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BELGRADE LAW REVIEW

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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

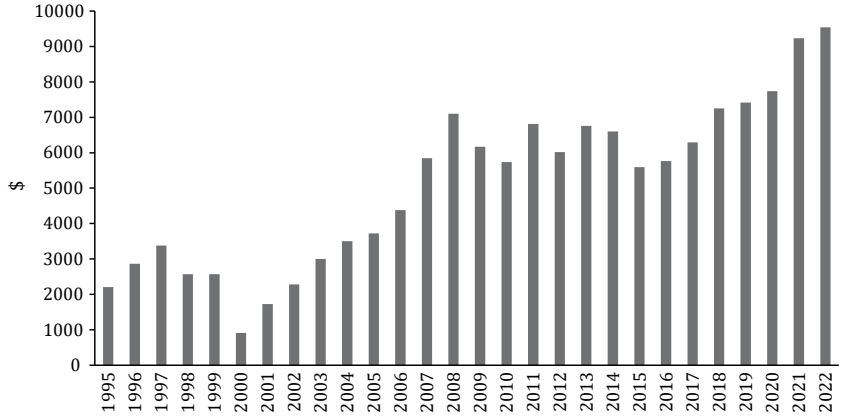
In order to perceive the development of the air transport market in Serbia during the 2000–2023 period, the air passenger profile, segments, and their evolution are analyzed. This analysis examines how air passenger profiles changed over time driven by the regulatory environment, competitive landscape,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

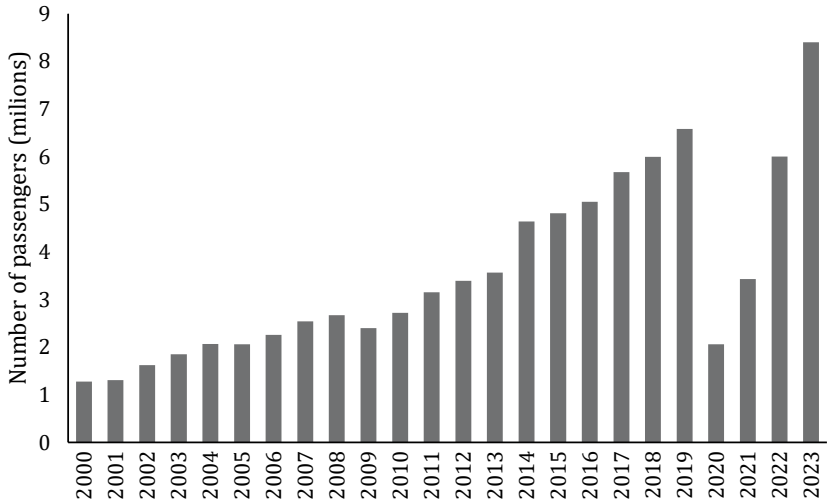
It is worth noting that the GDP per capita in period 1995 to 2000 was between USD 2,207 and USD 3,380. The GDP per capita in the late 1990s was approximately three times lower than the GDP per capita in 2022.

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).

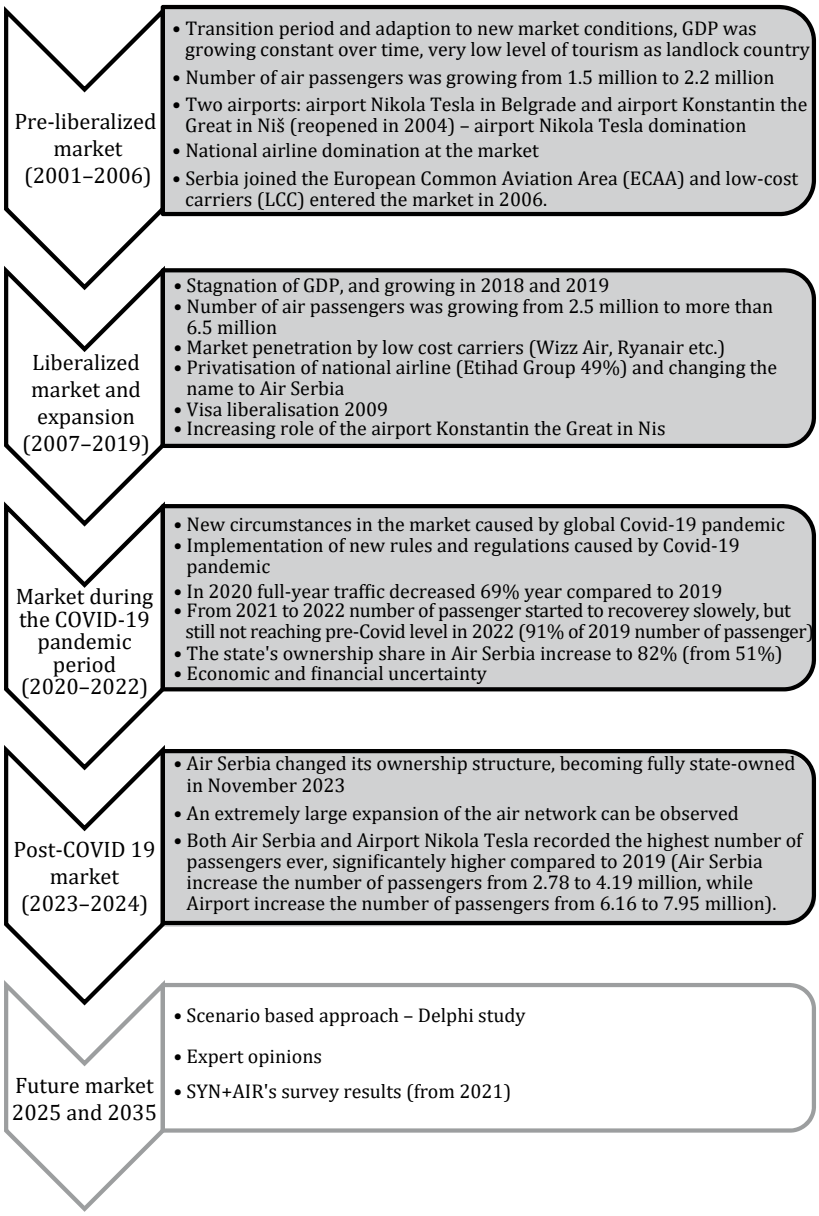
3. METHODOLOGY AND OBSERVED PERIOD

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

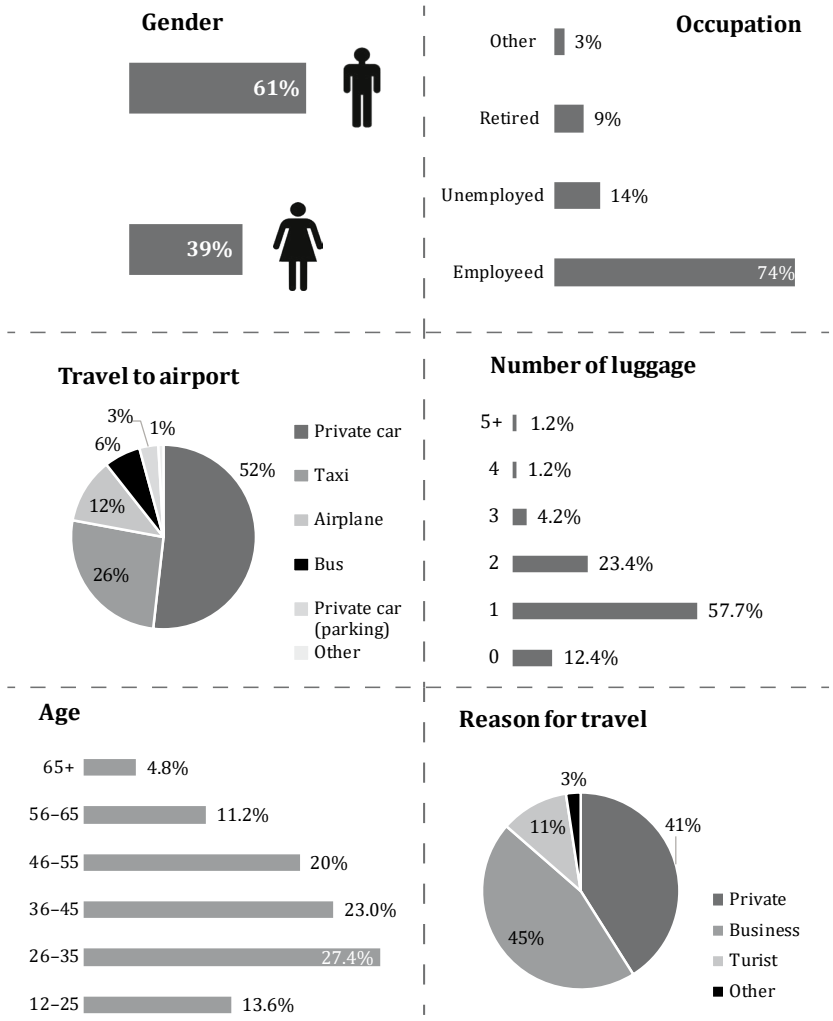
[2] The national airline was known as Yugoslav Airlines (JAT) until 2003, when its name was changed to Jat Airways. Following the partial privatization of the national airline in 2013, it was renamed Air Serbia.

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.

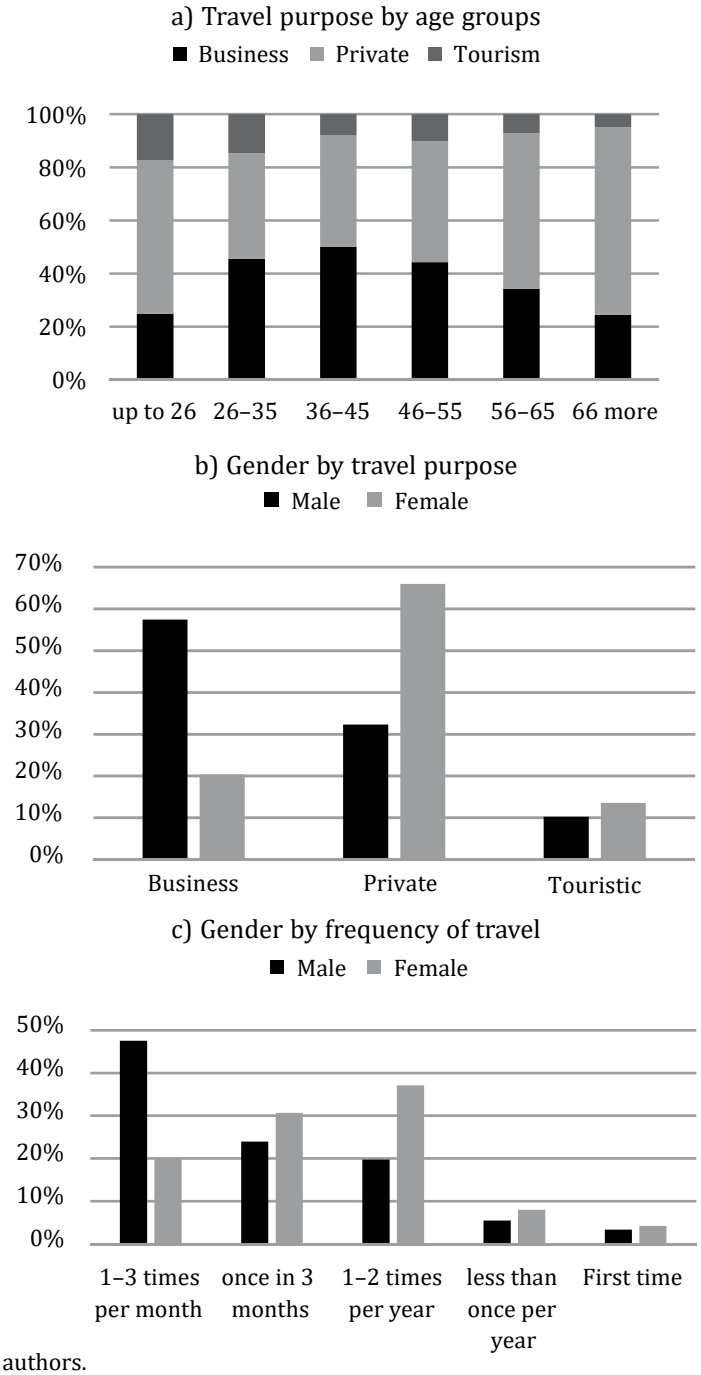
Additional analysis were done to profile passenger segments and to gain a more detailed picture of the market. The selected cross-tabulation based on the data from a survey conducted in 2006 at the airport in Belgrade (1,023 responses) are presented to demonstrate the differences between air passenger 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.

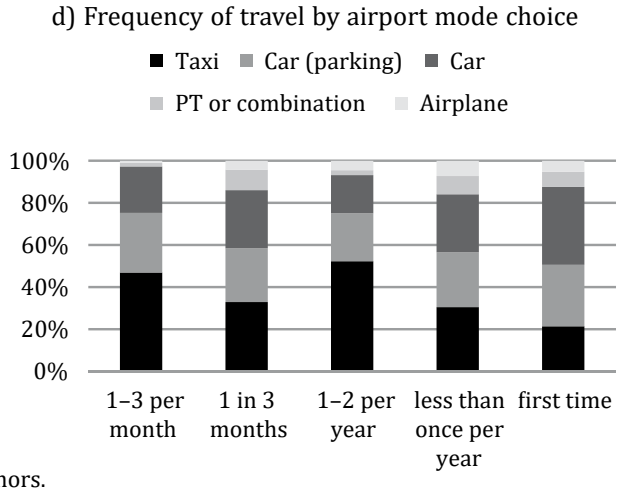
The comparison between different age groups of respondents and their travel purpose is presented in Figure 5a, from which it can be concluded that people aged 56 and older mostly travelled for private and then business purposes. People aged between 46–55 travelled for private and business purposes equally.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

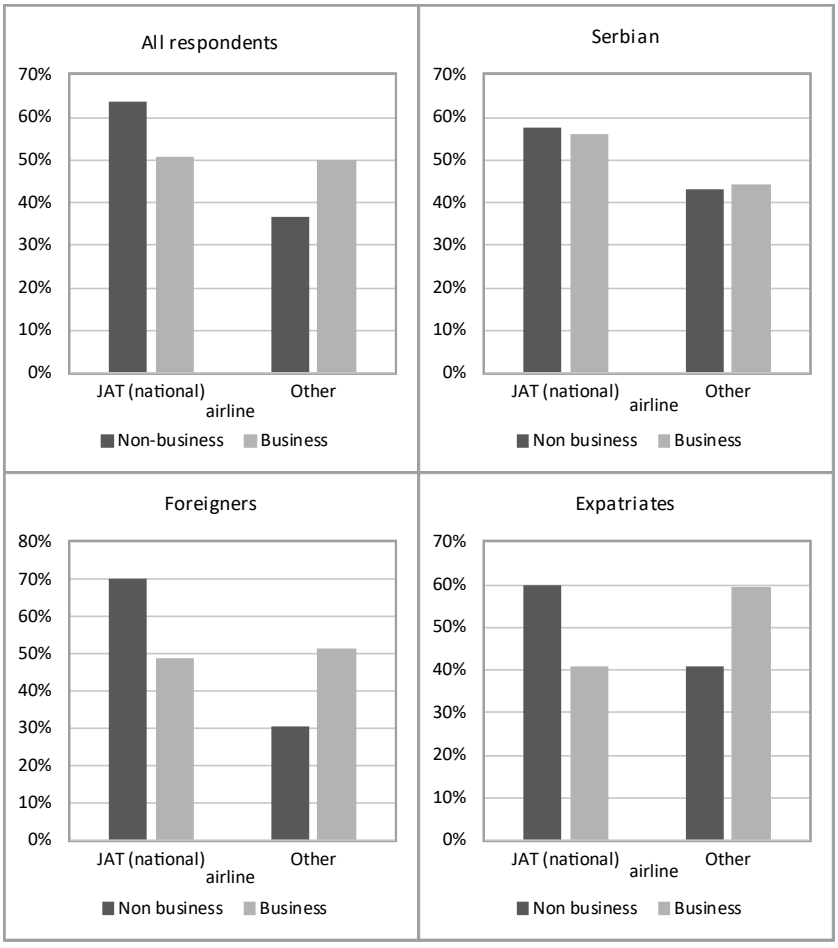
Business and private travelers came to the airport mostly by car (someone drove them to the airport), followed by taxi and plane. Business passengers more often left their cars in the airport parking compared to the passengers who traveled privately. Both used the Yugoslav Airlines/JAT Airways bus service 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.

