podeljenim društvima.

2. KONSOCIJATIVNA DEMOKRATIJA – MOGUĆI ODGOVOR ZA SAVREMENA (PODELJENA) DRUŠTVA

U centru tradicionalne teorije države bilo je pitanje „dobre vlade". Danas se pred teoriju države postavljaju mnogo kompleksnija pitanja. Kao posledica globalizacije, preko 95% svetske populacije živi u multikulturalnim državama u kojima postoje podele po brojnim linijama (etničkoj, kulturnoj, jezičkoj, religijskoj). Otuda je pitanje kako države mogu i treba da se „bore" s takvim razlikama (Fleiner, Basta Fleiner 2009, 510). Multikulturalna država stvara brojne izazove i za pojedine pravne institute. Zato je neophodno da se pronađu takvi instrumenti koji će objasniti ne samo šta je dobro za sve u državi već šta je dobro za svaku zajednicu u okviru nje. Samo tako će država sebi obezbediti legitimitet jer će u suprotnom većina uvek preglasati manjinu (Fleiner, Basta Fleiner 2009, 513, 520–521).

Na tragu tog dualiteta – većina *v.* manjina – treba primetiti da je u „srcu" demokratije primena većinskog principa. Često se (neopravdano) demokratija i vladavina većine izjednačavaju. Da bi mogao da se stavi znak jednakosti između njih, neophodno je da su društva relativno homogena (Lajphart 2003, 96), a takvih društava gotovo i da nema. Naravno, intenzitet razlika, po etničkoj, jezičkoj, religijskoj ili kulturnoj liniji, nije uvek isti, ali ako uzmemo u obzir ona društva koja su tako podeljena da vladavina većine praktično znači diktaturu većine, možemo reći da su njima potrebni posebni mehanizmi kojima se prevazilaze podele (Lajphart 2003, 96).

Jedan mogući model uređenja takvih društava ponudio je Arent Lajphart u svojoj teoriji konsocijativne demokratije. On je, naime, demokratske sisteme podelio na one u kojima postoji većinska demokratija i one u kojima se primenjuje model konsocijativne demokratije. Polazna tačka tog razlikovanja bila je Linkolnova (*Abraham Lincoln*) definicija demokratije kao „vladavine naroda, od strane naroda i za narod". Iz toga sledi pitanje čije interese vlada

(*government*) treba da zadovolji kada se pojave protivrečni interesi. Moguće je ponuditi dva odgovora: interes većine ili interes najvećeg mogućeg broja ljudi (Lijphart 2008, 111–112). Iz toga proizlaze dva modela demokratije: većinski, koji političku vlast koncentriše u rukama većine, i konsocijativni, koji pokušava da omogući što većem broju različitih grupa da vrše vlast (Lijphart 2008, 112). Lajphart te modele analizira navođenjem kriterijuma razlikovanja. On je uočio deset karakteristika (koje naziva varijablama) predstavljajući ih kao dihotomije, odnosno „kontrast" između većinske i konsocijativne demokratije. One su podeljene u dve dimenzije. Prva se tiče organizacije izvršne vlasti, stranačkog i izbornog sistema i sastoji se od pet varijabli: koncentracija izvršne vlasti u kabinetu koji čini jedna stranka nasuprot zajedničkom vršenju izvršne vlasti putem širokih koalicijā; odnos između izvršne i zakonodavne vlasti, u kojima je izvršna vlast dominantna nasuprot njihovoj ravnoteži; dvostranački sistem nasuprot višestranačkom sistemu; većinski izborni sistem nasuprot proporcionalnom izbornom sistemu; pluralistički sistem interesnih grupa nasuprot koordinisanom i korporativističkom sistemu interesnih grupa. Druga dimenzija je uglavnom povezana sa kontrastom između federalnog i unitarnog državnog uređenja i nju takođe čini pet varijabli: unitarna država nasuprot federalnoj državi; koncentracija zakonodavne vlasti u jednodomom parlamentu nasuprot egalitarnom bikameralizmu; meki ustavi nasuprot čvrstim ustavima; suprematija parlamenta nasuprot ustavnosudskoj kontroli zakona; centralne banke koje zavise od izvršne vlasti nasuprot nezavisnih centralnih banaka (detaljno o tome videti: Lijphart 1999, 3, 10–21, 34–47).[1]

Teorija konsocijativne demokratije u osnovi počiva na četiri organizaciona principa: široke koalicije, autonomija segmenata, proporcionalnost i mogućnost veta (McGarry, O'Leary 2006, 43–44; Milosavljević, Popović 2019, 215). Osnovna premisa te teorije jeste da društva koja su duboko podeljena mogu da prevaziđu probleme primenom određenih mehanizama. Da bi se jedno društvo smatralo podeljenim, smatra Lajphart, neophodno je ustanoviti u kojim segmentima društva postoji podela i koliko ljudi pripada svakom od tih delova. Osim toga, mora da postoji jasna granica između političkih, društvenih i ekonomskih linija podele (videti Andeweg 2000,

[1] U svojim „ranim radovima" on vrši normativnu analizu i pokušava da ponudi institucionalno rešenje za podeljena društva (posebno videti Lijphart 1968; 1975; 1977), dok se kasnije posvetio empirijskoj analizi. U tom smislu videti Lijphart 1984, u kome analizira većinske i konsocijativne sisteme na primeru dvadeset jedne države. U drugom izdanju (Lijphart 1999), on je analizu proširio, tako da „uzorak" čini ukupno trideset šest država. Videti još i Lijphart 2004, gde predlaže ustavna rešenja za podeljena društva.

519). Konačno, Lajphart ističe da su važan kriterijum i političke partije, odnosno podrška određenim partijama koju im pružaju različite društvene grupe, pri čemu u toj podršci nema velikih oscilacija (Lijphart 1981, 356).

Druga osnovna premisa Lajphartove teorije jeste da je demokratija *prima facie* vladavina većine i da iz toga proizlazi da celokupno društvo prihvata odluke političke vlasti koja se upravo većinom i legitimiše. S druge strane, ako se prihvati teza o uređenju društva na konsocijativnim principima, iz toga proizlazi da demokratski mehanizmi sada imaju bitno drugačiju sadržinu – oni počivaju na principu konsenzusa (Lijphart 2008, 111). Taj koncept čini relevantnim i činjenica da je konsocijativna demokratija prerasla iz dopune demokratskoj teoriji koja je težila da objasni razloge stabilnosti u nekoliko malih evropskih država u normativnu teoriju konsocijativnog inženjeringa (*consociational engineering*) u praktično svim duboko podeljenim društvima (Andeweg 2000, 517).

Podele demokratije su brojne i gotovo neiscrpne. Nesumnjivo je da među različitim tipovima demokratije postoje brojne razlike, ali osnovna ideja je da se u određenim demokratskim sistemima odluke ne donose samo primenom većinskog principa već da postoje i brojni drugi mehanizmi koji štite prava različitih grupa u državi. Na ovom mestu treba posebno pomenuti pojam deliberativne demokratije i veze koje postoje između nje i konsocijativne demokratije. Tako, Held ističe da je deliberativno donošenje odluke način njenog legitimisanja. Politička legitimnost se ne ostvaruje primenom većinskog principa *per se* već navođenjem jasnih razloga i objašnjenja. Tako se u procesu deliberacije privatna opredeljenja pretvaraju u stavove javnosti (Held 2006, 237). Zapravo i deliberativna demokratija nastoji da u javnoj debati opravda različite političke argumente i to bez nadglasavanja. Na tom mestu su uočljive jasne veze između dva koncepta. Konsocijativna demokratija isto tako pokušava da nađe kompromis, ali ne kao srednje rešenje već kao „ispregovarani sporazum“ u kojem će svaka strana „izgubiti“ na jednom, a „dobiti“ na drugom pitanju (Andeweg 2000, 512). Ona se, dakle, pojavljuje kao lek za probleme većinske demokratije (Setälä 1999, 2), koja pokazuje brojne slabosti u savremenim državama. Drugim rečima, smatramo da nema konsocijativne demokratije bez procesa deliberacije čija se suština ogleda u tome da odluka ni o jednom važnijem pitanju ne može biti doneta samo zato što je za nju glasala većina.