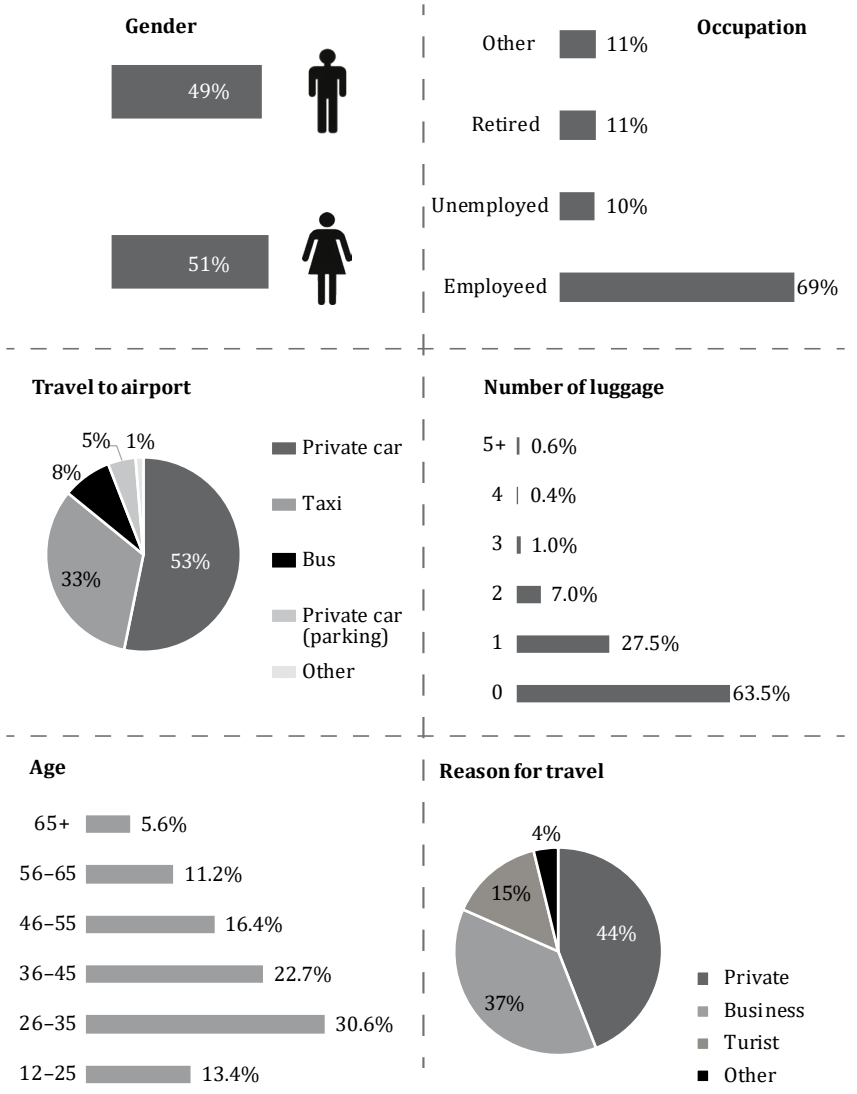
All these changes positively affected airport activity growth in Serbia. The number of passenger at Nikola Tesla Airport rose to 6.1 million in 2019. This was driven by the introduction of a larger number of new routes at more affordable prices. Along with Air Serbia, the Belgrade Airport also became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

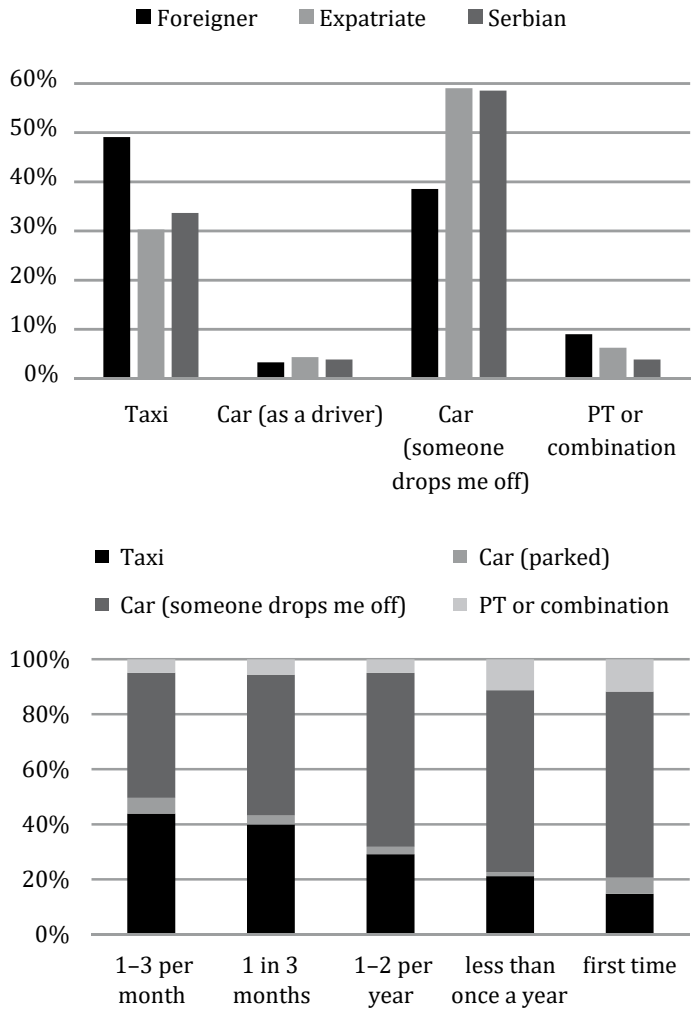


Source: authors.

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)

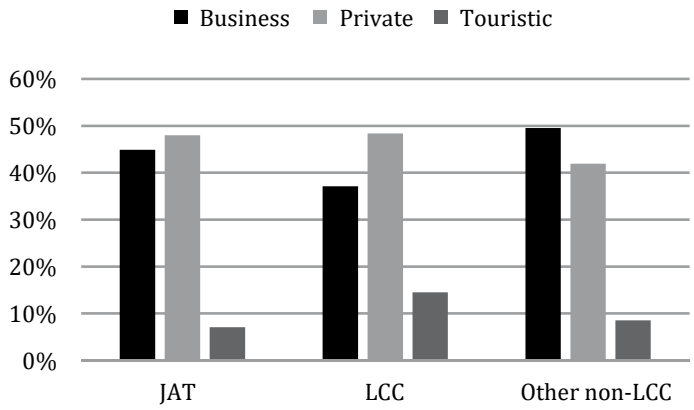
Travel purpose				
Airport access mode choice	Business Count (% within airport access mode choice)	Private Count (% within airport access mode choice)	Tourism Count (% within airport access mode choice)	Total Count (% within airport access mode choice)
Taxi	308 (57.4%)	189 (35.2%)	40 (7.4%)	537 (100%)
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%)

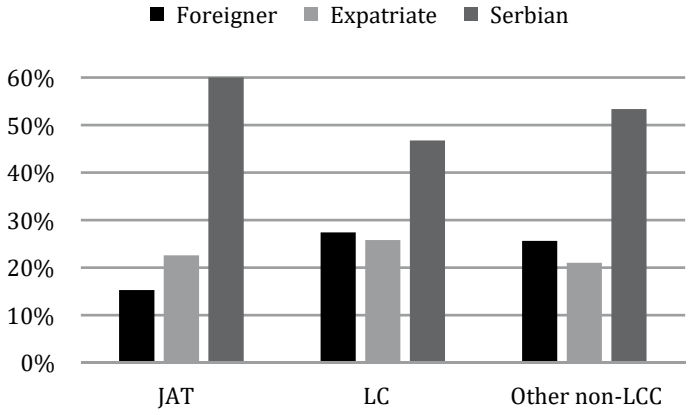
3	49 (55.1%)	33 (37.1%)	7 (7.9%)	89 (100%)
4+	51 (56%)	27 (29.7%)	13 (14.3%)	91 (100%)
Travel purpose by group size cross-tabulation: χ^2 (6, N = 1475) = 46.010[a], p-value <.0001, a: 0 cells (0.0%) have an expected count of less than 5. The minimum expected count is 7.42.				
Citizenship	Business Count (% 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



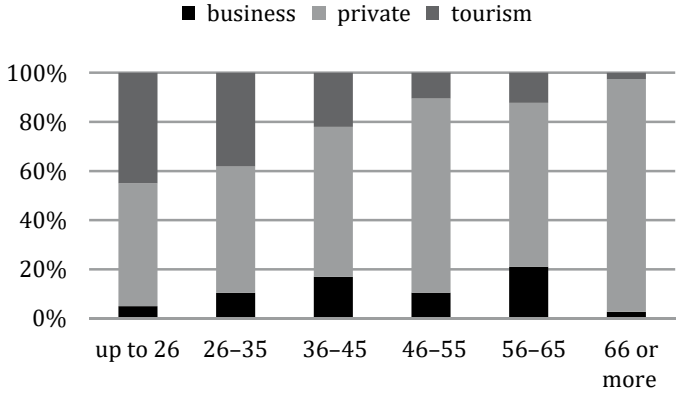


Source: authors.

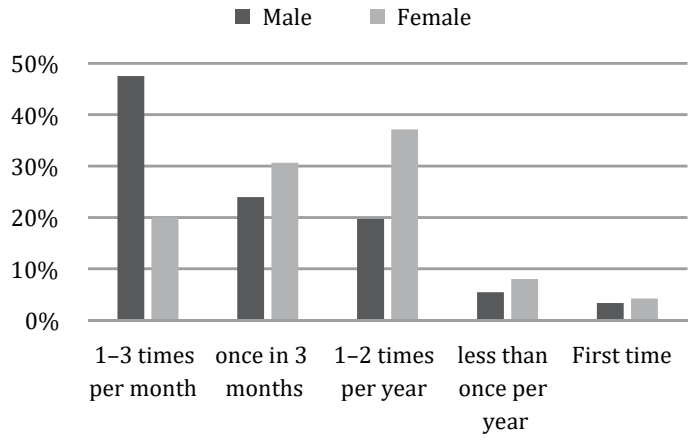
The last part of the in-depth analysis of the Serbian market's air passenger attitudes and behaviors during the 2007–2019 period is related to the data obtained from the survey conducted in 2017 at the Niš Airport. This airport is a regional one, intended mostly for LCCs, which led to the creation of 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

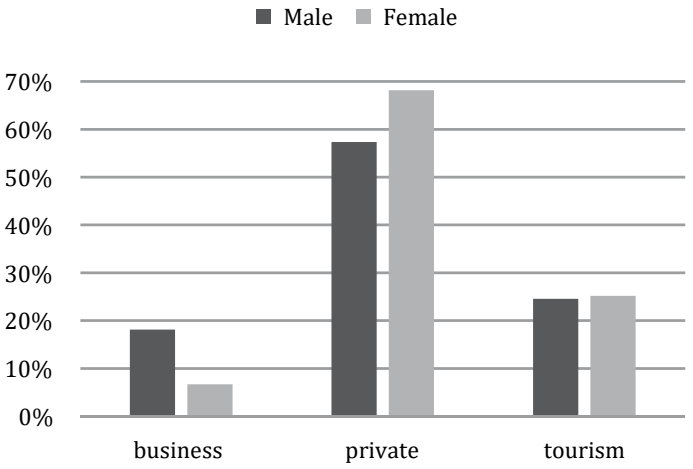
a) Travel purpose by age group

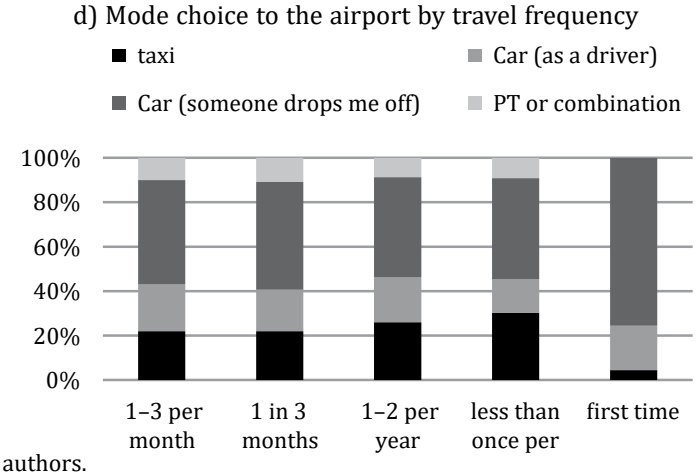


b) Gender by travel frequency



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)

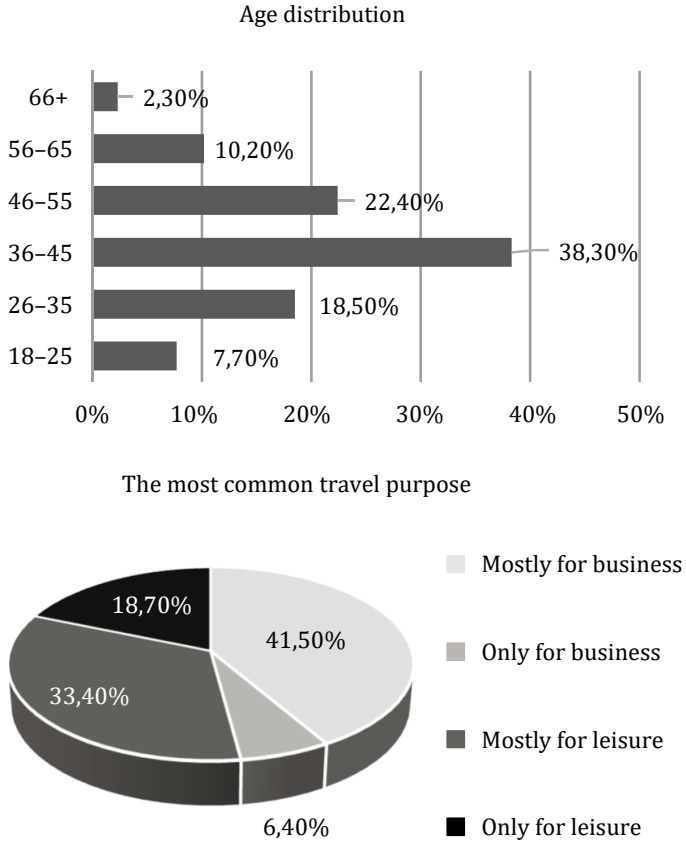
As has already been mentioned, the survey was conducted online due to the COVID-19 restrictions. The questionnaire consisted of three parts: Mobility Profile, Travel Preferences in 3 different hypothetical scenarios, and Sociodemographic Profile (Kukić *et al*. 2021; Colovic *et al*. 2022; Babić *et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

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[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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БЛАНКО МЕНИЦА КАО СРЕДСТВО ОБЕЗБЕЂЕЊА ПОТОШАЧКОГ КРЕДИТА

У раду се разматра смисао употребе бланко менице као средства обезбеђења потрошачког кредита, а истовремено се сумња у њену сврху као средства обезбеђења таквог кредита. Полазна хипотеза је обесмишљеност бланко менице као средства обезбеђења, при чему се указује да се она састоји у томе што је исто лице дужник по два основа – меници и уговору о кредиту. Штавише, то исто лице је, суштински, јемац самоме себи тако што потписом на бланко меници јемчи за свој дуг из уговора о потрошачком кредиту.

Таква поставка делује таутолошки, с обзиром на то да једно лице по два правна основа а истом имовином јемчи за своје испуњење обавезе у основном послу. У томе се, управо, састоји бесмисао употребе бланко менице као средства обезбеђења. Да би, као таква, збиља представљала средство обезбеђења, нужно је да се уз потпис корисника кредита на њој појаве и потписи авалиста. У супротном, таква меница није средство обезбеђења.

Кључне речи: *Бланко меница. – Потрошачки кредит. – Апстрактност. – Алеаторност.*

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1. УОЧАВАЊЕ ПРОБЛЕМА

Имајући у виду пословну праксу банака да од корисника кредита као средство обезбеђења потрошачког кредита без изузетка захтевају потписану бланко меницу, чини се неопходним критички размотрити такву појаву, њену оправданост, тачније корисност, и правну важност. Треба анализирати употребљивост такве менице за пословну банку, али и ризичност потписа корисника кредита на исправи која би у будућности могла да фигурира као меница. Основну хипотезу рада, управо, чини правни бесмисао употребе бланко менице као средства обезбеђења, а бесмисао се уочава не само на страни банке као корисника таквог обезбеђења већ и на страни примаоца кредита као даваоца обезбеђења.

Посматрано из угла банке као давоца кредита и примаоца средства обезбеђења у виду потписане бланко менице, правни бесмисао се састоји у томе што суштински као поверилачка страна не стиче ни у чему бољи положај. Смисао бланко менице је у томе да се попуни у складу са овлашћењем (уговором) о попуни ако се посао који обезбеђује не испуни на очекиван начин. То у случају потрошачког кредита значи да је банка овлашћена да попуни бланко меницу са осталим битним састојцима и износом који одговара неврaћеном дугу из таквог кредита. Међутим, банка тиме не побољшава свој положај јер је према клијенту у скоро истом правном положају као и када нема меницу. Између њих (конкретног клијента и банке) не дејствује менична апстрактност и сви приговори које је клијент могао да упути банци по основу уговора о кредиту опстају и као менични приговори ако би банка попунила меницу у складу са тим уговором (о кредиту). Ако је банка не би попунила у складу са тим уговором, онда би клијент стекао додатни приговор непопуне бланко менице у складу са овлашћењем за попуну и уједно указао на банчину несавесност (В. Јовановић 1958, 342). Дакле, ако клијент нема новчаних средстава да врати кредит који му је дат, положај банке је практично исти и постојање (непостојање) менице као средства обезбеђења не утиче на његово побољшање. Она према клијенту не би могла да се намири јер он новца нема. Додуше, чињеница је да јој претходно попуњена бланко меница, као веродостојна исправа, омогућава употребу скраћеног извршног поступка, али се тиме у стварности положај банке не побољшава ако клијент нема новчаних средстава на банкарским рачунима (Николић 2020, 281 и даље). Употребом такве попуњене менице у скраћеном извршном поступку банка стиче само додатно процедурално право на промптност, брзину принудног остварења свог права, али ако клијент нема новчаних средстава на текућем (динарском или девизном) рачуну, такво

додатно право се чини бесмисленим јер је неупотребљиво. Тачније, не постоји објект, новчана маса спрам које би се остварило, а сама меница не доноси нову вредност као средство обезбеђења ако нема имовине на коју би се она могла ослонити, реферисати у извршењу, односно у остварењу меничног, поверилачког права.

С друге стране, положај кредитног дужника који враћање кредита обезбеђује потписаном (бланко) меницом може се значајно погоршати злоупотребом такве хартије од вредности у настајању. Потписивање меничног обрасца без осталих битних меничних састојака и саме суме на том обрасцу води потписника у неизвесност и неодређеност. Он је, наиме, у ситуацији да чека начин и време даље употребе таквог обрасца (који је он потписао), а које зависи у меничном смислу само од имаоца, тачније држаоца таквог обрасца, а не и од потписника. Иако је смисао бланко менице да буде попуњена у складу са овлашћењем које потписник даје њеном држаоцу, такав држалац, ипак, може да одступи од таквог овлашћења прекорачивши га или се уопште не осврћући на њега и да попуни меницу према нахођењу (Allcock 1982, 21). Наравно, таквој меници би њен потписник могао да приговори, али само ако би њен држалац био његов непосредни поверилац (банка као уговорна страна из уговора о кредиту) или неко друго несавесно лице које је знало за такво одступање од овлашћења за попуну. У супротном ће потписник меничног обрасца, односно бланко менице морати да трпи такво погрешно попуњавање (најпре меничне своте) у садејству са савесношћу другог стицаоца менице.

Како би се хипотеза о бесмислу или чак непотребности коришћења такве бланко менице као средства обезбеђења кредита потврдила или оповргла, неопходно је функционално размотрити уговор о потрошачком кредиту и бланко меницу, њихове правне режиме и могућности злоупотребе. Након такве анализе, моћи ће да се изведе закључак о смислу и потреби такве менице у настајању као подршци и обезбеђењу основног посла потрошачког кредита.

2. ПОЈАМ И ПРАВНО ОДРЕЂЕЊЕ ПОТРОШАЧКОГ КРЕДИТА

2.1. Појам

Уговор о потрошачком кредиту представља посебну врсту, варијанту класичног уговора о кредиту, имајући у виду, пре свега, својства уговорних страна и поједине друге састојке таквог уговора (Brown 2019, 155–157). Тако, уговор о потрошачком кредиту се закључује између

професионалног трговца, с једне стране (банке или платне институције), и физичког лица које има својство потрошача, с друге стране.[1] Основна сврха потрошачког кредита је повећање куповне моћи корисника кредита (Васиљевић 2012, 362).

Од других одлика које потрошачки кредит чине посебном врстом у односу на класични кредит, издвајају се рок, врсте обезбеђења и сам износ.[2] Тако, правилност је да потрошачки кредит не буде предмет уговора у коме је рок враћања дуга дужи од пет година. То, дакле, упућује на својеврсну краткорочност потрошачког кредита (ако се има у виду средњорочност и дугорочност стамбених, хипотекарних и инвестиционих кредита).

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[1] *Објашњење*: Сама чињеница да се уговор о потрошачком кредиту закључује између неравноправних страна указује на потребу правне заштите стране која је слабија. У случају таквог кредита, страна је слабија по два основа – прво, као физичко лице, непрофесионалац, нетрговац, а друго, као лице које, спрам банке, као даваоца кредита, нема иста знања о банкарској делатности. Могуће је разликовати две врсте корисника кредита – потрошача. Прво, оне који су у стању колико-толико да заштите своја права – тзв. просечни потрошачи, и друге који то нису – тзв. рањиви потрошачи (Brown 2019, 122). Историјски, до половине 20. века, корисници банкарских услуга су у већем обиму били привредници, професионални трговци, а мање обични грађани. У савременом распореду односа, скоро 90 процената одраслог становништва има неки облик односа са банком (услужни, кредитни или депозитни). Због тога се створила удаљеност у знањима и економском положају између банке и корисника услуга и потреба за заштитом слабије уговорне стране (Elinger, Lomnicka, Hare 2011, 115). Отуда, у српском праву постоји посебан пропис, Закон о заштити корисника финансијских услуга, али и у Европској унији низ директива које су посвећене потрошачком кредиту, односно заштити корисника таквог кредита као слабије уговорне стране. Упор. Закон о заштити корисника финансијских услуга, *Сл. гласник РС* 35/2011 и 139/2014 и Директива ЕУ 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*), Директива ЕУ 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*) и Директива ЕУ 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] Директивом ЕУ 2023/2225, којом је на нивоу Европске уније уређен потрошачки кредит, предвиђено је да се неће применити на кредите који имају, у основи, одлике потрошачког, али чији износ премашује 100 хиљада евра. Изузетно, износ потрошачког кредита може да буде већи од 100 хиљада евра ако је узет наменски за обнову домаћинства (куће, стана), а да при томе није обезбеђен стварним правом (хипотеком) на том домаћинству које је предмет обнове. Вид. Директива ЕУ 2023/2225, чл. 2, ст. 2, тач. c; чл. 2, ст. 3.

С друге стране, у погледу средстава обезбеђења, потрошачки кредит одликују посебно прилагођена средства обезбеђења попут јемства (у колоквијалном дискурсу чувени „жиранти“), административне забране и менице (најчешће бланко са трасираним или сопственим меничним изразом).[3] То значи да се у уговору о потрошачком кредиту не употребљавају, по правилу, стварна средства обезбеђења (попут хипотеке или ручне залоге), иако такву могућност не би требало искључити нарочито када је у питању регистрована залога на покретним стварима.[4] Најзад, осигурање (кредита) као врста обезбеђења појављује се неретко и истовремено са бланко меницом када давалац кредита процени да постоји повећан ризик неврaћања потрошачког кредита (најчешће је то случај са старијим генерацијама потрошача попут пензионера или другим потрошачима за које банка процени да бланко меница као средство обезбеђења није довољна).

2.2. Правно одређење

Уговор о потрошачком кредиту се закључује, како је већ поменуто, између трговца, с једне стране, и физичког лица – нетрговца, којем је новчани износ кредита потребан због задовољења неких својих, речју,

[3] Једна од ретких држава у свету која изричито искључује употребу менице као средства обезбеђења потрошачког кредита је Федерација Босне и Херцеговине (Петрић 2006, 109). Могуће је да је до таквог радикалнијег решења законодавац Федерације БиХ дошао услед угледања на законодавца Европске уније који је у једном тренутку уређивао могућност да меница буде средство обезбеђења потрошачког кредита. У доцнијим верзијама прописа којима се уређује потрошачки кредит уклоњена је норма која се односи на меницу, чиме је створена својеврсна недоумица да ли је такво средство обезбеђења могуће (иако није уређено више) или је потпуно искључена његова употреба (попут забране у БиХ). Упор. Директива ЕУ 87/102, чл. 10 и Директива ЕУ 2008/48 лк. 5, ст. 1, тач (n) и Директива ЕУ 2023/2225, чл. 21, ст. 1, тач. (o) и Закон о заштити потрошача у Босни и Херцеговини, *Сл. гласник БиХ* 25/2006 и 88/015, чл. 62, ст. 2. С друге стране, у Републици Србији је могућност употребе менице као средства обезбеђења потрошачког кредита изричито могућа на основу Закона о заштити корисника финансијских услуга, *Сл. гласник РС* 35/2011 и 139/2014, чл. 17, ст. 8.

[4] О различитим средствима обезбеђења, а нарочито о јемству, залози и хипотеци, постоји разноврсна правна књижевност (Хибер, Живковић 2015, 138 и даље, 225 и даље и 275 и даље; Cranston, Avgouleas, van Zwieten, Hare, van Sante 2017, 544 и даље).

потрошачких потреба које се не своде на профитабилност.[5] Основна чинидба банке се састоји у стављању на располагање одређене суме новца (непосредном предајом суме новца или омогућавањем њеног коришћења путем текућег рачуна), док се основна чинидба корисника кредита састоји у враћању суме новца која му је претходно дата и плаћању накнаде, цене за њено коришћење у виду камате. Уговор о потрошачком кредиту представља формалан, двостранообавезујући, именован посао, са средњорочним трајањем испуњења чинидаба, комутативан и теретан.[6] У погледу правне природе, у основи је уговор о зајму са посебношћу у виду врсте предмета и субјекта даваоца. Тако се као предмет појављује само новац (дакле, не и друге телесне, покретне заменљиве ствари), а као давалац банка или други, посебан субјект који је за такве послове овлашћен од централне банке (Јовановић, Радовић, Радовић 2021а, 466).

2.3. Обезбеђење потрошачког кредита

Како је већ уочено, правилност је да уговор о потрошачком кредиту није обезбеђен стварноправним средствима обезбеђења попут хипотеке или било ког другог облика залоге, укључујући и ручну. Потрошачком кредиту су својствена лична средства обезбеђења попут јемства или авалиране менице, а у савременом банкарском пословању преовлађује употреба бланко меница и административне забране као средства обезбеђења (Јанковец 1999, 609–610).[7]

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[5] У питању је, дакле, посебна врста наменског ванпривредног кредита која је намењена искључиво физичким лицима (Јанковец 1999, 609). С друге стране, позитивно српско законодавство корисником таквог кредита одређује не само класично физичко лице без привредне делатности већ и физичко лице које је предузетник или пољопривредник (Јовановић, Радовић, Радовић 2021а, 467).

[6] Посебно важна особина таквог потрошачког кредита јесте да се закључује техником уговора по приступу. То има последицу на сужавање простора за изражавање корисникове воље те њено свођење на пристанак или одустанак (енг. *take it or leave it*). Основна учења о уговорима по приступу у српској правној књижевности пружио је професор Борислав Т. Благојевић (Благојевић 2013, 39 и даље).

[7] *Напомена*: У раду се обрађује меница као традиционално средство обезбеђења, односно посматра се као средство које доприноси повећању вероватноће намирења основног, обезбеђеног потраживања. Насупрот средствима обезбеђења постоје средства учвршћења облигација, која имају циљ

Јемство је једнострана формализована изјава трећег лица којом се обавезује да ће вратити пуноважни дуг главног дужника.[8] Зависно од тога да ли је супсидијарно (какво се претпоставља у грађанскоправним односима) или солидарно (какво се претпоставља у трговинскоправним пословима), јемац се обавезује да ће испунити обавезу главног дужника ако је он претходно не изврши или чак једновремено са њим (у случају солидарног јемства).

Авалирана меница као средство обезбеђења је (најчешће сопствена) меница коју је издао корисник кредита, а за испуњење меничне обавезе је, на самој меници (најчешће на њеном лицу), јемчило неко треће лице – менични авалиста. Авалирана меница је, дакле, средство обезбеђење кредита у коме је корисник кредита већ претходно издао меницу у корист банке, а испуњење меничне обавезе је потврдило, гарантовало, јемчило неко треће лице (треће у погледу основног посла потрошачког кредита између банке и корисника), поставши менични авалиста.[9]

да „помогну повериоцу у случају неуредности или недисциплине дужника“ у испуњавању облигације, али не и да повећају вероватноћу њеног намирења (Хибер, Живковић 2015, 17–18).

[8] Опширније о јемству као средству личног обезбеђења писали су професори Правног факултета у Београду (Хибер, Живковић 2015, 275 и даље).