Referendum se obično shvata kao sredstvo neposrednog izjašnjavanja birača putem glasanja o zakonima i drugim pitanjima važnim za zajednicu (Jovičić 2006, 3). Kada se birači neposredno izjašnjavaju o nekom pitanju, oni najčešće moraju da se opredele između dva odgovora. Međutim, da li takav instrument odgovara zahtevima konoscijativne demokratije ili je on nužno sredstvo većine kojim se ugrožava manjina? Da li referendum može

da bude konstruisan tako da odluka bude „sveobuhvatna“, odnosno da obuhvati predstavnike svih relevantnih društvenih grupa, što je polazna premisa teorije konsocijativne demokratije (Andeweg 2000, 512)? Da bismo odgovorili na postavljena pitanja, u nastavku ćemo pokušati da objasnimo priroda referenduma ukazivanjem na moguće prednosti i mane tog instituta.

3. PRIRODA REFERENDUMA

U XIX veku je na tekovinama Francuske revolucije uvedena predstavnička demokratija, pri čemu se sadržina tog političkog režima razlikuje od društva do društva (Jovičić 2006, 3). Od druge polovine XIX veka, a naročito u XX veku, istovremeno su razvijani i mehanizmi neposredne demokratije poput referenduma, narodne inicijative i imperativnog mandata (Jovičić 2006, 3). Nakon Drugog svetskog rata „pluralizacija“ društava je postala naročito intenzivna, pa je o modelima za takva društva počelo da se govori nešto kasnije. Tada su se otvorila nova pitanja te se i pogled na neke institucije, uključujući i referendum, promenio.

Posebno važno pitanje jeste koje su karakteristike referenduma, ako se on posmatra u kontekstu konsocijativne demokratije. Pre svega, time se iz analize isključuje veliki broj referenduma. Analiza i zaključci koji se nude u ovom radu ne mogu se odnositi na svaki već na one referendume koji se u velikoj meri tiču ustavnih pitanja. Zapravo, predmet referenduma koji se često navode kao primeri jesu ustavnoidentitetska pitanja. Koje su karakteristike i kakva je priroda referenduma, moguće je otkriti analizom argumenata koji se u teoriji obično navode kao prednosti ili mane tog instrumenta neposredne demokratije.

Kao najveća vrednost referenduma navodi se to što njegova primena zapravo znači približavanje suštinskoj demokratiji. U etimološkom značenju, demokratija jeste vladavina naroda (i to većine naroda), s tim što je ovde to značenje i doslovno primenjeno. Referendum se obično razume ili vidi kao glas naroda. Pre svega, referendum ima funkciju legitimizacije. Naime, narodni predstavnici su izabrani da donose svakodnevne političke odluke, ali nisu ovlašćeni (ili ne bi trebalo da budu) da donose odluke o pitanjima od najvećeg značaja (Hamon 1995, 50–51). Osim toga, često se pojavljuje nesaglasnost između volje većine naroda, s jedne strane, i onoga šta su odlučili narodni predstavnici, s druge strane (Setälä 1999, 14–17). Referendum ima i funkciju kontravlasti (*contre-pouvoir*), vlasti suprotstavljanja. Iako se mogu uspostaviti različiti mehanizmi odlučivanja, naročito u društvima koja su podeljena, referendum se često posmatra kao mogućnost da se građani

suprotstave aktima zakonodavne vlasti – oni tada najneposrednije vrše vlast. Štaviše, građani uspostavljaju ravnotežu u odnosu na predstavnike koje su ranije izabrali i tako postaju centar odlučivanja (Hamon 1995, 52–54). Konačno, upravo referendum može da pomogne i u funkcionisanju predstavničke demokratije. Pošto sva vlast dolazi od naroda, čini se logičnim da ona može i da reši sukobe između onih koje je izabrala. Tada referendum ima funkciju arbitraže (Hamon 1995, 55).

Međutim, dublje razmišljanje o referendumu može pokazati i neke njegove slabosti. Načelno, postoje dve vrste kritika upućenih referendumu: prva linija kritike je ona koja ga potpuno odbacuje kao sredstvo donošenja odluka, smatrajući ga nedemokratskom alternativom predstavničkoj demokratiji (Tierney 2012, 22). Međutim, citirajući De Malbera (*Raymond Carré de Malberg*), Kvortrup (*Matt Qvortrup*) navodi da referendum zapravo i nije suprotstavljen predstavničkoj demokratiji već da je njena logična dopuna (Qvortrup 2005, 11). S druge strane, ima autora koji načelno prihvataju referendum kao „atraktivno" sredstvo donošenja odluka, uz ogradu da postoje značajni problemi s njegovom praktičnom primenom (Tierney 2012, 22).[2]

Te kritike se u teoriji upućuju referendumu na opštem nivou, bez obzira na društveni kontekst. Budući da se postavlja pitanje mogućnosti referenduma u konsocijativnim demokratijama, potencijalne nedostatke je neophodno razmotriti iz perspektive podeljenih društava. To će biti učinjeno analizom svih faza referendumskog procesa, uz ukazivanje na ona mesta u tom procesu koja su od značaja da bi se dobio odgovor na pitanje da li referendum po svojoj prirodi odgovara podeljenim društvima.

[2] Stav prema referendumu u velikoj meri je uslovljen i „ideološkom pozicijom". Naime, Tirni ukazuje na dve demokratske tradicije i njihov odnos prema referendumskom načinu donošenja odluka. Tako, s jedne strane, postoji pozicija liberalizma – za liberale, najvažnija vrednost su osnovna prava koja su zasnovana na vrhunskoj vrednosti individualne slobode. Oni su često „uplašeni" od populističkih politika, pa, sledstveno tome, zauzimaju negativan stav prema referendumu. S druge strane, građanski republikanizam (*civic republicanism*) skloniji je institucionalizovanju mehanizama aktivne participacije građana kao osnovnom demokratskom principu, jačajući narodno samoodređenje (*popular self-determination*) (Tierney 2012, 20). Može se zaključiti da je to i razlog tako velikih razmimoilaženja u stavu prema referendumu – on je zapravo određen ideološkim pristupom o svrsi i značenju demokratije (Lord 2021, 32). O vezi između referenduma i različitih ideoloških pozicija videti: Jovičić 2006, 27–28.

4. FAZE REFERENDUMSKOG PROCESA

Prva faza je pokretanje postupka. Referendum može biti obavezna faza u donošenju neke odluke i tu se obično ne pojavljuju naročito sporna pitanja. S druge strane, referendum može biti pokrenut na osnovu narodne inicijative i tada je neophodno odgovoriti na nekoliko pitanja. Amon (*Francis Hamon*) ističe da faza pokretanja referenduma odozdo ima tri „podfaze". Prva je tzv. preliminarna faza, druga prikupljanje potpisa, a treća provera broja prikupljenih potpisa. U prvoj fazi pokretanja postupka, u kontekstu ovog rada, značajno je pitanje formulacije referendumskog pitanja. Ukoliko je reč o referendumima koji su pokrenuti na osnovu narodne inicijative, tada se uobičajeno obrazuje inicijativni odbor čiji je osnovni zadatak da prikupi dovoljan broj potpisa. Istovremeno se podnosi i predlog referendumskog pitanja (Hamon 1995, 31–35). Način njegovog formulisanja je izuzetno važan u podeljenim društvima, pa je u vezi s tim važno razmotriti i mogućnosti kontrole tog pitanja. Razni oblici takve kontrole čine formalna ograničenja referenduma, dok postoje i materijalna, onda kada se zabranjuje da određena pitanja uopšte budu predmet referendumskog odlučivanja (Moeckli 2021, 6). Druga faza u organizaciji referenduma jeste referendumska kampanja. Ona, prema Amonovim rečima, mora biti edukativna (videti Hamon 1995, 35–39), a u ovom radu se iznosi teza da je druga faza referendumskog procesa u podeljenim društvima najznačajnija. Osnovna kritika upućena referendumu iz perspektive podeljenih društava tiče se izostanka deliberativnosti, te će takva teza kasnije biti ispitana. Treća faza je glasanje. U tom stadijumu, za podeljena društva najznačajnija su pitanja kojom se većinom donosi odluka i kakav je položaj manjina u referendumskom procesu. Konačno, četvrta faza podrazumeva kontrolu, premda se kontrola proteže kroz čitav referendumski proces (Hamon 1995, 39–48).