[9] Положај меничног авалисте у таквом распореду односа је, чини се, истоветан положају меничног издаваоца, корисника кредита, имајући у виду пре свега меничне приговоре које може да истиче према меничном повериоцу (Јанковец 1999, 700). То делује и логично јер се тиме давалац кредита обезбеђује обавезом још једног лица, авалисте, са додатним процедуралним предностима које меница као вредодостојна исправа има, али не добија више права него што има према лицу за које се авалира (хонорату у меничној терминологији). Вид. Закон о меници – ЗМ, *Сл. лист ФНРЈ* 104/46, *Сл. лист СФРЈ* 16/65, 54/70, 57/89, *Сл. лист СРЈ* 46/96, *Сл. лист СЦГ – Уставна повеља* 1/2003, чл. 31, ст. 1. С друге стране, постоји супротно тумачење да авалиста, иако, начелно, има истоветан положај као хонорат, ипак нема право да истиче приговоре које би могао да истиче хонорат (Јовановић, Радовић, Радовић 2021а, 643). Ако би се на основу таквог тумачења применила установа авала као јемства потрошачком кредиту, онда би кредитор имао бољи положај јер би у случају неврћања кредита могао да има самостално, апстрактно и пуно менично право према авалисти. При томе, остваривање кредиторовог меничног права не би било угрожено приговорима које, по меници, према њему има корисник кредита (представљен као издавалац у меници). Чини се да се тиме, у контексту потрошачког кредита, ствара додатна неравноправност и побољшава положај даваоца кредита јер му се, у садржинском, материјалноправном смислу, даје додатак на право које има према кориснику кредита представљеном у меници као издаваоцу. Додатак кредиторовом праву се састоји у томе што по квалитету добија више постојањем таквог авалисте у односу на положај корисника кредита. Конкретно и упрошћено, ако је корисник кредита у износу од 1 милион динара, као издавалац менице вратио, на пример, 700 хиљада динара, онда би он као издавалац могао да

Административна забрана је својеврсна техника умањења зараде коју послодавац чини запосленом са његовим пристанком. То је, наиме, анахрона установа и реликт времена друштвене својине и државних предузећа у којима су таква предузећа представљала продужену руку државе у организацији друштвених односа (Uzelac, Zeljko 2022, 56–57). Запослени који би закључио уговор о кредиту са банком као средство обезбеђења би пружао административну забрану, односно својеврсни додатни уговор између њега и послодавца на основу кога се послодавцу даје право да умањи део зараде у висини месечне рате кредита. Послодавац се, истовремено, обавезује да ће то учинити сваког месеца и тако омогућити кредитору да намири своје месечно потраживање. Важно је уочити да таква послодавчева обавеза (обећање банци) не представља јемство нити гаранцију (попут оне коју дају банке) као вид једностране изјаве воље послодавца учињене према и у корист банке већ само једну техничку радњу умањења месечне зараде запосленом који је у том распореду односа још и корисник кредита. На тај начин, послодавац не може да буде, у крајњем исходу, одговоран према банци ако није успела у конкретном месецу да намири своје месечно потраживање по кредиту јер су према запосленом постојала нека приоритетнија потраживања (обавеза по основу законског издржавања, на пример).[10] Дакле, административном забраном као техником обезбеђења потрошачког кредита запослени се онемогућава да располаже делом зараде која је у висини месечне рате кредита. Из перспективе банке, као даваоца кредита, она представља само средство којим се омогућава да се банка намири на том обустављеном делу зараде. Послодавац се, дакле, не обавезује да ће банци као кредитору запосленог исплатити износ месечне рате кредита већ само да ће у ту сврху умањити износ месечне зараде свом запосленом и тако, посредно, омогућити кредитору да оствари своје месечно потраживање.[11]

истакне меничном повериоцу свој лични приговор да је исплатио 700 хиљада и да дугује само 300 хиљада динара. Ако би у меници био уписан износ од 1 милион динара, онда авалиста, према таквом, за кредитора повољнијем тумачењу, не би могао да истакне приговор који би могао његов хонорат (корисник кредита, а издавалац менице) да је већ враћено 700 хиљада кредитне суме. На тај начин би се менични авал учинио неоправдано самосталним (неакцесорним) обликом јемства. Врховни касациони суд, Рев. 1367/2021 од 24. новембра 2022.

[10] Закон о извршењу и обезбеђењу – ЗИО, *Сл. гласник* 106/2016, 113/2017, 54/2019, 9/2020, 10/2023, чл. 297.

[11] Административна забрана може да се учини унеколико сличном са цертифицираним чеком јер у оба случаја долази до „блокирања", резервисања, чувања средстава дужника на банкарском текућем рачуну у сврху плаћања дуга. Међутим, разлика је у томе што се код цертифицираног чак приликом

Најзад, као средство обезбеђења потрошачког кредита користи се и сама бланко меница. За разлику од јемства и меничног авала у коме се трећа лица појављују као лични „гаранти“ враћања кредита, бланко меница, слично као и административна забрана, не уводи трећа лица као додатне „гаранте“ испуњења обавезе већ банка пред собом има истог, једног, дужника који се, у случају бланко менице, прецедурално чини поузданијим дужником због менице као веродостојне исправе.

3. БЛАНКО МЕНИЦА КАО СРЕДСТВО ОБЕЗБЕЂЕЊА ПОТРОШАЧКОГ КРЕДИТА

3.1. Појам

Бланко меница (нем. *Blanko Wechsel*) представља хартију од вредности у настајању јер у тренутку њеног издавања нису попуњени сви битни састојци, али постоји садржина основног посла из које се може са извесношћу закључити како ће бити одређени и попуњени састојци који недостају (Assies 2002, 52).[12] Израз издавање бланко менице треба

поступка „блокирања“ клијентовог новца на рачуну банка једнострано обавезује чековном повериоцу да ће та блокирана средства сачувати до тренутка подношења чека на исплату. Разлика је, дакле, у томе што се код цертифицираног чека банка која блокира клијентова средства са циљем наплате чека, заправо, једнострано обавезује по чеку, као чековни дужник. Супротно, у случају административне забране, послодавац који „блокира“ део зараде запосленог чини то само технички, не и правно, јер се не обавезује банци, као повериоцу запосленог, да ће му ту месечну рату кредита и исплатити. Више о цертифицираном чеку су писали професори Правног факултета у Београду (Бартош, Антонијевић, Јовановић 1974, 226; М. Радовић 2016, 183–185; Јанковић 2018, 59).

[12] Чини се да је најтачније правно одређење бланко менице пружила М. Радовић указавши да је реч о приватној исправи са речју меница на себи, у коју нису унети битни менични састојци већ постоји само потпис и намера меничног обавезивања лица које је сачињава (Јовановић, В. Радовић, М. Радовић 2021а, 659). Због тога се може закључити да бланко меница није меница већ само исправа, хартија од вредности у настајању, у коју ће, евентуално, бити уписани менични састојци у складу са намером њеног издаваоца. У том смислу, чини се да је исправно одредити такву исправу само терминолошки као меницу јер она то у том одређењу, без битних састојака, није меница већ само могућност да то и постане. Таква исправа представља само потврду њеног потписника да жели да се обавеже менично, али не и готову, потпуну меницу (Jacobi 1956, 477–478). Тек попуном битних састојака таква исправа „достиже“ квалитет да буде одређена меницом, а сама попуна се врши у складу са уговором о попуни, односно основним послом који је претеча таквој исправи. Међутим, чини се да је правилније одредити да се попуна недостајућих битних

тумачити у контексту начина њене употребе (Büdiger 1934, 181). У том смислу, издавање се своди на предају потписаног празног меничног обрасца са намером обезбеђења испуњења обавезе из основног посла и уједно овлашћивање на попуну таквог обрасца са састојцима који су у складу са тим послом.[13] Предајом таквог потписаног обрасца се, из меничноправног угла посматрано, изричито, намерно пропушта унос битних састојака у меницу, док се њен ималац прећутно овлашћује да је складно предменичном договору попуни ако за то буде било потребе (Јанковец 1999, 694). Конкретно, банка има то право у случају када корисник не врати кредит.

Бланко меница, као институт, није потпуно законски уређена већ је настала из потребе пословне праксе. Једино правило које се на њу односи и отуда јој даје, уопште, појмовну могућност да као таква постоји односи се на накнадну попуну битних састојака који нису били присутни на обрасцу приликом издавања. Правилом о накнадној попуни такве бланко менице тежи се складу са апстрактношћу и самосталношћу у меници на начин да ће претходно непопуњена меница имати правну важност када се доцније попуни, па чак и ако су битни састојци попуњени супротно овлашћењу на попуну (Јанковец 1993, 640–642). Једино ако су такви састојци попуњени несавесно, односно када је ималац знао да су састојци унети у образац супротно или другачије од овлашћења, односно основног посла, моћи ће да се истакне приговор да тако попуњена не може да има правно дејство.[14]

састојака врши у складу са намером потписника исправе, а не у складу са уговором који представља само правни облик за изражавање потписникове намере и уједно давања овлашћења другој страни да попуну учини према потписниковој намери (али, уједно и у попуниочевом интересу). Основ такве тврдње се налази у томе да је менична обавеза у основи увек једнострана изјава воље, а не и уговор (Васиљевић 2012, 471).

[13] Бланко меница као појмовна одредница настала је као последица примене теорије пропуштања (теорија омисије), а насупрот теорији јединствене попуне (лат. *unitu actu*) према којој су у тренутку издавања морали да буду попуњени сви битни менични састојци, па чак и једним рукописом и мастилом (Јанковец 1999, 694).

[14] *Анализа прописа*: правило које на крњи, оскудан начин уређује бланко меницу установљено је још у Женевском једнообразном меничном закону из 1930. године, а преузела су га дословно национална законодавства која припадају женевском меничном кругу, међу њима и Србија и Немачка. Интересантно је да су законописци држава потписница Женевске меничне конвенције дословно преписали и превели то правило, не желећи да га прилагоде свом правном систему или евентуално учине јаснијим и лакшим за примену. Тако, израз у српском Закону о меници „*...осим ако ју је стекао зломислено или је при стицању менице поступио са великом немарношћу*“ указује на ускраћивање (негацију) права која би ималац тако неваљано попуњене менице иначе имао

3.2. Функционисање бланко менице

Бланко меница има распрострањену примену као средство обезбеђења потрошачког кредита на начин да корисник кредита потписује менични образац и предаје га банци, а банка има право да попуни тај образац у складу са уговором о кредиту ако корисник не врати кредит на уговорени начин. То значи да је банка као давалац кредита овлашћена не само да попуни битне састојке већ и да у меницу унесе и своту која одговара невраћеном износу потрошачког кредита. Такво овлашћење банка је пређутно стекла кроз потписану исправу са назнаком менице која јој је предата, а у којој је пропуштен унос осталих битних меничних састојака. Садржина овлашћења је одређена према основном послу, тачније према чинидби потписника меничног обрасца из уговора о потрошачком кредиту.

Тако, бланко меница ће бити попуњена ако корисник кредита и уједно потписник такве менице не врати кредит о доспелости или макар неки део своје уговорне обавезе. Тада ће банка попунити бланко меницу састојцима који свој извор имају уговор о кредиту и сумом новца која у свом износу одговара невраћеном делу кредита и евентуално припадајућих камата. У супротном, ако би потписник меничног обрасца вратио кредит, онда би банци престало да важи овлашћење на попуну такве исправе (тачније, допуну раније започетог уноса меничних састојака) и створила би се обавеза враћања таквог, потписаног обрасца.

Функционисање бланко менице има, дакле, два односно три могућа сценарија. Први, уколико корисник не врати кредит, банка ће попунити менични образац у складу са уговором о кредиту и овлашћењем на попуну недостајућих меничних састојака и износа своте невраћеног кредита, у том случају меничне обавезе. Друго, у случају да корисник врати

да је био савестан, односно да није знао да је тако попуњена. Делује да би правило било јасније и неспорније да је употребљен израз савесност која утиче на свест о могућности неваљане попуне или знање да је тако попуњена јер би тежиште таквог било управо на оном смислу који се имао у виду приликом стварања таквог правила. Истоветно наведеном изразу српског меничног закона је и правило у немачком меничном закону и поменутој Женевској меничној конвенцији (нем. *„...es sei denn, daß er den Wechsel in bösem Glauben erworben hat oder ihm beim Erwerb eine grobe Fahrlässigkeit zur Last fällt*“; енг. *„... unless he has acquired the bill of exchange in bad faith or, in acquiring it, has been guilty of gross negligence*“). Упор. ЗМ, чл. 16, ст. 2. и немачки Менични закон (нем. *Wechselgesetz*), art. 10, доступан на адреси: *https://www.gesetze-im-internet.de/wg/BJNR003990933.html*, 8. јануар 2024, и Женевски менични закон (енг. *Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes, Geneva, 7 June 1930*), par. 10.

кредит, банци престаје овлашћење на попуну и установљава се обавеза враћања потписаног меничног обрасца ревносном кориснику кредита. Трећи сценарио се односи на злоупотребу банчиног овлашћења када банка попуњава меничне састојке противно уговору о кредиту који обезбеђује таква исправа и прекорачењем својих овлашћења (Јанковец 1999, 695). То је случај када је корисник вратио један део кредита, а банка у меницу упише своту која одговара целини кредита или чак и већи износ, односно не упише износ на који је имала право које јој је дато прећутним овлашћењем потписника бланкета (Виђић 2014, 400–401). Тада долази до сукобљености основних меничних правила о њеној каузалности и апстрактности, односно релативности (лат. *inter partes*) и апсолутности (лат. *erga omnes*) а које јој, управо обезбеђују вредност трговачког папира у који правни систем има поверење дајући му одлику веродостојности.[15]

4. АПСТРАКТНОСТ И АЛЕАТОРНОСТ БЛАНКО МЕНИЦЕ

4.1. Апстрактност

Меница као приватна исправа представља врло строгу и формалну хартију од вредности која има својство веродостојне исправе, што јој омогућава, процедурално, знатно лакше остварење права која у себи садржи. Такво олакшано остварење права садржински потиче из меничне асптрактности јер је менично право, које је опредмећено у новчаној чинидби, изузето из контекста предменичних односа (Gursky 2007, 32). Назначена сума и распоред односа и лица назначених и потписаних у меници имају своју самосталност јер се из саме исправе не може спознати историјски оквир и разлог њеног настанка (Jacobi 1954, 275–276). У крајњем исходу, могуће је само наслутити, препознати, али не и извесно утврдити предменично порекло односа изражених на самој меници потписима и назначењима.

Према томе, менично право је отпорно на утицаје из предменичне средине, односно правно изражено, на њега није могуће утицати приговорима који имају свој основ у неком предменичном односу, то јест у основном послу (Јанковец 1993, 640). Једино одступање од такве апстрактности, а то истовремено представља и меничну каузалност,

[15] У сваком случају, предајом потписане бланко менице, као својеврсне неодређене и апстрактне гаранције, повећава се ризик њене злоупотребе (Bülow 2007, 294).

јесте случај односа између непосредних уговорника из основног посла (у предменичном односу) који су, у меничном нивоу односа, менични поверилац и дужник. Тада ће један према другоме моћи да улажу приговоре не само из менице (на шта указује њена апстрактност и апсолутност) већ и из њиховог међусобног, предменичног односа (на шта указује уско тумачена каузалност и релативност менице). Такође, несавесност имаоца менице ће за последицу имати каузалност, то јест релативизацију менице тиме што ће менични дужник моћи да му истиче приговоре из предменичних односа других меничних дужника.[16]

Имајући у виду какве обрисе менице представља бланко меница, може се закључити да је у њој апстрактност правних односа још више изражена. С обзиром на то да су пропуштени скоро сви битни састојци, осим потписа издаваоца и меничне назнаке, чини се да таква, потписникова обавеза на меници има одлику не само апстрактности већ и неодређености. Додуше, у односу на држаоца такве исправе, то јест банку, даваоца кредита, постоји каузалност и релативност односа. Но, ако би давалац кредита каоималац такве менице несавесно располагао њоме и пренео је трећем савесном лицу, тада би се уместо ускраћивања дејства апстрактности, што је, како је приказано, очекивана последица, јавила супротна последица. Менична апстрактност би тада, несавесном попуном и располагањем бланко меницом, појачала додатну отуђеност изворног потписника меничног обрасца од обавезе коју је планирао, то јест имао у виду потписивањем таквог обрасца. Чак би се и менична неодређеност (својствена бланко меници и не толико опасна када се користи у складу са овлашћењем и сврхом) изразила у њеном најнежељенијем облику, на пример, уписивањем знатно више суме него што је износ кредита који је потписник добио на почетку уговором о кредиту од банке.

Таквом, могућом злоупотребом бланко менице и несавесном, али несанкционисаном употребом механизама апстрактности у меници ствара се прилична правна несигурност и неизвесност не само за потписника (но највише за њега) већ и за цео правни и финансијски систем. Делује да се у таквом случају сама несавесност попуне бланко менице, правно ојачана и заштићена апстрактношћу, преображава у својеврсну алеаторност у меничном праву.

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[16] *Објашњење*: Такво правило је у складу са негаторним дејством начела савесности и поштења према коме се ускраћује правно дејство правилима на која би, иначе, имао право савесни ималац менице. Дакле, управо је својом несавесношћу ималац менице учинио да престане дејство и уопште механизам меничне апстрактности.