4.1. Referendumsko pitanje

Jedan od načina da se utiče na ishod referenduma jeste formulisanje referendumskog pitanja. Ono može biti takvo da zbunjuje birače i da oni uopšte nisu svesni šta njihov glas znači, čime se pravo glasa obesmišljava. Formulisanje pitanja prethodi glasanju o njemu te postoji veliki interes svih strana da u tome učestvuju. Da bi se sprečila mogućnost zloupotrebe referenduma, razvila se ideja da referendumsko pitanje treba da bude

predmet ustavnosudskog odlučivanja (ili predmet odlučivanja pred najvišim sudom u zemljama u kojima nema institucije ustavnog suda), premda ni ona nije bez kritika (o tome Marxer, Pállinger 2009, 35).

U Uputstvu dobre prakse za održavanje referenduma Venecijanska komisija navodi da je „jasnost pitanja ključni aspekt slobode birača da formira sopstveno mišljenje. Pitanje ne sme da bude zbunjujuće ili sugestivno, a naročito ne sme da bude takvo da pominje pretpostavljene posledice prihvatanja ili neprihvatanja referendumske odluke“ (*Code of Good Practice on Referendums* para. 15; videti i *Revised Code of Good Practice on Referendums*). U drugom dokumentu, Venecijanska komisija je navela da pitanje mora biti formulisano tako da poštuje jedinstvo forme (*unity of form*) i jedinstvo sadržaja (*unity of content*) (*Guidelines for Constitutional Referendums at National Level*, para. II, P). Jedinstvo forme podrazumeva da jedno pitanje ne sme da sadrži u sebi specifično formulisano pitanje s načelnim predlogom ili načelnim pitanjem. Pod jedinstvom sadržaja, Venecijanska komisija razume unutrašnju, suštinsku (*intrinsic*) vezu između različitih delova pitanja koje se stavlja na glasanje s ciljem da se garantuje slobodno pravo glasača, koji ne sme biti pozvan da prihvati ili odbije predlog u celini ako nema te veze. Pod time treba razumeti da delovi pitanja ne smeju biti protivrečni, da veza između delova pitanja mora biti jasna i da delovi moraju biti tako povezani da proističu jedan iz drugog ili da te delove povezuje sadržina (Cvetković 2022).[3]

Tirni navodi da je jasnost centralno pitanje u svakom procesu deliberativnog odlučivanja (Tierney 2012, 227). Za kanadski Vrhovni sud, u slučaju secesije Kvebeka, značenje pojma „jasnosti“ predstavljalo je praktično centralno pitanje (videti *infra* 5). U vezi s jasno postavljenim pitanjem, ključno je uočiti da se ono može odnositi na tri aspekta. Prvi problem se tiče jezičke formulacije pitanja. Naime, često se dešava da se pitanjem iznuđuje odgovor samo zbog jezika koji je korišćen u njegovom formulisanju. Treba izbegavati i one reči koje mogu imati preterano negativnu ili pozitivnu psihološku konotaciju, kao što su „secesija“, „vaša sopstvena država“ i slične (Jovanović 2007, 190). Drugi problem je u tome što se postavlja više pitanja u okviru jednog. Tu se birači nalaze u situaciji da im se izbor prilično sužava ili da su primorani da nevoljno glasaju jer nisu u stanju da potpuno slobodno

[3] U evropskom kontekstu koristi se termin *unity of content*, dok se u Sjedinjenim Američkim Državama upotrebljava termin *single-subject rule* koji možda rečitije govori o čemu je reč (Moeckli 2021, 33–34; Cvetković 2022).

formiraju mišljenje o pojedinom pitanju.[4] Konačno, treći problem se tiče sugestivnosti pitanja – ono može biti tako formulisano da se birač praktično primorava na određeni odgovor.[5]

4.2. Predmet referenduma

Postavljanje kriterijuma jasnosti i određivanje bližih pravila o tome kada se jedno referendumsko pitanje smatra jasnim može se označiti kao oblik formalnog ograničenja u formulisanju referendumskog pitanja. Međutim, uporedno posmatrano, česta su i ograničenja predmeta referenduma, koja se mogu označiti kao materijalna.

Uporedno posmatrano, ograničenja se mogu odnositi na četiri grupe pitanja: 1) osnovne funkcije države, pod čime se podrazumevaju finansije države, nacionalna bezbednost, ovlašćenja državnih organa u neredovnom stanju (npr. proglašenje rata, pravni režim vanrednog stanja); 2) zaštita osnovnih prava i sloboda; 3) osnovna svojstva države i njenog uređenja (npr. zabrana promene državnog uređenja, zvaničnog jezika, različite zabrane s ciljem zaštite teritorijalnog integriteta) i 4) organizacija države (npr. nadležnost zakonodavnog tela ili pravila o organizaciji izbora) (Forgács, Ibi, Moeckli 2021, 265–268). Osim toga, postoje i ograničenja u mogućnosti iznošenja međunarodnih ugovora na referendum (Moeckli 2021, 6).

U kontekstu podeljenih multikulturalnih društava, poseban značaj imaju ograničenja predmeta referenduma koja su u vezi sa zaštitom osnovnih prava, s obzirom na opasnost da se u tim društvima referendum pretvori

[4] Na primer, Šarl de Gol je na referendumu 1962. godine postavio dva pitanja koja su bila formulisana kao jedno pitanje: „Da li prihvatate Evijanske sporazume i davanje punih ovlašćenja predsedniku republike da ih sprovede?“ Jasno je da je ovde reč o dva potpuno različita i odvojena pitanja i da je De Gol iskoristio svoju poziciju da nametne takvo pitanje sa ciljem da većina glasa za odgovor „da“. Primer preuzet od: Tierney 2012, 232.

[5] Treba pomenuti da na ishod referenduma može da se utiče i na druge načine: odlukom da se inicira održavanje referenduma, ali i određivanjem pravila pod kojima će referendum biti održan (Tierney 2012, 24). Nedovoljno vremena za referendumsku kampanju onemogućava birače da formiraju svoje mišljenje ili da se upoznaju sa svim relevantnim argumentima. Istovremeno, zakazivanje referenduma za tačno određeni datum može biti i stvar taktike (Jovanović 2007, 185). Naravno, jasno je i da organizovanje referendumske kampanje, što obuhvata medijsko oglašavanje, javne debate, finansiranje kampanje i sl., ima ogroman uticaj na ishod referenduma (Jovanović 2007, 186–187).

u sredstvo tiranije većine nad manjinom (vid. *infra* 4.5).[6] Zbog toga se u nekim državama izričito predviđa da referendum ne može da se odnosi na pitanje osnovnih prava i sloboda (videti npr. član 93. stav 3. Ustava Slovačke). Ustavna zaštita osnovnih prava zasnovana je na njihovom individualnom karakteru, a osnovna svrha isključenja osnovnih prava iz polja referendumskog odlučivanja je upravo zaštita pojedinca, te se smatra da nije opravdano na referendumu diskutovati o njihovom (ne)postojanju. U suprotnom, čitav koncept individualne zaštite mogao bi biti podriven odlukom većine (Baraník 2021, 183).

Posebno je važno pomenuti da su česte situacije da ustavni sudovi pojedinih država uvode prećutna materijalna ograničenja. Dva su takva primera. Tako je Ustavni sud Hrvatske, raspravljajući o dopuštenosti referenduma kojim bi se u Ustav Hrvatske unela definicija braka kao zajednice muškarca i žene, a to pitanje je izazvalo velike društvene podele, izneo stav da na referendum ne može biti izneto pitanje koje preti narušavanju strukturalnih obeležja hrvatske ustavne države. Ona tvore hrvatski ustavni identitet, uključujući najviše vrednosti ustavnog poretka Republike Hrvatske, iako takva formulacija ne postoji u hrvatskom ustavu.[7] S druge strane, italijanskim ustavom je predviđeno da abrogativni referendum ne može biti održan povodom fiskalnih zakona, zakona o budžetu, amnestije i pomilovanja i zakona kojima se ratifikuju međunarodni ugovori (Ibi 2021, 75). Međutim, u jednom slučaju koji se ticao održavanja abrogativnog referenduma, Ustavni sud Italije je izneo stav da bez obzira na to što je ustavom izričito predviđeno koja pitanja ne mogu biti predmet referenduma, implicitno se podrazumeva da predmet referenduma ne mogu biti ni oni zakoni koji su u tako bliskoj vezi sa ustavnom materijom da bi njihovo isključenje iz pravnog poretka uticalo na osnovna ustavna načela i funkcionisanje osnovnih organa države (Ibi 2021, 77).

Iako postavljanje ograničenja, i formalnih i materijalnih, ima veliki značaj, naročito u podeljenim društvima, to nije dovoljno već je neophodno predvideti i institucionalne mehanizme poštovanja tih ograničenja. Zbog toga je neophodno osvrnuti se na pitanje kontrole formalnih i materijalnih ograničenja referendumskog pitanja.

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[6] Relativno često se navodi primer odluke donete na referendumu u Švajcarskoj da se ograniči izgradnja minareta. I pored preporuke federalnih vlasti da se predlog odbije, on je prihvaćen na referendumu 2009. godine (Stefanini 2017, 375; vid. o tome i: Tushnet 2022, 5).

[7] Ustavni sud Hrvatske, SuS-1/2013 od 14. novembra 2013, odeljak II, para. 5.

4.3. Kontrola referendumskog pitanja

Iz ideje narodne suverenosti, dosledno primenjene, proizlazi da glas naroda izražen na referendumu u vezi sa postavljenim pitanjem bude konačna odluka. Tako, u teoriji i dalje postoje stavovi da je on slobodan da oblikuje i preuređuje društvo kako želi (Nugraha 2022, 20) i da ne može biti ograničen. Međutim, već je ranije pokazano da mnogi ustavi poznaju i formalna i materijalna ograničenja predmeta referenduma, a veliki je broj zemalja u kojima su predviđeni i različiti oblici kontrole referendumskog pitanja.

U pogledu momenta kontrole, ona može biti *ex ante* ili *ex post*. U prvom slučaju, kontrola je preventivna, a u drugom korektivna (Hamon 1995, 44). Kontrola može da se odnosi na pripremne radnje i akte, na referendumsko pitanje i na sâm postupak glasanja (tada je reč o proceduralnim pitanjima) (Hamon 1995, 44). U mnogim evropskim državama predviđena je sudska kontrola odluke o iznošenju određenog pitanja na referendum. Treba praviti razliku između ocene dozvoljenosti predmeta referenduma (kada pojedina pitanja uopšte ne mogu biti predmet referendumskog odlučivanja, videti *supra* 4.2) i kontrole načina na koji je referendumsko pitanje formulisano, što se uglavnom određuje u odnosu na kriterijum „jasnosti" (*Referendums in Europe – an analysis of the legal rules in European states* 287/2004, para. I, J; videti i *Study on referendums – replies to the questionnaire* 887/2017).

Postoje raznovrsna rešenja pitanja koji je organ nadležan za odlučivanje o ispunjenosti uslova za održavanje referenduma (*Referendums in Europe – an analysis of the legal rules in European states* 287/2004, para. I, P, p. 15). Većina država Evrope ne pravi razliku između kontrole formalnih i materijalnih ograničenja, već se nadzor poverava istim organima (Forgács, Ibi, Moeckli 2021, 272). Uporedno posmatrano, nadzor mogu da vrše parlament, organi izvršne vlasti, izborne komisije i, najvažnije, sudovi (Forgács, Ibi, Moeckli 2021, 272). Kontrola može biti i višestepena, pri čemu posebnu ulogu kao kontrolori imaju ustavni sudovi. Na primer u Italiji, Ustavni sud može odlučiti da određeno pitanje nije u saglasnosti sa Ustavom. Naime, u članu 75. Ustava Italije uređuju se tzv. abrogativni referendumi. Zakonom od 1970. godine predviđen je sistem dvostruke kontrole inicijative za održavanje referenduma. Referendum se može održati ako to zahteva najmanje 500.000 birača ili pet regionalnih saveta. „Prvi nivo" provere je u nadležnosti Kasacionog suda, tačnije tzv. Centralne kancelarije (*Ufficio Centrale per il referendum*)[8] koja potvrđuje

[8] Reč je o posebnom sudskom veću koje je sastavljeno od sudija Kasacionog suda i koje zaseda po potrebi (Ibi 2021, 67; Hamon 1995, 44).

da je referendumski zahtev saglasan zakonu i ne bavi se kontrolom jasnosti referendumskog pitanja – ona proverava da li je prikupljen dovoljan broj potpisa, da li su potpisi overeni i da li se referendumski zahtev odnosi na zakon koji je na snazi (Ibi 2021, 80). Ustavnom sudu je poveren drugi „nivo kontrole". U njegovoj je nadležnosti, između ostalog, da utvrdi adekvatnost (i jasnost) formulisanog pitanja (Ibi 2021, 81–83). S druge strane, u Švajcarskoj je kontrola referenduma na federalnom nivou u potpunosti poverena Saveznoj skupštini (Forgács, Ibi, Moeckli 2021, 275).

Na osnovu analize formalnih i materijalnih ograničenja referendumskog pitanja i njihove kontrole, videli smo da u nekim situacijama ustavni sud može da deluje i kao koustavotvorac, dopisujući određena materijalna ograničenja. Međutim, da bi uopšte mogao da štiti vrednosti konsocijativne demokratije, važno je prethodno predvideti nadležnost ustavnog suda u procesu kontrole. Na primer, praksa Ustavnog suda Hrvatske je u tom smislu vrlo značajna, ali njegova nadležnost u procesu kontrole referendumskog pitanja može biti zasnovana samo na inicijativu organa koji je doneo odluku o raspisivanju referenduma, a to je parlament (Forgács, Ibi, Moeckli 2021, 275). Time se svrha i efikasnost takve ustavnosudske zašite mogu dovesti u pitanje. Ipak, važan je zaključak da bi bilo zamislivo (i moguće) da jedan aktivistički ustavni sud u podeljenom društvu ima ulogu u „sprečavanju" održavanja referenduma koji ima potencijal da deluje kao „tiransko sredstvo većine".

4.4. Deliberativni način donošenja odluka

Jedna od najvećih kritika nedemokratskog karaktera referenduma tiče se načina donošenja odluka o njegovom održavanju. Tako se ističe da je nedostatak referenduma, a naročito u savremenim multikulturalnim i često podeljenim društvima, to što građani donose odluku o pitanju koje im može biti „nametnuto", svodeći tako ceo demokratski proces na izbor da ili ne, pri čemu izostaje deliberativnost. Oni koji zastupaju takav stav navode da je donošenje odluka na osnovu volje većine uistinu nedemokratsko sredstvo zato što je to prost zbir volja koji pokušava da tu činjenicu pretvori u pravo. Prema njihovom shvatanju, istinska demokratija bi podrazumevala upravljanje zasnovano na argumentima i racionalnim razlozima (Sunstein 2001, 7).

Na tragu takvih mišljenja se u ovom radu iznosi stav da sama odluka o referendumskom pitanju ima manji značaj od toga kako se do rezultata zaista došlo. Drugim rečima, ako je procedura pravilno postavljena, rezultat će biti legitiman, kakav god bio, i to otvara prostor za primenu referenduma i u nevećinskim sistemima.

Pitanje je, međutim, da li logika referenduma dozvoljava takav pristup. Dakle, da li referendum uopšte može biti sredstvo konsocijativne demokratije? Nesporno je da referendum mora da deluje kao mehanizam agregacije individualnih volja (Tierney 2012, 29). To se, s jedne strane, može posmatrati kao prednost referenduma jer se time građani disciplinuju i uče tome da jasno uobliče ideje, ali i da se ponašaju kao članovi zajednice. Ipak, u slučaju podeljenih društava, koja nas u ovom radu interesuju, teško da se svi mogući interesi koji postoje u društvu mogu svesti na dve ili tri mogućnosti (videti Jovanović 2007, 169–170). Takva priroda referenduma se najbolje može videti upravo kada se na referendum iznose ustavnopravna pitanja. Naime, u multikulturalnim ili duboko podeljenim društvima nema demosa kao celine već postoji većina na jednoj strani i više različitih manjina na drugoj (Tierney 2012, 252; McEvoy 2018; Jovanović 2007, 169). Zbog toga se postavlja pitanje da li polarizacija koju referendum nameće može da pomogne da se dođe do rešenja ili će ih samo produbiti (Tierney 2012, 380). Lajphart je u svom pionirskom radu o konsocijativnoj demokratiji od 1969. godine naveo da referendum može da podstakne kompetitivno ponašanje u podeljenim društvima i da time produbi međusobne tenzije i političku nestabilnost (Qvortrup 2018, 180).