4.2. Алеаторност

Као што је већ уочено, попуна бланко менице је неизвесна, односно зависна од испуњења чинидбе из основног посла. Конкретно, код уговора о потрошачком кредиту, зависи од тога да ли ће корисник кредита (потписник меничног обрасца) испунити своју обавезу на враћање кредита и у којој мери. Тако, ако је не испуни или не испуни у целини, давалац кредита ће попунити бланко меницу састојцима и свотом која одговара невраћеном кредиту.[17] Међутим, могуће је да ималац бланко менице (давалац кредита) или пак неко треће лице на које меница буде пренета попуне меницу према свом нахођењу и даље је индосирају на савесно лице, тако да крајња последица буде опстанак такве, за изворног потписника бланко менице, непланирано велике (уопште другачије) обавезе.[18]

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[17] Управо таква ситуација одговара својеврсном осигураном случају (нем. *Sicherungsfall*) након чијег настанка се ствара банчино право на попуну и остварење менице која је до тада служила као средство обезбеђења (нем. *Sicherungsmittel*) (Gursky 2007, 37).

[18] *Објашњење*: У сучају када је бланко меница тако злоупотребљена од даваоца кредита као овлашћеног лица на њену попуну, она ће, како је уочено, опстати у дејству ако је изворни менични овлашћеник индосира на савесно лице (оно које није знало да је таква меница била раније бланко или које није знало да су њени састојци попуњени у супротности са споразумом и овлашћењем на попуну) (Prenkert *et al*. 2021, 32–38). Чини се да таква појава личи на правни режим меморандума у трговинским односима, али и на својеврстан агенцијски проблем (Boucher 1950, 103).

Најпре, неовлашћено лице може употребом меморандума, као пословног папира са отиснутим подацима о привредном субјекту, и симулацијом потписа овлашћеног лица да произведе ваљане правне последице у правном саобраћају само ако је лице коме је меморандум упућен савесно (Јовановић, В. Радовић, М. Радовић 2021а, 90–91). Таквим правилом се жели заштитити поверење у правни саобраћај, али и санкционисати трговац за немарност у чувању свог пословног папира. Тачније, трговац се оптерећује ризиком злоупотребе меморандума. Ако се таква правна ситуација упореди са бланко меницом, онда је сличност очигледна нарочито у делу у коме се пружа правно дејство злоупотребљеној односно неовлашћено попуњеној меници коју стекне савесно треће лице. Две основне вредносне потпоре, које постоје у режиму меморандума, постоје и код бланко менице. Прво, поверење у правни саобраћај и заштита треће савесне стране и, друго, додуше неоправдано, оптерећивање потписника обрасца на трпљење такве последице. Међутим, тамо где почињу разлози за оправданост оптерећивања ризиком имаоца меморандума престају да постоје разлози за такво оптерећивање потписника бланко менице. Меморандум је ствар трговачка, дакле лица која се баве трговином, док је меница, посебно у 20. веку, престала да буде искључиво ствар пословања трговаца већ је добила и своју грађанскоправну примену (Бартош, Антонијевић, Јовановић 1974, 3–7). Управо када је користи потрошач као корисник кредита, она губи

Суштина правног режима бланко менице се састоји у томе да њен издавалац може да истакне приговоре из основног, предменичног посла само њеном првом имаоцу, а уједно и његовом сауговорнику из

трговачку нарав и могућности које јој пружају механизми самосталности и апстрактности постају нежељени и неоправдани правни терет таквом потписнику, односно издаваоцу. Чини се да је решење у правилном тумачењу прописа о прекорачењу заступничких овлашћења тако што када се прекорачи овлашћење трговца-налогодавца штити правни саобраћај и такви послови опстају, док у случају грађанина-налогодавца такво прекорачење овлашћења не би смело да производи правна дејство, осим ако би га он накнадно одобрио (Јовановић, В. Радовић, М. Радовић 2021б, 159). Чини се да меница не би смела да буде изузетак у томе, без обзира на њену строгост и формалност које јој, као својеврсни реликти староримске стипулације, омогућавају самосталан, аутономан, режим и правни живот (Zimmermann 1990, 68–72). У супротном омогућавало би се и, додатно, правно оснаживало залоупотребљавање права (Ђуровић 1995, 387).

С друге стране, чини се да банка, као давалац потрошачког кредита и као овлашћеник на попуну бланко менице, приликом злоупотребе права на попуну обрасца утиче на стварање својеврсног агенцијског проблема. Агенцијски проблем, као изворно компанијскоправна установа, постоји када дође до одступања од овлашћења која је заступани дао заступнику (агенту). С обзиром на различити ниво односа и врсте субјеката у питању, постоје у основи три компанијскоправна агенцијска проблема (управа – акционари, већински акционар – мањински акционар, компанија – остали носиоци интереса, па и друштво у ширем смислу) (Васиљевић 2009, 5–8). Међутим, основа и механизам агенцијског проблема могу да постоје и у другим правним оквирима попут менице, односно бланко менице. У том смислу, чини се да ималац бланко менице (банка-давалац кредита) ствара агенцијски проблем када одступи од датог јој овлашћења на њену попуну. У том смислу, ако би се таква банчина радња схватила као створени агенцијски проблем, било би целисходно приступити његовом решавању, тачније његовом спречавању тзв. стратегијом овлашћења (Васиљевић 2009, 10–11). У меничном, правном, оквиру то би могло да буде ускраћивање могућности да се меница као целина, деловањем меничне апстрактности пренесе неадекватно попуњена на треће савесно лице. Чини се да би најделотворније било уношење тзв. ректа клаузуле у бланко меницу тако што би се у обрасцу додала речца „не“ испред одреднице „по нарадби“, чиме би се сваки индосамент који би банка као изворни ималац бланко менице учинила сматрао грађанскоправном цесијом (Вићић 2014, 402–404). На тај начин би се потписнику бланко менице омогућило да сваком даљем меничном стицаоцу (ма како би савестан) истиче приговоре које има према банци (па и оне из основног посла са њом).

Најзад, иако поистовећивање злоупотребе права на попуну са агенцијским проблемом има логичног основа, ипак се, уже правно посматрано, то не може тако правно одредити. Банка као ималац менице је у случају неврћања кредита, истина, попуњава са овлашћењем и у складу са основним послом, али то чини у сопственом интересу, а не у интересу даваоца овлашћења што је, по себи, нужно за агенцијски, заступнички, посао (Kelly *et al*. 2011, 100, 107). На тај начин се таква појава удаљава од концепта агенцијског проблема, иако са њим има знатну изражајну сличност.

основног посла (банци даваоцу кредита), али не и потоњим савесним стицаоцима (индосатарима) менице. Због тога је потписник меничног обрасца у неодређеном и неизвесном положају јер у тренутку потписивања није извесно хоће ли и како ће менични образац бити попуњен. Отуда се може наслутити да бланко меница има правну особину алеаторности. Са њом је, међутим, веома повезана, па и поистовећена условност попуне бланко менице. Алеаторност и условност у себи носе неизвесност остварења, испуњења неког посла, јер им је у основи будућа неизвесна околност (Van Niekerk 1998, 94–97). Таква околност је за меничног потписника својеврстан ризик који се састоји у томе хоће ли се или неће попунити бланко меница и, још неодређеније, како ће се попунити. Алеаторношћу се сматра неизвесност испуњења посла која зависи од будуће неизвесне околности која не зависи непосредно и одлучујуће од уговорних страна.

С друге стране, услов у уговору значи околност која најчешће зависи од воље уговорних страна. Имајући то у виду, делује да је правна нарав бланко менице ближа њеном условном, а не алеаторном одређењу јер се алеаторност, по правилу, одређује као околност која је ван контроле странака. То се посебно уочава у редовном начину попуне бланко менице, када се она попуњава у складу са правним послом који јој је у основи (али, и у каузи).[19] У таквом случају, менични услов се може одредити као потестативни јер његово испуњење зависи искључиво од воље страна у питању (Стојановић, Антић 2004, 342). У складу са тиме, попуна менице зависи искључиво од воље њеног изворног потписника (корисника потрошачког кредита) у смислу хоће ли вратити позајмљени износ, али и од воље банке, као имаоца менице (даваоца кредита), у смислу хоће ли попунити меницу ако му њен потписник не врати кредит о доспелости. Најзад, попуна бланко менице може да не зависи само од воље поменутих страна у питању већ и од воље трећих када се нађе у њиховој државини, када се услед дејства начела савесности има сматрати пуноважном иако није попуњена у складу са овлашћењем које је њен потписник дао. Тада се чини да је више одређује каузални услов јер њена попуна не зависи од воље изворних страна у питању већ од воље трећих лица. Међутим, то је само привид јер је и треће лице које доцније попуњава меницу заправо страна у меници, са тежњом да извуче одређено право из ње. Због тога, и када бланко меницу попуњава треће лице (а не банка као давалац кредита и изворни овлашћеник на

[19] Такав услов се може одредити и као изричит јер је уочљив у основном послу који претходи меници и који представља својеврстан нацрт попуне такве менице (Corbin 1918, 743–744)

попуну), опет се остварење меничног права своди на вољу онога кога се то право и тиче (трећег лица), па се не може сматрати да је такав услов каузалан већ само потестативан. Имајући то у виду, може се закључити да је у основи остварења бланко менице потестативан услов. Међутим, сама неодређеност услова бланко менице указује на то да се као такав у појединим ситуацијама преображава у алеаторност тако што, ипак, остаје неизвесно када ће, ко и како попунити бланко меницу, којој се и тако попуњеној даје правна снага (Curbin 1918, 754). Због тога се може закључити да је природа бланко менице условна само уколико се она попуњава у складу са основним послом, а да свака другачија попуна утиче на удаљавање од условне природе и приближавање алеаторној природи.

5. НЕДОСТАТНОСТИ БЛАНКО МЕНИЦЕ КАО СРЕДСТВА ОБЕЗБЕЂЕЊА

5.1. Недостатност из банчиног угла

Када се бланко меница посматра као средство обезбеђења које банци треба да пружи сигурност наплате, тачније враћања кредитне суме, онда се долази до закључка да бланко меница уопште и није средство обезбеђења каквим се сматра. Прво, менични потписник, то јест дужник јесте банчин клијент, односно корисник кредита, те се иза улоге дужника те две, формално различите облигације налази исто лице. Управо такав идентитет лица показује да банка, заправо, није обезбеђена бланко меницом јер ако дужник кроз правни основ основног посла не врати дуговани кредитни износ, велика је вероватноћа да неће исплатити ни менични износ, по другом основу. Једино што банка као менични корисник добија јесте процедурална олакшаност и убрзаност наплате у скраћеном извршном поступку, што се састоји најчешће у блокади текућег (или било ког банкарског) рачуна тог дужника (Николић 2020, 281 и даље). Међутим, ако он нема новчаних средстава на рачуну или пак имовине уопште, онда се за банку обесмишљава обезбеђујуће својство такве бланко менице. Банка, додуше, има могућност да таквом меницом располаже на начин да је есконтује или „утржиши, уновчи“ на било који други начин, кроз радњу њеног преноса (индосамента, пре свега), но тиме улази у ризик да постане несавесна јер би, знајући за имовинско стање дужника, практично намерно оштетила новог меничног стицаоца (Таталовић 1987, 24–25).

Друго, банка би имала употребну вредност менице као средства обезбеђења само када би се уз потписника (трасанта / акцептанта) на меници нашло и још неколико лица у регресном меничном (дужничком) својству. То је у прошлости била скоро редовна банкарска пракса када се кориснику кредита као услов за његово давање тражила меница обезбеђена потписима још два жиранта.[20] Управо, меница представља средство обезбеђења само када у себи садржи и друге дужнике (авалисте, интервенијенте, индосанте) који ће исплатити меницу ако је не исплати главни менични дужник. То значи да је меница лично средство обезбеђења јер се њен дуг обезбеђује обавезама лица, те што је више таквих лица у меници, већи је потенцијал менице као средства обезбеђења.[21] Бланко меница, утолико пре, није средство обезбеђења јер нема капацитет за то, односно недостају јој друга лица која би стајала као могући дужници иза меничног дуга. У бланко меници се исто лице појављује у два својства / положаја – као дужник из основног посла (уговора о потрошачком кредиту) и као менични дужниик. Банка у таквој ситуацији има једно лице као дужника по два различита основа – једном из конкретног, основног правног посла, а другом из апстрактног меничног посла (Јанковец 1993, 639–640).

Због тога се не може говорити о томе да је банка путем бланко менице обезбеђена јер ако се бланко меница схвати као лично средство обезбеђења, што она увек и јесте, онда се долази до закључка да исто лице истом, својом, имовином обезбеђује исплату свог, ранијег, дуга по истом основу. То је својеврсна таутологија јер се испуњење једног банчиног потраживања према клијенту обезбеђује стварањем новог банчиног потраживања према том истом клијенту. Обрнуто, клијент

[20] *Објашњење*: Да би се банка потпуно обезбедила, у таквој ситуацији је тражила да се меницом створи привид одређених меничних радњи како се та два жиранта не би испољила као менични авалисти, а у том случају би имали истоветан положај као корисник кредита (односно и његове приговоре би могли да истакну). Због тога се стварао привид одређених меничних радњи попут издавања или индосирања менице, што би за правни резултат имало да жиранти формално буду представљени на меници као трасант или индосанти, а не као авалисти. Такав, „сакривени" авал има повољан учинак за банку као меничног корисника јер тада добија чисте, нове, оригинарне дужнике, попут трасанта и индосаната, а не деривиране попут авалисте који имају положај свог хонората, односно лица за чије испуњење обавезе су јемчили (Бартош, Антонијевић, Јовановић 1974, 89–90). У крајњем случају, то би значило да сакривени авалисти не би могли да истичу приговоре корисника кредита према банци, док би класични авалиста то могао.

[21] То значи да ималац менице не стиче стварно право на имовини меничног дужника, па чак ни на новчаним средствима са његовог рачуна који су изворно намењени за менично покриће (Aigler 1924, 859).

се појављује као дужник према банци по два различита основа, с том разликом што се у другом, меничном дугу, појављује као својеврстан јемац самоме себи за испуњење дуга из основног посла потрошачког кредита. Будући да таква меница не пружа банци ниједну предност у намирењу потраживања осим просте процедуралне (у смислу олакшане и убрзане наплате према клијенту), јасно је да када клијент нема имовине (па зато не враћа дуг из основног посла), банци поверилачко својство по бланко меници ништа суштински неће значити. Тада неће постојати имовина спрам које би се меница могла намирити, односно неће постојати простор (имовински) за маневар, покрет (менични).

5.2. Недостатност из угла корисника кредита

Уско правно посматрано, фукционисање бланко менице може деловати врло неодређено и несигурно јер банка као овлашћени попунилац недостајућих састојака може према свом нахођењу да попуни менично писмено и тако оптерети његовог потписника обавезом коју у тренутку потписивања меничног празног обрасца није желео. Корисник кредита и уједно потписник меничног (бланко) обрасца се таквом меницом унапред обавезује да ће исплатити менични дуг било у својству трасанта (издаваоца) у случају да бланко меница буде изражена, доцније, као сопствена, било у својству акцептанта ако би она била изражена као трасирана. Углавном, једини известан састојак такве менице је обавеза њеног потписника. Остали састојци се, како је већ уочено, попуњавају у складу са одредбама основног посла.

Међутим, уважавајући деловање апстрактности у меници у садејству са савесношћу доцнијих стицалаца, могуће је да се воља изворног потписника отргне од његове, изворне, намере да буде менично обавезан само на онај новчани износ који не врати на основу основног, кредитног, посла.[22] То је и основни недостатак и бојазан таквог лица јер је могуће да банка, као тренутни ималац таквог потписаног обрасца или неко друго лице на које она меницу пренесе, једноставно попуни остале битне састојке и суму на другачији начин од договореног, односно од оног на који је банка изворно овлашћена од „издаваоца“ бланко менице. Када би тако, супротно споразуму, попуњену меницу

[22] У више наврата спомињана савесност доцнијег стицаоца (бланко) менице састоји се у његовом незнању о томе да је менични образац попуњен супротно, уопште, другачије од основног посла чије испуњење обезбеђује (Prenkert *et al*. 2021, 32–12).