Iako ima mnogo slučajeva koji potvrđuju tu tezu (referendum u Belgiji o povratku kralja 1950. godine), bilo je i potpuno suprotnih primera. Jedan od njih je i referendum u Severnoj Irskoj 1998. godine. Tada je velikom većinom prihvaćen Sporazum iz Belfasta, i to na dva referenduma koja su istovremeno održana – jedan u Severnoj Irskoj, drugi u Republici Irskoj. Time je prevaziđen dugogodišnji problem između dva dela tog ostrva.[9] Nasuprot tvrdnjama koje su ranije navedene u radu, referendum je ovde upravo delovao suprotno, kao sredstvo prevazilaženja sukoba. Sporazum iz Belfasta je pokazao da referendum ne treba apriorno odbacivati. Ključ uspeha je

[9] Referendum se ticao Sporazuma iz Belfasta (poznat i kao *Good Friday Agreement*), kojim je prevaziđen višedecenijski sukob između severnog dela ostrva koji pripada Ujedinjenom Kraljevstvu i Republike Irske. Sukob se u osnovi vodio između dve struje: unionističke, koja je zagovarala poziciju da Severna Irska treba i dalje da pripada Ujedinjenom Kraljevstvu, i republikanske, koja se zalagala za ujedinjenje celog ostrva. Taj je sukob, međutim, imao značajna verska i etnička obeležja. Detaljnu analizu referendumskog procesa videti u: Hayward 2021, 247–265.

bio u deliberativnom procesu koji je uključio sve aktere. Prvo su sve strane imale mogućnost da iznesu predloge, bez nametanja pitanja i predloga, a potom su o problemu mogle i da raspravljaju. Učešće u javnoj diskusiji bilo je dozvoljeno čak i paravojnim organizacijama, što svakako predstavlja ekstreman primer. Konačno, istovremeno su održana dva referenduma sa dva različita pitanja: jedan u Severnoj Irskoj, o prihvatanju Sporazuma iz Belfasta, a drugi u Republici Irskoj, o izmenama Ustava Irske, čime su sve strane učestvovale ravnopravno u procesu donošenja odluke (McEvoy 2018, 12). Takvo iskustvo potvrđuje, kako označava Sanstajn (*Sunstein*), prostu društvenu činjenicu da ljudi mogu da „uđu" u razgovor s jednim stavom, a da iz njega „izađu" s drugim (Sunstein 2001, 14).

Jedan relativno novi primer se tiče referendumā koji su održani na teritoriji Ukrajine 2022. godine povodom pripajanja nekoliko ukrajinskih regiona (Donjecka, Luganska, Hersona, Zaporožja) Ruskoj Federaciji. Ne ulazeći ovom prilikom u analizu međunarodnopravnih i ustavnopravnih pitanja koja se tiču dozvoljenosti aneksije, važno je primetiti da takvi referendumi ne mogu imati vrednost po sebi te da posebno mogu da budu kritikovani iz perspektive deliberativnosti. Ruski predstavnici su se pozivali na činjenicu da je referendumska procedura bila transparentna te da su strani posmatrači mogli da prate tok glasanja.[10] Međutim, ključno je da procedura glasanja na dan održavanja referenduma, čak i kada zadovoljava sve standarde slobode i jednakosti izbora, ne može biti dovoljna da se opravda rezultat referenduma. Da bi neka politička odluka bila legitimisana, nije dovoljno da većina podrži odluku već je neophodno da različiti politički stavovi budu opravdani jasnim argumentima, uz poštovanje svih strana, uključujući i manjine. Razume se, a to je jasan formalnopravni argument, u ratnom stanju se ne može obezbediti deliberativnost te se narodno glasanje u tim uslovima i ne može okarakterisati kao referendum.[11]

[10] *https://news.un.org/en/story/2022/09/1128161*, poslednji pristup 29. marta 2023.

[11] To potvrđuje i mišljenje Venecijanske komisije. Naime, Savet Evrope je utvrdio da mišljenje koje je Venecijanska komisija usvojila 2014. godine povodom referenduma na Krimu iste godine *mutatis mutandis* važi i u slučaju ratnog stanja. Naime, u situacijama u kojima nema demokratskih uslova, poput rata, vojnih pretnji ili vanrednog stanja, nije dozvoljeno održavanje referenduma (Opinion on „whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles", 2014).

Da bi taj instrument neposredne demokratije mogao da zadovolji potrebe savremenih društava, neophodno je, dakle, da javna debata omogući slobodno formiranje volje birača. Treba primetiti da u pluralističkim društvima konsenzus društvenih grupa o onome što se može nazvati „osnovnom strukturom" (*basic structure*) društva vodi međusobnom razumevanju, saradnji i stabilnosti društva u celini (Jovanović 2007, 13).

Pitanje je, međutim, da li referendum u Irskoj treba posmatrati kao pravilo ili kao izuzetak. Čini se da je najispravnije o njemu govoriti kao o primeru za ugled. Tako, Mendes (*Conrado Hübner Mendes*) navodi da referendum nije mehanizam deliberativne demokratije, ali ukoliko ima određene karakteristike, može se govoriti i o „deliberativnom referendumu" (Mendes 2013, 43 fn. 120). U Irskoj je, osim svih ranije navedenih mehanizama, bitno institucionalno obeležje bio i dogovor o poštovanju glasa manjina. Time se osporava teza da je referendum po definiciji sredstvo „tiranije većine".

4.5. Referendumska većina

Na opasnost od „tiranije većine" upozoravao je još Medison (*James Madison*) u Federalističkim spisima (Madison 2008, 48–55). Često se kritikuje karakteristika referenduma da favorizuje većinu i potpuno isključuje manjinu. I Lajphart je u svojim radovima o konsocijativnoj demokratiji ukazivao na takvu opasnost kada je reč o referendumima. On primećuje da, iako referendumi mogu da pruže demokratsku legitimizaciju novim ustavima, ipak su neophodna neka ograničenja jer referendum može biti opasno sredstvo (*blunt majoritarian instrument*) u rukama većine protiv manjine (Lijphart 2004, 106). Zapravo, zbog svoje većinske prirode s efektom „pobednik odnosi sve" (*the winner takes all*) može biti „katalizator" konflikta (Qvortrup 2018, 181). Tirni takav efekat referendumskog odlučivanja zove „*majoritarian disincentive*" (Tierney 2012, 271). Kao najnegativniji efekat većinskog pravila (*majority rule*), navodi se marginalizacija interesa manjina putem polarizacija (Palermo, Kössler 2017, 117). Lajphart je kao jedan od mehanizama koji će sprečiti takav efekat referenduma predložio davanje mogućnosti manjini (*small minority*) birača da iniciraju održavanje referenduma, pozvavši se na primer Švajcarske, jer je u tome video snažno sredstvo jačanja mehanizma zajedničkog vršenja vlasti (*power-sharing*) (Lijphart 2004, 106). Ipak, takav predlog nije najjasniji, naročito imajući u vidu da Lajphart nije obrazložio kako se tim mehanizmom mogu postići

željeni efekti.[12] Da bi referendum mogao da bude sredstvo demokratske legitimacije u podeljenom društvu, on mora da ima određene karakteristike, tj. mora biti „konstruisan" tako da odgovara zahtevima takvih društava. Moguće rešenje je predvideti određene „glasačke pragove", odnosno većine drugačije (veće) od proste. Tirni navodi tri modela (Tierney 2012, 272–274). Prvi podrazumeva zahtev da na referendumu glasa određeni broj ili procenat od ukupnog broja birača (50% plus jedan glas, ili se broj potrebnih glasova izražava razlomcima – 2/3, 3/4). Drugi podrazumeva zahtev za postojanjem „dvostruke većine" (*double majority*) – na primer, u Švajcarskoj kada je reč o referendumima prilikom promene ustava, kada se zahteva da za odluku glasa većina od ukupnog broja birača i većina kantona, pri čemu se rezultat glasanja birača u kantonu računa kao glas kantona (Jovičić 2006, 25). Treće rešenje podrazumeva da je dovoljno da za usvajanje odluke glasa više od polovine izašlih birača, pri čemu se traži da je glasala većina od ukupnog broja upisanih birača. Kvortrup toj podeli dodaje još jedan model koji označava kao „zahtev za etničkom većinom". To je situacija u kojoj određena etnička grupa koja je manjinska u državi, ali se određeno pitanje na nju odnosi, mora da podrži predlog da bi bio usvojen (vid. detaljno Qvortrup 2005, 164–174).

Ideja s postavljanjem viših „pragova" počiva na pretpostavci da će tako pre samog glasanja biti postignut širi konsenzus, kako bi referendum uspeo. Ili kako je nekadašnji kanadski ministar Stefan Dion (*Stéphane Dion*) rekao, u vezi sa secesijom Kvebeka: „Ne razbijajte državu sa podrškom od 50% plus jedan glas – separatistički lideri širom sveta ne govore dozvolite nam da glasamo i videćete da polovina mog naroda želi da se otcepi" (Qvortrup 2005, 166). Međutim, predviđanje bilo kakvog praga nosi i jednu opasnost. Naime, normiranje određene većine često može biti arbitrerno ili skrojeno prema interesima neke grupe. Tako je kanadski Vrhovni sud u svojoj odluci od 1998. godine, povodom secesije Kvebeka, insistirao na tome da je neophodno da na referendumu postoji „jasna većina" (videti *infra* 5). Ponekad problem i nije u tome koja će se većina tražiti za donošenje odluke. Tako, u Severnoj Irskoj nije bio postavljen zahtev da većina obe zajednice glasa za Sporazum. Suština je bila da se pre samog glasanja dođe do sporazuma u ključnim institucijama, odnosno da sporazum postigne što je moguće veći broj aktera (Tierney 2012, 281).

[12] Iako Lajphart nije precizirao o kom je mehanizmu reč, moguće je da je imao na umu „narodni veto" iz člana 141. Ustava Švajcarske. U pitanju je pravo koje se priznaje grupi od najmanje 50.000 građana da zahtevaju iznošenje na referendum tek izglasanog federalnog zakona.

Slučaj koji je u izvesnoj meri povezan s poštovanjem prava manjinskih grupa i većinom koja je potrebna za donošenje odluke odnosi se na formiranje novog kantona Jure u Švajcarskoj. Taj primer Tomas Flajner i Lidija Basta Flajner označili su kao „impresivan jer pokazuje kulturu kompromisa" (Fleiner, Basta Fleiner 2009, 605). Reč je o težnji regiona Jure da se izdvoji iz sastava kantona Berna, pri čemu su se postavila dva vrlo važna pitanja: da li većina naroda zaista želi da se „otcepi" od kantona Berna i kako na demokratski način utvrditi granice Jure (Fleiner, Basta Fleiner 2009, 605). Prvo su stanovnici regiona Jure glasali o tome da li žele da se formira novi kanton Jura, koji je do tada bio u sastavu kantona Berna. Nakon što je većina glasala „za" (premda je reč o 50,7% birača nasuprot 46,9% koji su glasali protiv; Jovanović 2007, 181), u onim delovima koji su glasali „protiv" građani su mogli na drugom glasanju da se izjasne o tome da li žele da ostanu u sastavu kantona Berna ili da ipak budu deo novog kantona. Onda je organizovan i treći „krug glasanja", za građane u opštinama duž novoutvrđenih granica o tome pod čijom kantonalnom jurisdikcijom žele da se nađu (Jovanović 2007, 181). Konačno, četvrta faza je podrazumevala referendum na saveznom nivou o izmenama Ustava Švajcarske, čime je Jura postala dvadeset treći kanton, odnosno dvadeset šesti, uključujući i polukantone (Fleiner, Basta Fleiner 2009, 605–606; Linder 2021, 93–94). Iz tog primera se vidi način prevazilaženja jednog spornog pitanja, i to na principima konsenzusa. Ta dugačka i složena procedura primene kaskadnih referenduma, koju je Flajner nazvao „kreativnom zaštitom manjina" (Linder 2021, 96) bila je organizovana tako da omogući stvaranje konsenzusa, i to ne samo u „tankoj" većini već i u većini svih zajednica na svim nivoima koje su „pogođene" tim pitanjem (Fleiner, Basta Fleiner 2009, 606).[13]

[13] Taj primer pokazuje i koliki je značaj pregovora za prevazilaženje konflikta, pri čemu oni moraju biti takvi da štite interese svih strana. Tako je, posle mnogo pregovora između Jure, Berna i Švajcarske Konfederacije, organizovano novo glasanje 2013. godine, ovoga puta o tome da li građani žele da pokrenu proceduru ponovnog ujedinjenja kantona Jure i Bernske Jure, odnosno onih delova istorijske pokrajine Jura koji su ostali u sastavu kantona Berna. Dok su stanovnici kantona Jura to široko prihvatili, stanovnici Bernske Jure su odbili takav predlog, sa izuzetkom stanovnika grada Mutje (*Moutier*), koji su prihvatili predlog stvaranja „jedinstvene" Jure. Zbog toga je organizovano „konačno" glasanje na nivou te opštine 2017. godine, na kojem su građani Mutjea potvrdili svoj raniji stav (sa većinom od oko 52%), ali je glasanje kasnije poništeno iz proceduralnih razloga (Linder 2021, 96). Posle niza pregovora svih strana, rezultati još jednog referenduma od 2021. godine pokazali su rešenost građana te opštine da budu u sastavu kantona Jure (shorturl.at/psNY7, poslednji pristup 19. marta 2023; Mazidi, Minder 2019, 9–12). Rezultati su zvanično proglašeni, te se očekuje da do 2026. godine Mutje i zvanično bude u sastavu kantona Jure.

5. PRIMENA REFERENDUMA NA PRINCIPIMA KONSOCIJATIVNE DEMOKRATIJE

U prethodnom delu rada prikazani su stavovi koji upozoravaju na opasnosti referenduma u pluralnim društvima, smatrajući ga instrumentom većinske demokratije. Istovremeno, analiza je pokazala da njegovu primenu ne treba apriorno odbaciti te da referendum može imati integrativno dejstvo i u izrazito pluralnim, pa i podeljenim društvima. Drugim rečima, iako nije „konstruisan" kao sredstvo koje je u stanju da zadovolji mnoštvo različitih interesa, referendum to može da bude pod uslovom da ima određena svojstva. U nastavku će biti razmotreno da li je moguća takva primena referenduma, na primeru Kanade i secesije Kvebeka. Kanada nije uzeta za primer zbog pitanja secesije već zbog uloge referenduma u tom procesu. Naime, pred građane se postavilo jedno vrhunsko ustavnopravno pitanje koje je izazvalo velike potrese u kanadskom društvu – da li jedna pokrajina može da se otcepi od ostatka države, pri čemu je pokušano da se ta odluka donese na referendumu. Rasplet te ustavnopravne drame pruža mogućnost da se odgovori na osnovno pitanje – da li je referendum moguć u sistemima nevećinske demokratije i pod kojim uslovima. S druge strane, Kanada je primer pluralnog društva te su svi potencijalni nedostaci referenduma u širem kontekstu došli do izražaja upravo u slučaju Kvebeka.

Parlament Kanade je 2000. godine, posle višedecenijskih pokušaja da se poboljša položaj Kvebeka u okviru kanadske federacije i dva referenduma o otcepljenju te pokrajine od Kanade (1980. i 1995), usvojio Zakon o jasnosti,[14] kojim je pravno uredio postupak dogovorne secesije. Tim zakonom je u delo sprovedeno savetodavno mišljenje Vrhovnog suda Kanade od 1998. godine[15] (Marinković 2002, 388–389), koje je doneto nakon što je Vlada Kanade postavila pitanje dozvoljenosti secesije s ustavnopravnog i međunarodnopravnog stanovišta.[16]

[14] *S.C. 2000, c. 26*; neformalno *Clarity Act.*

[15] *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[16] Kanadsku federaciju, između ostalog, karakteriše i specifičan odnos između anglofonskog i frankofonskog stanovništva. Kako primećuje Marinković, gotovo vek i po dug razvoj federalizma u Kanadi obeležen je, pre svega, dezintegracionim procesima, koji se, između ostalog, ogledaju u sve izraženijem rascepu na anglofonski i frankofonski deo (2002, 389–390).