стекло савесно треће лице, онда би оно стекло, сходно меничној апстрактности, оригинерно, изворно, менично право на које не утичу ранији односи, а пре свега однос основног посла који је требало да буде основа за будућу садржину такве, бланко менице (Krepold, Fischbeck 2009, 168–169).[23] Таква врста неизвесности за потписника бланко менице указује на својеврсну алеаторност јер је могуће да више различитих сценарија попуне добије правну важност без обзира на изворну вољу издаваоца такве менице. Да би се таква алеаторност, тачније правно дејство, избегла могуће је „издаваоца" бланко менице заштитити самом меницом, то јест одредбом са меничноправним дејством. Уношење тзв. ректа клаузуле у менични образац произвело би правну последицу да меница не може да се отргне у доцнијем промету од основног, кредитног посла (Виђић 2014, 402–404). Само дејство ректа клаузуле се састоји у томе да се меница преображава од законски претпостављене хартије по наредби у хартију на име (Бартош, Антонијевић, Јовановић 1974, 81–82). То даље значи да ће менични потписник (корисник кредита) моћи да истиче сваком даљем имаоцу менице све приговоре које је могао да употреби према изворном, првом имаоцу менице, односно чије је име имао у виду приликом издавања.

[23] Код класичне, трасиране менице, пренос индосаментом повлачи за собом последице деривативног и оригинарног начина стицања у исто време. У погледу форме, меница се индосаментом преноси деривативно јер је није могуће тако пренети ако претходник, индосант, није био формално, тачније физички представљен на самој меници као поверилац. С друге стране, када се меница пренесе на индосатара, то не значи да је он стекао потпуно иста права као његов претходник, индосант. Могуће је, чак, да стекне и више права ако се испостави да је индосантов основ имања менице био неваљан или пак да је њему могло да се истакне више приговора него доцнијем стицаоцу – индосатару. У том смислу, менични стицалац је добио изворно менично право, односно стекао ју је оригинарно (Јовановић, В. Радовић, М. Радовић 2021, 620). То значи да се право *на* меницу (као својеврсно стварно право) преноси деривативним путем јер је нужно да је такво исто, у траженој форми, имао претходник, а да се право *из* менице (као својеврсно облигационо право) стиче оригинарним путем јер се, сходно апстрактности, инкорпорираности, непосредности, самосталности и савесности меничној, ствара привид изворног, новог имаоца меничног права. Када се има у виду бланко меница, јасно је да је она у свом постанку хартија на доносиоца па је проста предаја довољна за пренос права на њој. С друге стране, пошто у њој нису испуњени битни састојци, али ни менични износ, јасно је да их доцнији стицалац може попунити по нахођењу и пренети неком трећем лицу које ће бити савесно и тако је, својом савесношћу, стерилисати, правно оснажити и ослободити могућих приговора њене неприкладне попуне. Постоје, додуше, опречна мишљења о режиму преноса бланко менице у смислу да ли се она преноси као таква без споразума о попуни везаног за њу или се преноси уједно и истовремено са споразумом о попуни (Таталовић 1987, 24–27).

То је свакако банка од које је добио потрошачки кредит, а којој би по том послу, али и другим међусобним пословима са банком, могао да истиче, евентуално, приговоре. Но, такав правни учинак би могао да се створи само ако би се приликом потписивања и предаје меничног обрасца уписало банчино име, како би се меничноправни однос везао за правни положај банке као првог меничног повериоца – ремитента. У супротном, ако се приликом „издавања“ бланко менице не би уписало име ремитента, односно банке даваоца кредита, постојала би могућност да банка пренесе меницу простом предајом на неко треће лице које би, у крајњем исходу, уписало своје име, чиме би се учинак ректа клаузуле у целини обесмислио. У таквом, нежељеном сценарију, потписник би могао доцнијим имаоцима да истиче само оне личне приговоре које има према уписаном ремитенту, а не и према банци са којом је у основном послу јер њеног имена на таквој меници уопште и нема.

6. ЗАКЉУЧАК

Имајући у виду да меница, а нарочито бланко меница у широј правничкој, али и лаичкој јавности представља скоро неизоставан инструмент, средство обезбеђења разних послова, а најчешће уговора о (потрошачком) кредиту, чинило се да је нужно дубље размотрити правни режим такве менице. Дошло се до закључка да бланко меница није делотворно средство обезбеђења потрошачког кредита, иако својим појавним обликом и начином употребе ствара привид да јесте. Привид се састоји у томе што предаја потписаног меничног бланкета (обрасца) од корисника кредита ствара могућност банци, као даваоцу кредита, да попуни такав образац сходно основном кредитном послу. Она би требало то да учини тако што би уписала менични износ који одговара невраћеној суми са каматама и тако попуњену, са одликом веродостојности, употребила извршењем према њеном потписнику, то јест кориснику кредита. Међутим, истина је да, када се тако меница попуни, банка не стиче додатно обезбеђење ни стварне, а ни личне природе, јер је менични дужник у исто време и дужник из основног, кредитног, посла. То има за реалну последицу да банка спрам себе има једно лице које је дужник по два основа, тачније једно лице, са једном, својом, имовином, које је према њој дужно по два основа. При томе, то исто лице потписаном бланко меницом својеврсно јемчи за испуњење своје обавезе из основног, кредитног, посла. Речју, постаје јемац самоме себи. Једино ново право које банка стиче на основу бланко менице састоји се у процедуралној брзини остваривања

менице у скраћеном извршном поступку. Међутим, такво право остаје огољено и нефункционално ако менични, односно кредитни дужник нема имовине из које би исплатио кредит, односно меницу. Употреба менице у скраћеном извршном поступку има смисла само ако менични дужник има неки други рачун код те или друге банке па да се на тај начин, блокадом располагања средствима са тог рачуна, банка намири. Но, то је мало вероватно. Реално, животно посматрано, нема разлога да корисник кредита не врати тај кредит ако има новца на рачуну, а при томе је свестан да ће банка у случају неврaћања кредита „активирати" меницу према њему и наплатити се промптно у скраћеном извршном поступку. Уз то би га додатно оптеретила и трошковима извршења, али и веће уговорне, казнене камате.

С друге стране, банка као ималац потписаног меничног обрасца може „трговати" на начин да га као таквог или попуњеног пренесе на неко треће лице. У случају да „осети" да корисник кредита у перспективи неће имати новца, банка би могла да попуни меницу било у складу са основним послом било другачије од основног посла и да је такву пренесе на неко треће савесно лице. Тада би таква меница због тога представљала средство обезбеђења банке за „пласирани" потрошачки кредит, али би банка дошла у ризик злоупотребе права или пак кривотворења воље потписника меничног бланкета. Оба случаја су правно неприхватљива. У првом случају, банка има право да попуни меницу у складу са овлашћењем о попуни, али би преносом такве менице довела у заблуду треће савесно лице да ће је издавалац исплатити у потпуности, што би се свело на то да оно може да је наплати само од банке у регресном поступку. Међутим, ако би банка пренела на треће лице саму бланко меницу (заједно са овлашћењем на попуну), онда би заиста злоупотребила своје право. Треће савесно лице би на основу бланко менице стекло само издаваоца (корисника кредита) као дужника, а не и банку која би таквом бланко меницом располагала као хартијом на доносиоца и сходно томе не би се појавила као индосант према трећем лицу. Банка би се тако непоштено послужила својим правом, на уштрб, пре свега, трећег савесног имаоца менице, јер би он у крајњем исходу имао за дужника само издаваоца бланко менице. За њега је банка већ знала да неће бити у стању да врати основни дуг, односно кредит, па је, свесна неупотребљивости менице према њему (јер нема имовине), проследила меницу трећем лицу од кога је највероватније добила новчану протичинидбу.

У другом случају, када банка кривотвори бланко меницу, односно вољу њеног потписника, то чини највише на штету њеног потписника, односно корисника кредита, а у своју корист и у корист трећег савесног

имаоца менице. У том случају, да би избегла приговор непопуне менице у складу са овлашћењем за попуну, банка такву другачије попуњену меницу преноси на треће савесно лице које, сходно апстрактности, самосталности и инкорпорираности меничној, стиче оно право које је у њој представљено на самој хартији. Међутим, чак ни тада тако кривотворена меница неће представљати средство обезбеђења ако њен потписник нема имовине из које би она могла да се наплати.

Јасно је, дакле, да меница нема „обезбеђујући" потенцијал ако се на њој и у основном послу само једно лице појављује као дужник – прво у улози корисника кредита, а друго као трасант / издавалац или, евентуално акцептант. Због тога се закључује да (бланко) меница као таква није средство обезбеђења потрошачког кредита већ је то само ако обухвати и друга лица као дужнике који ће различитим меничним улогама „јемчити" меничном испуњењу, а уједно и испуњењу обавезе из основног посла чије испуњење тада заиста и обезбеђује.

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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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МОГУЋНОСТИ РЕФЕРЕНДУМА У КОНСОЦИЈАТИВНОЈ ДЕМОКРАТИЈИ

У раду се анализира могућност примене референдума у системима консоцијативне демократије. Према теорији Арента Лајпхарта, сви демократски системи се могу поделити у две групе: већински и консоцијативни. Референдум се уобичајено схвата као механизам непосредног одлучивања народа који почива на принципу већине. У овом раду покушавамо да анализирамо које квалитете референдум мора да има у системима консоцијативне демократије – оним у којима постоји подељеност друштва по бројним основама, тако да буде задовољен најшири могући број интереса, а да тај механизам непосредног одлучивања народа не изгуби своју институционалну физиономију и логику. У анализи се разматрају сва она питања која су у подељеним друштвима важна, и на теоријском и на практичном плану.

Кључне речи: *Референдум. – Консоцијативна демократија. – Делиберативност. – Јасност референдумског питања. – Референдумска већина.*

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1. УВОД

Након релативно кратке „паузе“ од последњег референдума о отцепљењу покрајине Квебек од Канаде који је одржан 1980. године, питање сецесије Квебека се поново поставило крајем осамдесетих и почетком деведесетих година. На другом референдуму одржаном 1995. године за опцију „да“ гласало је 49,42%, а за опцију „не“ 50,58% грађана, чиме је покушај цепања Канаде и други пут доживео неуспех (Маринковић 2002, 396). Међутим, тиме није било затворено веома важно уставно питање у Канади. Референдум је, чини се, изазвао још дубље поделе, нарочито имајући у виду тако велику подељеност бирачког тела. Још раније, 1992. године, није успео ни референдум о Договору из Шарлоттауна (*Charlottetown Accord*), који се тицао свеобухватних реформи канадског уставног система. Коментаришући резултат референдума о Квебеку, Чејмберс (*Simone Chambers*) наводи да изношење комплексних питања на референдумско изјашњавање производи узнемирујући резултат: „нас које смо победили“ и „вас које сте изгубили“ (Chambers 1998, 159). С друге стране, говорећи о атмосфери пре гласања која је подразумевала организовање „конференција“ с циљем размене идеја и ставова о договору из Шарлоттауна, ауторка наводи да је дебата која је у почетку била врло садржајна имала све мање аргумената како се одржавање референдума приближавало да би се пред сâм референдум једно комплексно уставно питање свело на борбу будућих победника против будућих поражених (Chambers 1998, 159–160).

Осим размишљања о разлозима који су довели до таквих резултата и немогућности превазилажења кризе, може се поставити још једно питање – која је улога референдумâ у таквим ситуацијама и да ли они подстичу превазилажење кризе или су катализатори још дубљих подела?

С друге стране, референдумско одлучивање не мора нужно бити израз већинске демократије ако се спроводи у сложеној процедури која уважава чињеницу да језичка или верска заједница која је у мањини на ширем плану чини већину на ужем плану политичко-територијалног организовања. Наиме, седамдесетих година прошлог века уставни систем Швајцарске је измењен како би се омогућило да настане нови кантон. Применом сложене демократске процедуре, која је укључивала и тзв. каскадне референдуме (Fleiner, Basta Fleiner 2009; видети и: Jovanović 2007), образован је засебан кантон тако што је Јура издвојена из кантона Берна.

Природа референдума је сложена, а његова улога изазива немале несугласице. Док једни аутори наводе да је референдум неадекватно средство у подељеним друштвима које може да изазове још дубље поделе, други су нешто оптимистичнији у погледу његове примене (McEvoy 2018, 3). Уобичајено искључење мањинских група у уставотворном поступку узима се као основни недостатак и камен спотицања тог поступка доношења одлука (McEvoy 2018, 3). Слично резонују Батлер (*David Butler*) и Рени (*Austin Ranney*), који наводе да баш зато што се путем референдумā не могу „мерити" аргументи, они могу бити опаснији по права мањинских група од одлучивања у представничким телима (наведено према Lijphart 1999, 231). Лајпхарт, „отац" теорије консоцијативне демократије, није имао кохерентне ставове о референдуму. Иако је указивао на то да тај институт има природу својствену већинској демократији, референдум се, према његовом мишљењу, не може сматрати елементом ни већинске ни консоцијативне демократије (Setälä 1999, 78–79; Vatter 2000, 184–185). Наиме, у плуралним друштвима владавина већине, као и принципи и механизми већинске демократије опасни су јер трајно искључују мањине (Лајпхарт 2003, 96; Qvortrup 2018, 177). Такав став су касније потврдили бројни аутори. С друге стране, може се поставити питање шта је алтернатива референдумском одлучивању. Чејмберс наводи да је у подељеним друштвима кључно постићи компромис. Она сматра да је референдумску атмосферу пожељно заменити стварањем јавног простора у коме се могу артикулисати различити интереси (Chambers 1998, 158). Међутим, има и аутора који наводе да се управо референдумом може превазићи криза у консоцијативним демократијама, уколико има одређене квалитете (Qvortrup 2018, 177; Fleiner, Basta Fleiner 2009, 525).

Шире посматрано, питање је да ли фрагментисано друштво може бити уједињено додатним политичким и правним инструментима и процедурама (Fleiner, Basta Fleiner 2009, 512). Да ли је референдум у једном таквом друштву средство разједињавања или управо „алатка" чијом се правилном применом сукоб може превазићи (Fleiner, Basta Fleiner 2009, 525)?

У центру пажње овога рада је питање могућности организовања референдума у системима консоцијативне демократије. У тим системима се подразумева да одлучујући принцип није владавина већине већ могућност да што већи број различитих група врши власт, у условима подељености друштва по различитим основама. Премда постоје и терминолошке и појмовне расправе како треба означити такве системе, основна премиса је да власт не може да се врши као прост збир воља и да демократија мора да почива на аргументима, а не само на моћи и

на гласовима (Sunstein 2001, 7). И мада такав систем може бити оцењен као пожељан у друштвима која су подељена, а она су у већини, чини се да је он и нужан.

Најпре ће бити размотрени појам консоцијативне демократије и њему блиски концепти, који почивају на истој почетној премиси. Потом ћемо покушати да одредимо природу института референдума, али не његовим дефинисањем већ указивањем на његове кључне недостатке из угла консоцијативне демократије и, последично, предлагањем начина њиховог превазилажења. У трећем делу се наставља с анализом референдума, али на овом месту кроз све фазе тога процеса, уз коришћење практичних примера. Ти примери нису само они који долазе из консоцијативних демократија, и то управо због честе претпоставке да је референдум неспојив с консоцијативном демократијом, те таквих примера и нема довољно. Зато сматрамо да су релевантни сви они примери који могу послужити као „материјал" у процесу уставног инжењеринга једног наизглед типичног института већинске демократије, али у новим и другачијим условима. На крају, кључне критике референдума и могући одговори биће испитани на примеру Канаде будући да сматрамо да су у том случају постављена сва она питања која су значајна за организовање референдума у подељеним друштвима.