Vrhovni sud je ukazao na četiri osnovna načela ustavnog sistema Kanade: federalizam, demokratiju, konstitucionalizam i vladavinu prava i zaštitu prava manjina (para. 49). Sud nije isključio mogućnost otcepljenja jednog dela teritorije, pod uslovom da se poštuje procedura, koja je kasnije bila detaljnije uređena Zakonom o jasnosti.

U savetodavnom mišljenju se ističe da referendum nije dovoljan za odluku o otcepljenju, ali da nesumnjivo može biti demokratski metod upoznavanja sa pogledima biračkog tela o važnim političkim pitanjima. Međutim, Sud naglašava da i u tom slučaju „jasna većina" mora da izrazi mišljenje o tom pitanju (para. 87). Tada se, ukoliko postoji jasna i nedvosmislena volja, rađa obaveza svih strana da pregovaraju o budućim ustavnim promenama (para. 88). Odluka Suda je trpela brojne kritike upravo zbog toga što se u njoj koriste termini „jasno pitanje" i „jasna većina", iako uopšte nije jasno šta se pod tim podrazumeva (videti *supra* 4.1, 4.5). Zbog toga je i donet tzv. Zakon o jasnosti.

Njime se predviđa da vlada pokrajine koja želi da istupi iz federacije pokreće postupak objavljivanjem referendumskog pitanja. To pitanje je predmet kontrole koja je u nadležnosti Donjeg doma kanadskog parlamenta. Prilikom te kontrole, Donji dom Parlamenta će naročito razmotriti da li takvo pitanje omogućava jasno izražavanje volje naroda u pokrajini u vezi s predlogom secesije (odeljak 1.3). Osim toga, Zakonom se nalaže da se prilikom ocene da li je pitanje jasno uzmu u obzir sva gledišta koja Donji dom smatra relevantnim (odeljak 1.5).[17]

Ako je pitanje jasno, sledeća faza se sastoji u pregovorima, nakon kojih se održava referendum. U savetodavnom mišljenju Sud je naglasio da sve strane imaju obavezu da učestvuju u pregovorima (para. 89). Oni se vode u skladu

[17] Kontroli jasnosti referendumskog pitanja u tom zakonu posvećeno je mnogo pažnje upravo zbog toga što su pitanja postavljana na referendumima od 1980. i 1995. godine bila toliko dugačka i nejasna da su zbunjivala birače. Godine 1980. ono je glasilo: „Vlada Kvebeka je javno iznela svoj predlog za postizanje novog sporazuma s ostatkom Kanade, zasnovan na jednakosti nacija; taj sporazum bi omogućio Kvebeku da stekne isključivo pravo da donosi svoje zakone, zavodi svoje poreze i uspostavlja veze s inostranstvom – drugim rečima, suverenost – i u isto vreme da ostane s Kanadom u ekonomskoj zajednici, uključujući i zajedničku valutu; bilo kakve promene u političkom statusu koje bi proizašle iz tih pregovora biće, putem referenduma, iznete pred narod; da li se, pod ovim uslovima, saglašavate da date Vladi Kvebeka mandat da pregovara o predloženom sporazumu između Kvebeka i Kanade?" Na referndumu održanom 1995. godine pitanje je bilo formulisano nešto kraće, ali i dalje nejasno: „Da li se slažete da Kvebek treba da bude suveren nakon što uputi formalnu ponudu Kanadi za novo ekonomsko i političko partnerstvo u okviru Predloga zakona o budućnosti Kvebeka i sporazuma potpisanog 12. juna 1995?" (nav. prema: Marinković 2002, 394, 396).

s načelima koje je Sud identifikovao, između ostalog, i da se „apsolutni", odnosno ultimativni predlozi ne mogu prihvatiti (para. 90). Sud se osvrće i na ono što je u ovome članku označeno kao „slaba tačka" referenduma. Naime, demokratski princip većine, u slučaju Kanade, ne može biti značajniji ili iznad nekih drugih, poput vladavine prava, zaštite prava manjina ili federalizma, odnosno on sâm primenjen ne može proizvesti bilo kakvo pravno dejstvo (para. 91). Svestan „pluralnosti" kanadskog društva, Vrhovni sud podseća da „Kanađani nikada nisu prihvatili da naš sistem počiva na pravilu proste većine (*majority rule*)" (para. 76) i da je zato neophodno postaviti zahtev za pojačanom većinom (*enhanced majority*) kako bi Ustav obezbedio interese manjine koja takođe mora da bude konsultovana imajući u vidu da će odluka uticati i na nju (para. 76–77). Treba primetiti da Zakon o jasnosti ipak nije na konkretan način predvideo potrebnu većinu. Njime su data uputstva Donjem domu kako da proceni postojanje „jasne većine" (odeljak 2.2 i 2.3; Jovanović 2007, 193). Dakle, važno je da se u obzir uzme najveći mogući broj različitih, a istovremeno relevantnih mišljenja i stavova, kako bi se stvorila što šira osnova za donošenje odluke. Pogotovo je značajno pominjanje (autohtonih) manjinskih naroda u Zakonu o jasnosti, što govori da oni naročito mogu biti pogođeni referendumskom odlukom većine. Zato se njima i pruža zaštita (koja je posredna) jer je Donji dom dužan da njihove stavove uzme u obzir.

U nadležnosti tog doma kanadskog parlamenta je da vrši još jedan oblik kontrole referendumskog procesa i to *ex post* – naime, da li postoji jasno izražena volja jasne većine građana na sprovedenom referendumu (kontrola jasnosti referendumskog pitanja može se označiti kao *ex ante*). To znači da referendumska odluka mora biti „osnažena" aktom Donjeg doma koji donosi odluku kojom verifikuje referendumski rezultat.

6. ZAKLJUČAK

U ovom radu je razmatrano mesto referenduma u podeljenim društvima, i to u onima koja se smatraju konsocijativnim demokratijama. Analiza je imala dva cilja – da se utvrdi da li referendum može biti primenjen u konsocijativnim demokratijama i, ako je tako, pod kojim uslovima.

Referendum može izgledati kao demokratsko sredstvo donošenja političkih odluka. Zamisao toga instituta jeste da narod neposrednim izjašnjavanjem donosi odluku. Tu se predstavnička demokratija, kao uobičajeni oblik vršenja vlasti, „povlači", a građani najneposrednije vrše suverenost. Otuda referendum nije „svakodnevno" sredstvo već se koristi onda kada se postavi pitanje od najšireg društvenog značaja. To se odnosi i na situacije rešavanja teških političkih pitanja. Međutim, brojni autori primećuju da, iako

teorijski situacija izgleda jednostavno, u praksi „nema očiglednih dokaza da su referendumi uspešnije sredstvo od nekih drugih mehanizama u prevazilaženju teških političkih kriza kada je biračko telo podeljeno oko onih pitanja koja su od suštinske važnosti za njega“ (Jovanović 2007, 168–169). U podeljenim društvima su isprepletani različiti interesi. Zbog toga odluka o važnom pitanju ne može biti zasnovana isključivo na većinskom načelu. Suština je u tome da će odluka u društvu biti legitimna samo ako se različite grupe u društvu slože o njenoj sadržini, iz čega proizlazi da se legitimnost ne može meriti nezavisnim standardom pravde već pristankom onih kojima se vlada (Chambers 1998, 143). Referendum, međutim, često ne može da zadovolji tako brojne interese. Zato je i posmatrana mogućnost njegove primene u pluralnim ili čak podeljenim društvima jer u njima makar odluke ustavotvornog karaktera ne bi trebalo da budu zasnovane na principu većine već na zadovoljenju najšireg mogućeg broja interesa.

Referendumu se mogu uputiti tri grupe kritika. Prva se tiče referendumskog pitanja koje često može biti formulisano tako da njegov ishod bude željeni rezulatat. Drugo, deficit deliberativnosti, koji podrazumeva nemogućnost artikulisanja velikog broja različitih interesa, u situaciji u kojoj se odlučivanje svodi na alternativu da ili ne. Konačno, u podeljenim društvima su naročito sporna pitanja kojom većinom se donosi odluka i kakav je položaj manjina.

Analiza je pokazala da referendum ne treba olako odbaciti, čak ni u podeljenim društvima. Naime, Lajphart se u svojim kasnijim radovima bavio i predlaganjem rešenja za takva društva. U vezi s tim, Popović navodi da je oblikovanje ustanova u konsocijativnim sistemima jedan od najzanimljivijih vidova ustavnog inženjeringa. Taj zadatak ima i veliku praktičnu vrednost jer se u društvima koja su podeljena, naročito po jezičkoj i etničkoj liniji, konstruisanju ustavnih ustanova mora pristupiti posebno oprezno (Milosavljević, Popović 2019, 216–217). Drugim rečima, referendum može funkcionisati i u duboko podeljenim društvima, samo što u tom slučaju mora da ispuni određene uslove, odnosno mora biti „konstruisan“ tako da otkloni ili u najvećoj mogućoj meri ublaži nedostatke koji su ranije navedeni.

Otuda, pažnja mora biti pomerena sa samog glasanja na referendumsku proceduru. Kada postoji ozbiljna podela po nekom političkom pitanju, neophodna je artikulacija različitih interesa. Drugim rečima, problem mora biti jasno definisan, a na osnovu toga neophodno je postaviti jasno referendumsko pitanje. Od njegove formulacije može da zavisi i ishod referenduma. Moguća su različita rešenja – kontrola od ustavnosudskog organa ili od političkih organa, pri čemu je važno unapred predvideti ograničenja (u formi zakona) u formulisanju pitanja. Nekada se najviše vrednosti mogu zaštiti i postavljanjem materijalnih ograničenja – propisivanjem da neka pitanja ne mogu biti predmet referendumskog

odlučivanja. Osim toga, bilo bi dobro predvideti i garantovati vođenje diskusije u toku referendumske kampanje. Uopšte, javna debata mora biti takva da omogući slobodno formiranje volje birača. Ona može biti organizovana tako da uključuje različite oblike participacije najvećeg mogućeg broja različitih grupa u društvu, a naročito je važno da manjina ne bude marginalizovana. U vezi s tim se mogu predvideti i mehanizmi kojima se štite interesi manjinā. Tako je, na primer, formiran kanton Jura u Švajcarskoj. Konačno, kada je reč o potrebnom broju glasova za uspeh referenduma, praksa pokazuje da se mora tražiti određena kvalifikovana većina. Ona, međutim, mora biti postignuta tako da zadovolji interese najšireg mogućeg broja različitih grupa u društvu, a naročito da obuhvati manjine. Ta pitanja je razmatrao i Vrhovni sud Kanade u svojoj odluci o secesiji Kvebeka, gde je upravo uočio značaj jasno formulisanog pitanja i jasne većine, kao i potrebu da se zaštite brojni (različiti) stavovi u referendumskom procesu.

Ipak, kao što je u radu istaknuto, čini se da je manje važno kakav će biti ishod glasanja nego kakva će biti referendumska procedura. Iz prethodno rečenog proizlazi da pravilno organizovana kampanja i uopšte proces koji prethodi odlučivanju može biti ona faza koja će obezbediti legitimitet. Kako Sanstajn primećuje, pod dobrim uslovima, u procesu pregovaranja se može razjasniti osnov nesporazuma (Sunstein 2001, 8). Tako se može zadovoljiti najširi mogući broj interesa, pa će legitimacijsko sredstvo biti čitav proces, a ne rezultat referenduma. Koji su to mehanizmi, zavisi od uslova u konkretnom društvu. Tome je moguće uputiti kritiku da su svi mehanizmi koji su ranije navedeni preterano složeni, ali „složena“ društva, heterogena, a naročito duboko podeljena, često zahtevaju i prenormiranost, kako bi se sprečile moguće zloupotrebe. Zbog toga referendum nije sredstvo koje je ograničeno na većinsku demokratiju već institut kojise, uz izvesna institucionalna „osnaživanja“, može primeniti i u nevećinskim sistemima. Štaviše, referendum zadržava sve svoje važne funkcije čak i u podeljenim društvima – on i tada (ako je dobro „postavljen“) predstavlja mehanizam neposrednog vršenja vlasti građana. Referendum ima potencijal da se oblikuje tako da različitim grupama omogući da izraze svoje stavove i da tako otkloni nesporazume i spreči dalje podele u društvu.

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POSSIBILITIES OF REFERENDA IN THE SYSTEMS OF CONSOCIATIONAL DEMOCRACY

Summary

The paper analyzes the possibilities of referenda in consociational democracies. According to Arend Lijphart, democratic systems can be divided into majoritarian and consociational. Referendum is commonly understood as a mechanism of the people's direct decision-making based on the majoritarian principle. This paper analyzes what qualities the referendum must possess in order to be compatible with the system of consociational democracy. The term consociational democracy applies to systems in which the society is divided on multiple grounds, in such a way that the majority of interests are satisfied while preserving the institutional shape and logic of this mechanism of direct decision-making. The analysis includes the consideration of all issues of relevance to the divided societies, in the theoretical and practical sense.

Key words: *Referendum*. – *Consociational Democracy*. – *Deliberation*. – *Clarity of the Referendum Question*. – *Referendum Majority*.

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Dva autora

T: Kao što je ukazano (Daniels, Martin 1995, broj strane),

L: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

T: Kao što je pokazano (Stanković, Orlić 2014, broj strane),

L: Stanković, Obren, Miodrag Orlić. 2014. *Stvarno pravo.* Beograd: Nomos.

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Više od tri autora

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L: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

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L: Varadi, Tibor, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić. 2012. *Međunarodno privatno pravo*. 14. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

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T: (Zavod za intelektualnu svojinu Republike Srbije 2015, broj strane)

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L: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

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Citiranje više dela istog autora iz iste godine

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L: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

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(Grogger 1991, broj strane; Witte 1980, broj strane; Levitt 1997, broj strane)

(Popović 2017, broj strane; Labus 2014, broj strane; Vasiljević 2013, broj strane)

Poglavlje u knjizi

T: Holms (Holmes 1988, broj strane) tvrdi...

L: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

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T: Švarc i Sajks (Schwartz, Sykes 1998, broj strane) tvrde suprotno.

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Knjiga sa više izdanja

T: Koristeći Grinov metod (Greene 1997), napravili smo model koji...

L: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

T: (Popović 2018, broj strane), *R:* Popović, Dejan. 2018. *Poresko pravo*. 16. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

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T: (Angell, Ames [1832] 1972, 24)

L: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

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T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12 ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

F: Zakonik o krivičnom postupku, *Službeni glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014, čl. 2, st. 1, tač. 3; 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, 60, Art 6 (3).

T: Za reference u tekstu koristiti skraćenice (ZKP ili ZKP RS; Regulation No. 1052/2013; Directive 2013/32) konzistentno u celom članku.

L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

Ne treba koristiti senčenje ili boju na grafičkim prikazima. Ako je potrebno vizuelno istaći pojedine razlike, molimo vas da koristite šrafiranje i unakrsno šrafiranje ili drugo sredstvo označavanja.

Ne treba koristiti okvir za tekst ispod ili oko slike.

Molimo vas da koristite font *Times New Roman* ako postoji bilo kakvo slovo ili tekst na slici. Veličina fonta mora biti najmanje 7.

Grafici ne sadrže bilo kakvu boju.

Naslovi slika su navedeni i na zasebnoj stranici sa dvostrukim proredom pod nazivom – Legenda korišćenih slika.

Slike ne mogu biti veće od 10 cm x 18 cm. Da bi se izbeglo da slika bude značajno smanjena, objašnjenja pojedinih delova slike treba da budu postavljena u okviru slike ili ispod nje.

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Radovi objavljeni u časopisu podležu anonimnoj recenziji dvoje recenzenata, koje određuje redakcija.

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