2. КОНСОЦИЈАТИВНА ДЕМОКРАТИЈА – МОГУЋИ ОДГОВОР ЗА САВРЕМЕНА (ПОДЕЉЕНА) ДРУШТВА

У центру традиционалне теорије државе било је питање „добре владе". Данас се пред теорију државе постављају много комплекснија питања. Као последица глобализације, преко 95% светске популације живи у мултикултуралним државама у којима постоје поделе по бројним линијама (етничкој, културној, језичкој, религијској). Отуда је питање како државе могу и треба да се „боре" с таквим разликама (Fleiner, Basta Fleiner 2009, 510). Мултикултурална држава ствара бројне изазове и за поједине правне институте. Зато је неопходно да се пронађу такви инструменти који ће објаснити не само шта је добро за све у држави већ шта је добро за сваку заједницу у оквиру ње. Само тако ће држава себи обезбедити легитимитет јер ће у супротном већина увек прегласати мањину (Fleiner, Basta Fleiner 2009, 513, 520–521).

На трагу тог дуалитета – већина *v.* мањина – треба приметити да је у „срцу" демократије примена већинског принципа. Често се (неоправдано) демократија и владавина већине изједначавају. Да би могао да

се стави знак једнакости између њих, неопходно је да су друштва релативно хомогена (Лајпхарт 2003, 96), а таквих друштава готово и да нема. Наравно, интензитет разлика, по етничкој, језичкој, религијској или културној линији, није увек исти, али ако узмемо у обзир она друштва која су тако подељена да владавина већине практично значи диктатуру већине, можемо рећи да су њима потребни посебни механизми којима се превазилазе поделе (Лајпхарт 2003, 96).

Један могући модел уређења таквих друштава понудио је Арент Лајпхарт у својој теорији консоцијативне демократије. Он је, наиме, демократске системе поделио на оне у којима постоји већинска демократија и оне у којима се примењује модел консоцијативне демократије. Полазна тачка тог разликовања била је Линколнова (*Abraham Lincoln*) дефиниција демократије као „владавине народа, од стране народа и за народ". Из тога следи питање чије интересе влада (*government*) треба да задовољи када се појаве противречни интереси. Могуће је понудити два одговора: интерес већине или интерес највећег могућег броја људи (Lijphart 2008, 111–112). Из тога произлазе два модела демократије: већински, који политичку власт концентрише у рукама већине, и консоцијативни, који покушава да омогући што већем броју различитих група да врше власт (Lijphart 2008, 112). Лајпхарт те моделе анализира навођењем критеријума разликовања. Он је уочио десет карактеристика (које назива варијаблама) представљајући их као дихотомије, односно „контраст" између већинске и консоцијативне демократије. Оне су подељене у две димензије. Прва се тиче организације извршне власти, страначког и изборног система и састоји се од пет варијабли: концентрација извршне власти у кабинету који чини једна странка насупрот заједничком вршењу извршне власти путем широких коалицијā; однос између извршне и законодавне власти, у којима је извршна власт доминантна насупрот њиховој равнотежи; двостраначки систем насупрот вишестраначком систему; већински изборни систем насупрот пропорционалном изборном систему; плуралистички систем интересних група насупрот координисаном и корпоративистичком систему интересних група. Друга димензија је углавном повезана са контрастом између федералног и унитарног државног уређења и њу такође чини пет варијабли: унитарна држава насупрот федералној држави; концентрација законодавне власти у једнодомом парламенту насупрот егалитарном бикамерализму; меки устави насупрот чврстим уставима; супрематија парламента насупрот уставносудској контроли

закона; централне банке које зависе од извршне власти насупрот независних централних банака (детаљно о томе видети: Lijphart 1999, 3, 10–21, 34–47).[1]

Теорија консоцијативне демократије у основи почива на четири организациона принципа: широке коалиције, аутономија сегмената, пропорционалност и могућност вета (McGarry, O'Leary 2006, 43–44; Милосављевић, Поповић 2019, 215). Основна премиса те теорије јесте да друштва која су дубоко подељена могу да превазиђу проблеме применом одређених механизама. Да би се једно друштво сматрало подељеним, сматра Лајпхарт, неопходно је установити у којим сегментима друштва постоји подела и колико људи припада сваком од тих делова. Осим тога, мора да постоји јасна граница између политичких, друштвених и економских линија поделе (видети Andeweg 2000, 519). Коначно, Лајпхарт истиче да су важан критеријум и политичке партије, односно подршка одређеним партијама коју им пружају различите друштвене групе, при чему у тој подршци нема великих осцилација (Lijphart 1981, 356).

Друга основна премиса Лајпхартове теорије јесте да је демократија *prima facie* владавина већине и да из тога произлази да целокупно друштво прихвата одлуке политичке власти која се управо већином и легитимише. С друге стране, ако се прихвати теза о уређењу друштва на консоцијативним принципима, из тога произлази да демократски механизми сада имају битно другачију садржину – они почивају на принципу консензуса (Lijphart 2008, 111). Тај концепт чини релевантним и чињеница да је консоцијативна демократија прерасла из допуне демократској теорији која је тежила да објасни разлоге стабилности у неколико малих европских држава у нормативну теорију консоцијативног инжењеринга (*consociational engineering*) у практично свим дубоко подељеним друштвима (Andeweg 2000, 517).

Поделе демократије су бројне и готово неисцрпне. Несумњиво је да међу различитим типовима демократије постоје бројне разлике, али основна идеја је да се у одређеним демократским системима одлуке не доносе само применом већинског принципа већ да постоје и бројни

[1] У својим „раним радовима" он врши нормативну анализу и покушава да понуди институционално решење за подељена друштва (посебно видети Lijphart 1968; 1975; 1977), док се касније посветио емпиријској анализи. У том смислу видети Lijphart 1984, у коме анализира већинске и консоцијативне системе на примеру двадесет једне државе. У другом издању (Lijphart 1999), он је анализу проширио, тако да „узорак" чини укупно тридесет шест држава. Видети још и Lijphart 2004, где предлаже уставна решења за подељена друштва.

други механизми који штите права различитих група у држави. На овом месту треба посебно поменути појам делиберативне демократије и везе које постоје између ње и консоцијативне демократије. Тако, Хелд истиче да је делиберативно доношење одлуке начин њеног легитимисања. Политичка легитимност се не остварује применом већинског принципа *per se* већ навођењем јасних разлога и објашњења. Тако се у процесу делиберације приватна опредељења претварају у ставове јавности (Held 2006, 237). Заправо и делиберативна демократија настоји да у јавној дебати оправда различите политичке аргументе и то без надгласавања. На том месту су уочљиве јасне везе између два концепта. Консоцијативна демократија исто тако покушава да нађе компромис, али не као средње решење већ као „испреговарани споразум" у којем ће свака страна „изгубити" на једном, а „добити" на другом питању (Andeweg 2000, 512). Она се, дакле, појављује као лек за проблеме већинске демократије (Setälä 1999, 2), која показује бројне слабости у савременим државама. Другим речима, сматрамо да нема консоцијативне демократије без процеса делиберације чија се суштина огледа у томе да одлука ни о једном важнијем питању не може бити донета само зато што је за њу гласала већина.

Референдум се обично схвата као средство непосредног изјашњавања бирача путем гласања о законима и другим питањима важним за заједницу (Јовичић 2006, 3). Када се бирачи непосредно изјашњавају о неком питању, они најчешће морају да се определе између два одговора. Међутим, да ли такав инструмент одговара захтевима коносцијативне демократије или је он нужно средство већине којим се угрожава мањина? Да ли референдум може да буде конструисан тако да одлука буде „свеобухватна", односно да обухвати представнике свих релевантних друштвених група, што је полазна премиса теорије консоцијативне демократије (Andeweg 2000, 512)? Да бисмо одговорили на постављена питања, у наставку ћемо покушати да објаснимо природа референдума указивањем на могуће предности и мане тог института.

3. ПРИРОДА РЕФЕРЕНДУМА

У XIX веку је на тековинама Француске револуције уведена представничка демократија, при чему се садржина тог политичког режима разликује од друштва до друштва (Јовичић 2006, 3). Од друге половине XIX века, а нарочито у XX веку, истовремено су развијани и механизми непосредне демократије попут референдума, народне иницијативе и императивног мандата (Јовичић 2006, 3). Након

Другог светског рата „плурализација“ друштава је постала нарочито интензивна, па је о моделима за таква друштва почело да се говори нешто касније. Тада су се отворила нова питања те се и поглед на неке институције, укључујући и референдум, променио.

Посебно важно питање јесте које су карактеристике референдума, ако се он посматра у контексту консоцијативне демократије. Пре свега, тиме се из анализе искључује велики број референдума. Анализа и закључци који се нуде у овом раду не могу се односити на сваки већ на оне референдуме који се у великој мери тичу уставних питања. Заправо, предмет референдума који се често наводе као примери јесу уставноидентитетска питања. Које су карактеристике и каква је природа референдума, могуће је открити анализом аргумената који се у теорији обично наводе као предности или мане тог инструмента непосредне демократије.

Као највећа вредност референдума наводи се то што његова примена заправо значи приближавање суштинској демократији. У етимолошком значењу, демократија јесте владавина народа (и то већине народа), с тим што је овде то значење и дословно примењено. Референдум се обично разуме или види као глас народа. Пре свега, референдум има функцију легитимизације. Наиме, народни представници су изабрани да доносе свакодневне политичке одлуке, али нису овлашћени (или не би требало да буду) да доносе одлуке о питањима од највећег значаја (Hamon 1995, 50–51). Осим тога, често се појављује несагласност између воље већине народа, с једне стране, и онога шта су одлучили народни представници, с друге стране (Setälä 1999, 14–17). Референдум има и функцију контравласти (*contre-pouvoir*), власти супротстављања. Иако се могу успоставити различити механизми одлучивања, нарочито у друштвима која су подељена, референдум се често посматра као могућност да се грађани супротставе актима законодавне власти – они тада најнепосредније врше власт. Штавише, грађани успостављају равнотежу у односу на представнике које су раније изабрали и тако постају центар одлучивања (Hamon 1995, 52–54). Коначно, управо референдум може да помогне и у функционисању представничке демократије. Пошто сва власт долази од народа, чини се логичним да она може и да реши сукобе између оних које је изабрала. Тада референдум има функцију арбитраже (Hamon 1995, 55).

Међутим, дубље размишљање о референдуму може показати и неке његове слабости. Начелно, постоје две врсте критика упућених референдуму: прва линија критике је она која га потпуно одбацује као средство доношења одлука, сматрајући га недемократском

алтернативом представничкој демократији (Tierney 2012, 22). Међутим, цитирајући Де Малбера (*Raymond Carré de Malberg*), Кворструп (*Matt Qvortrup*) наводи да референдум заправо и није супротстављен представничкој демократији већ да је њена логична допуна (Qvortrup 2005, 11). С друге стране, има аутора који начелно прихватају референдум као „атрактивно" средство доношења одлука, уз ограду да постоје значајни проблеми с његовом практичном применом (Tierney 2012, 22). [2]

Те критике се у теорији упућују референдуму на општем нивоу, без обзира на друштвени контекст. Будући да се поставља питање могућности референдума у консоцијативним демократијама, потенцијалне недостатке је неопходно размотрити из перспективе подељених друштава. То ће бити учињено анализом свих фаза референдумског процеса, уз указивање на она места у том процесу која су од значаја да би се добио одговор на питање да ли референдум по својој природи одговара подељеним друштвима.

4. ФАЗЕ РЕФЕРЕНДУМСКОГ ПРОЦЕСА

Прва фаза је покретање поступка. Референдум може бити обавезна фаза у доношењу неке одлуке и ту се обично не појављују нарочито спорна питања. С друге стране, референдум може бити покренут на основу народне иницијативе и тада је неопходно одговорити на неколико питања. Амон (*Francis Hamon*) истиче да фаза покретања референдума одоздо има три „подфазе". Прва је тзв. прелиминарна фаза, друга прикупљање потписа, а трећа провера броја прикупљених потписа. У првој фази покретања поступка, у контексту овог рада,

[2] Став према референдуму у великој мери је условљен и „идеолошком позицијом". Наиме, Тирни указује на две демократске традиције и њихов однос према референдумском начину доношења одлука. Тако, с једне стране, постоји позиција либерализма – за либерале, најважнија вредност су основна права која су заснована на врхунској вредности индивидуалне слободе. Они су често „уплашени" од популистичких политика, па, следствено томе, заузимају негативан став према референдуму. С друге стране, грађански републиканизам (*civic republicanism*) склонији је институционализовању механизама активне партиципације грађана као основном демократском принципу, јачајући народно самоодређење (*popular self-determination*) (Tierney 2012, 20). Може се закључити да је то и разлог тако великих размимоилажења у ставу према референдуму – он је заправо одређен идеолошким приступом о сврси и значењу демократије (Lord 2021, 32). О вези између референдума и различитих идеолошких позиција видети: Јовичић 2006, 27–28.

значајно је питање формулације референдумског питања. Уколико је реч о референдумима који су покренути на основу народне иницијативе, тада се уобичајено образује иницијативни одбор чији је основни задатак да прикупи довољан број потписа. Истовремено се подноси и предлог референдумског питања (Hamon 1995, 31–35). Начин његовог формулисања је изузетно важан у подељеним друштвима, па је у вези с тим важно размотрити и могућности контроле тог питања. Разни облици такве контроле чине формална ограничења референдума, док постоје и материјална, онда када се забрањује да одређена питања уопште буду предмет референдумског одлучивања (Moeckli 2021, 6). Друга фаза у организацији референдума јесте референдумска кампања. Она, према Амоновим речима, мора бити едукативна (видети Hamon 1995, 35–39), а у овом раду се износи теза да је друга фаза референдумског процеса у подељеним друштвима најзначајнија. Основна критика упућена референдуму из перспективе подељених друштава тиче се изостанка делиберативности, те ће таква теза касније бити испитана. Трећа фаза је гласање. У том стадијуму, за подељена друштва најзначајнија су питања којом се већином доноси одлука и какав је положај мањина у референдумском процесу. Коначно, четврта фаза подразумева контролу, премда се контрола протеже кроз читав референдумски процес (Hamon 1995, 39–48).

4.1. Референдумско питање

Један од начина да се утиче на исход референдума јесте формулисање референдумског питања. Оно може бити такво да збуњује бираче и да они уопште нису свесни шта њихов глас значи, чиме се право гласа обесмишљава. Формулисање питања претходи гласању о њему те постоји велики интерес свих страна да у томе учествују. Да би се спречила могућност злоупотребе референдума, развила се идеја да референдумско питање треба да буде предмет уставносудског одлучивања (или предмет одлучивања пред највишим судом у земљама у којима нема институције уставног суда), премда ни она није без критика (о томе Marxer, Pállinger 2009, 35).

У Упутству добре праксе за одржавање референдума Венецијанска комисија наводи да је „јасност питања кључни аспект слободе бирача да формира сопствено мишљење. Питање не сме да буде збуњујуће или сугестивно, а нарочито не сме да буде такво да помиње претпостављене последице прихватања или неприхватања референдумске одлуке“ (*Code of Good Practice on Referendums* пара. 15; видети и *Revised Code of Good*

Practice on Referendums). У другом документу, Венецијанска комисија је навела да питање мора бити формулисано тако да поштује јединство форме (*unity of form*) и јединство садржаја (*unity of content*) (*Guidelines for Constitutional Referendums at National Level*, para. II, P). Јединство форме подразумева да једно питање не сме да садржи у себи специфично формулисано питање с начелним предлогом или начелним питањем. Под јединством садржаја, Венецијанска комисија разуме унутрашњу, суштинску (*intrinsic*) везу између различитих делова питања које се ставља на гласање с циљем да се гарантује слободно право гласача, који не сме бити позван да прихвати или одбије предлог у целини ако нема те везе. Под тиме треба разумети да делови питања не смеју бити противречни, да веза између делова питања мора бити јасна и да делови морају бити тако повезани да проистичу један из другог или да те делове повезује садржина (Цветковић 2022).[3]

Тирни наводи да је јасност централно питање у сваком процесу делиберативног одлучивања (Tierney 2012, 227). За канадски Врховни суд, у случају сецесије Квебека, значење појма „јасности" представљало је практично централно питање (видети *infra* 5). У вези с јасно постављеним питањем, кључно је уочити да се оно може односити на три аспекта. Први проблем се тиче језичке формулације питања. Наиме, често се дешава да се питањем изнуђује одговор само због језика који је коришћен у његовом формулисању. Треба избегавати и оне речи које могу имати претерано негативну или позитивну психолошку конотацију, као што су „сецесија", „ваша сопствена држава" и сличне (Jovanović 2007, 190). Други проблем је у томе што се поставља више питања у оквиру једног. Ту се бирачи налазе у ситуацији да им се избор прилично сужава или да су приморани да невољно гласају јер нису у стању да потпуно слободно формирају мишљење о појединим питању.[4]

[3] У европском контексту користи се термин *unity of content*, док се у Сједињеним Америчким Државама употребљава термин *single-subject rule* који можда речитије говори о чему је реч (Moeckli 2021, 33–34; Цветковић 2022).

[4] На пример, Шарл де Гол је на референдуму 1962. године поставио два питања која су била формулисана као једно питање: „Да ли прихватате Евијанске споразуме и давање пуних овлашћења председнику републике да их спроведе?" Јасно је да је овде реч о два потпуно различита и одвојена питања и да је Де Гол искористио своју позицију да наметне такво питање са циљем да већина гласа за одговор „да". Пример преузет од: Tierney 2012, 232.

Коначно, трећи проблем се тиче сугестивности питања – оно може бити тако формулисано да се бирач практично приморава на одређени одговор.[5]

4.2. Предмет референдума

Постављање критеријума јасности и одређивање ближих правила о томе када се једно референдумско питање сматра јасним може се означити као облик формалног ограничења у формулисању референдумског питања. Међутим, упоредно посматрано, честа су и ограничења предмета референдума, која се могу означити као материјална.

Упоредно посматрано, ограничења се могу односити на четири групе питања: 1) основне функције државе, под чиме се подразумевају финансије државе, национална безбедност, овлашћења државних органа у нередовном стању (нпр. проглашење рата, правни режим ванредног стања); 2) заштита основних права и слобода; 3) основна својства државе и њеног уређења (нпр. забрана промене државног уређења, званичног језика, различите забране с циљем заштите територијалног интегритета) и 4) организација државе (нпр. надлежност законодавног тела или правила о организацији избора) (Forgács, Ibi, Moeckli 2021, 265–268). Осим тога, постоје и ограничења у могућности изношења међународних уговора на референдум (Moeckli 2021, 6).

У контексту подељених мултикултуралних друштава, посебан значај имају ограничења предмета референдума која су у вези са заштитом основних права, с обзиром на опасност да се у тим друштвима референдум претвори у средство тираније већине над мањином (вид. *infra* 4.5).[6] Због тога се у неким државама изричито предвиђа да

[5] Треба поменути да на исход референдума може да се утиче и на друге начине: одлуком да се иницира одржавање референдума, али и одређивањем правила под којима ће референдум бити одржан (Tierney 2012, 24). Недовољно времена за референдумску кампању онемогућава бираче да формирају своје мишљење или да се упознају са свим релевантним аргументима. Истовремено, заказивање референдума за тачно одређени датум може бити и ствар тактике (Jovanović 2007, 185). Наравно, јасно је и да организовање референдумске кампање, што обухвата медијско оглашавање, јавне дебате, финансирање кампање и сл., има огроман утицај на исход референдума (Jovanović 2007, 186–187).

[6] Релативно често се наводи пример одлуке донете на референдуму у Швајцарској да се ограничи изградња минарета. И поред препоруке федералних власти да се предлог одбије, он је прихваћен на референдуму 2009. године

референдум не може да се односи на питање основних права и слобода (видети нпр. члан 93. став 3. Устава Словачке). Уставна заштита основних права заснована је на њиховом индивидуалном карактеру, а основна сврха искључења основних права из поља референдумског одлучивања је управо заштита појединца, те се сматра да није оправдано на референдуму дискутовати о њиховом (не)постојању. У супротном, читав концепт индивидуалне заштите могао би бити подривен одлуком већине (Baraník 2021, 183).

Посебно је важно поменути да су честе ситуације да уставни судови појединих држава уводе прећутна материјална ограничења. Два су таква примера. Тако је Уставни суд Хрватске, расправљајући о допуштености референдума којим би се у Устав Хрватске унела дефиниција брака као заједнице мушкарца и жене, а то питање је изазвало велике друштвене поделе, изнео став да на референдум не може бити изнето питање које прети нарушавању структуралних обележја хрватске уставне државе. Она творе хрватски уставни идентитет, укључујући највише вредности уставног поретка Републике Хрватске, иако таква формулација не постоји у хрватском уставу.[7] С друге стране, италијанским уставом је предвиђено да аброгативни референдум не може бити одржан поводом фискалних закона, закона о буџету, амнестије и помиловања и закона којима се ратификују међународни уговори (Ibi 2021, 75). Међутим, у једном случају који се тицао одржавања аброгативног референдума, Уставни суд Италије је изнео став да без обзира на то што је уставом изричито предвиђено која питања не могу бити предмет референдума, имплицитно се подразумева да предмет референдума не могу бити ни они закони који су у тако блиској вези са уставном материјом да би њихово искључење из правног поретка утицало на основна уставна начела и функционисање основних органа државе (Ibi 2021, 77).

Иако постављање ограничења, и формалних и материјалних, има велики значај, нарочито у подељеним друштвима, то није довољно већ је неопходно предвидети и институционалне механизме поштовања тих ограничења. Због тога је неопходно осврнути се на питање контроле формалних и материјалних ограничења референдумског питања.

(Stefanini 2017, 375; вид. о томе и: Tushnet 2022, 5).

[7] Уставни суд Хрватске, SuS-1/2013 од 14. новембра 2013, одељак II, пара. 5.

4.3. Контрола референдумског питања

Из идеје народне суверености, доследно примењене, произлази да глас народа изражен на референдуму у вези са постављеним питањем буде коначна одлука. Тако, у теорији и даље постоје ставови да је он слободан да обликује и преуређује друштво како жели (Nugraha 2022, 20) и да не може бити ограничен. Међутим, већ је раније показано да многи устави познају и формална и материјална ограничења предмета референдума, а велики је број земаља у којима су предвиђени и различити облици контроле референдумског питања.

У погледу момента контроле, она може бити *ex ante* или *ex post*. У првом случају, контрола је превентивна, а у другом корективна (Hamon 1995, 44). Контрола може да се односи на припремне радње и акте, на референдумско питање и на сâм поступак гласања (тада је реч о процедуралним питањима) (Hamon 1995, 44). У многим европским државама предвиђена је судска контрола одлуке о изношењу одређеног питања на референдум. Треба правити разлику између оцене дозвољености предмета референдума (када поједина питања уопште не могу бити предмет референдумског одлучивања, видети *supra* 4.2) и контроле начина на који је референдумско питање формулисано, што се углавном одређује у односу на критеријум „јасности“ (*Referendums in Europe – an analysis of the legal rules in European states* 287/2004, para. I, J; видети и *Study on referendums – replies to the questionnaire* 887/2017).

Постоје разноврсна решења питања који је орган надлежан за одлучивање о испуњености услова за одржавање референдума (*Referendums in Europe – an analysis of the legal rules in European states* 287/2004, para. I, P, p. 15). Већина држава Европе не прави разлику између контроле формалних и материјалних ограничења, већ се надзор поверава истим органима (Forgács, Ibi, Moeckli 2021, 272). Упоредно посматрано, надзор могу да врше парламент, органи извршне власти, изборне комисије и, најважније, судови (Forgács, Ibi, Moeckli 2021, 272). Контрола може бити и вишестепена, при чему посебну улогу као контролори имају уставни судови. На пример у Италији, Уставни суд може одлучити да одређено питање није у сагласности са Уставом. Наиме, у члану 75. Устава Италије уређују се тзв. аброгативни референдуми. Законом од 1970. године предвиђен је систем двоструке контроле иницијативе за одржавање референдума. Референдум се може одржати ако то захтева најмање 500.000 бирача или пет регионалних савета. „Први ниво“ провере је у надлежности Касационог суда, тачније тзв. Централне канцеларије (*Ufficio Centrale*

per il referendum)[8] која потврђује да је референдумски захтев сагласан закону и не бави се контролом јасности референдумског питања – она проверава да ли је прикупљен довољан број потписа, да ли су потписи оверени и да ли се референдумски захтев односи на закон који је на снази (Ibi 2021, 80). Уставном суду је поверен други „ниво контроле". У његовој је надлежности, између осталог, да утврди адекватност (и јасност) формулисаног питања (Ibi 2021, 81–83). С друге стране, у Швајцарској је контрола референдума на федералном нивоу у потпуности поверена Савезној скупштини (Forgács, Ibi, Moeckli 2021, 275).

На основу анализе формалних и материјалних ограничења референдумског питања и њихове контроле, видели смо да у неким ситуацијама уставни суд може да делује и као коуставотворац, дописујући одређена материјална ограничења. Међутим, да би уопште могао да штити вредности консоцијативне демократије, важно је претходно предвидети надлежност уставног суда у процесу контроле. На пример, пракса Уставног суда Хрватске је у том смислу врло значајна, али његова надлежност у процесу контроле референдумског питања може бити заснована само на иницијативу органа који је донео одлуку о расписивању референдума, а то је парламент (Forgács, Ibi, Moeckli 2021, 275). Тиме се сврха и ефикасност такве уставносудске зашите могу довести у питање. Ипак, важан је закључак да би било замисливо (и могуће) да један активистички уставни суд у подељеном друштву има улогу у „спречавању" одржавања референдума који има потенцијал да делује као „тиранско средство већине".

4.4. Делиберативни начин доношења одлука

Једна од највећих критика недемократског карактера референдума тиче се начина доношења одлука о његовом одржавању. Тако се истиче да је недостатак референдума, а нарочито у савременим мултикултуралним и често подељеним друштвима, то што грађани доносе одлуку о питању које им може бити „наметнуто", сводећи тако цео демократски процес на избор да или не, при чему изостаје делиберативност. Они који заступају такав став наводе да је доношење одлука на основу воље већине уистину недемократско средство зато што је то прост збир вољa који покушава да ту чињеницу

[8] Реч је о посебном судском већу које је састављено од судија Касационог суда и које заседа по потреби (Ibi 2021, 67; Hamon 1995, 44).

претвори у право. Према њиховом схватању, истинска демократија би подразумевала управљање засновано на аргументима и рационалним разлозима (Sunstein 2001, 7).

На трагу таквих мишљења се у овом раду износи став да сама одлука о референдумском питању има мањи значај од тога како се до резултата заиста дошло. Другим речима, ако је процедура правилно постављена, резултат ће бити легитиман, какав год био, и то отвара простор за примену референдума и у невећинским системима.

Питање је, међутим, да ли логика референдума дозвољава такав приступ. Дакле, да ли референдум уопште може бити средство консоцијативне демократије? Неспорно је да референдум мора да делује као механизам агрегације индивидуалних воља (Tierney 2012, 29). То се, с једне стране, може посматрати као предност референдума јер се тиме грађани дисциплинују и уче томе да јасно уобличе идеје, али и да се понашају као чланови заједнице. Ипак, у случају подељених друштава, која нас у овом раду интересују, тешко да се сви могући интереси који постоје у друштву могу свести на две или три могућности (видети Jovanović 2007, 169–170). Таква природа референдума се најбоље може видети управо када се на референдум износе уставноправна питања. Наиме, у мултикултуралним или дубоко подељеним друштвима нема демоса као целине већ постоји већина на једној страни и више различитих мањина на другој (Tierney 2012, 252; McEvoy 2018; Jovanović 2007, 169). Због тога се поставља питање да ли поларизација коју референдум намеће може да помогне да се дође до решења или ће их само продубити (Tierney 2012, 380). Лајпхарт је у свом пионирском раду о консоцијативној демократији од 1969. године навео да референдум може да подстакне компетитивно понашање у подељеним друштвима и да тиме продуби међусобне тензије и политичку нестабилност (Qvortrup 2018, 180).

Иако има много случајева који потврђују ту тезу (референдум у Белгији о повратку краља 1950. године), било је и потпуно супротних примера. Један од њих је и референдум у Северној Ирској 1998. године. Тада је великом већином прихваћен Споразум из Белфаста, и то на два референдума која су истовремено одржана – један у Северној Ирској, други у Републици Ирској. Тиме је превазиђен дугогодишњи проблем између два дела тог острва.[9] Насупрот тврдњама које су

[9] Референдум се тицао Споразума из Белфаста (познат и као *Good Friday Agreement*), којим је превазиђен вишедеценијски сукоб између северног дела острва који припада Уједињеном Краљевству и Републике Ирске. Сукоб се у основи водио између две струје: унионистичке, која је заговарала позицију да

раније наведене у раду, референдум је овде управо деловао супротно, као средство превазилажења сукоба. Споразум из Белфаста је показао да референдум не треба априорно одбацивати. Кључ успеха је био у делиберативном процесу који је укључио све актере. Прво су све стране имале могућност да изнесу предлоге, без наметања питања и предлога, а потом су о проблему могле и да расправљају. Учешће у јавној дискусији било је дозвољено чак и паравојним организацијама, што свакако представља екстреман пример. Коначно, истовремено су одржана два референдума са два различита питања: један у Северној Ирској, о прихватању Споразума из Белфаста, а други у Републици Ирској, о изменама Устава Ирске, чиме су све стране учествовале равноправно у процесу доношења одлуке (McEvoy 2018, 12). Такво искуство потврђује, како означава Санстајн (*Sunstein*), просту друштвену чињеницу да људи могу да „уђу“ у разговор с једним ставом, а да из њега „изађу“ с другим (Sunstein 2001, 14).

Један релативно нови пример се тиче референдумā који су одржани на територији Украјине 2022. године поводом припајања неколико украјинских региона (Доњецка, Луганска, Херсона, Запорожја) Руској Федерацији. Не улазећи овом приликом у анализу међународноправних и уставноправних питања која се тичу дозвољености анексије, важно је приметити да такви референдуми не могу имати вредност по себи те да посебно могу да буду критиковани из перспективе делиберативности. Руски представници су се позивали на чињеницу да је референдумска процедура била транспарентна те да су страни посматрачи могли да прате ток гласања.[10] Међутим, кључно је да процедура гласања на дан одржавања референдума, чак и када задовољава све стандарде слободе и једнакости избора, не може бити довољна да се оправда резултат референдума. Да би нека политичка одлука била легитимисана, није довољно да већина подржи одлуку већ је неопходно да различити политички ставови буду оправдани јасним аргументима, уз поштовање свих страна, укључујући и мањине. Разуме

Северна Ирска треба и даље да припада Уједињеном Краљевству, и републиканске, која се залагала за уједињење целог острва. Тај је сукоб, међутим, имао значајна верска и етничка обележја. Детаљну анализу референдумског процеса видети у: Hayward 2021, 247–265.

[10] *https://news.un.org/en/story/2022/09/1128161*, последњи приступ 29. марта 2023.

се, а то је јасан формалноправни аргумент, у ратном стању се не може обезбедити делиберативност те се народно гласање у тим условима и не може окарактерисати као референдум.[11]

Да би тај инструмент непосредне демократије могао да задовољи потребе савремених друштава, неопходно је, дакле, да јавна дебата омогући слободно формирање воље бирача. Треба приметити да у плуралистичким друштвима консензус друштвених група о ономе што се може назвати „основном структуром" (*basic structure*) друштва води међусобном разумевању, сарадњи и стабилности друштва у целини (Jovanović 2007, 13).

Питање је, међутим, да ли референдум у Ирској треба посматрати као правило или као изузетак. Чини се да је најисправније о њему говорити као о примеру за углед. Тако, Мендес (*Conrado Hübner Mendes*) наводи да референдум није механизам делиберативне демократије, али уколико има одређене карактеристике, може се говорити и о „делиберативном референдуму" (Mendes 2013, 43 фн. 120). У Ирској је, осим свих раније наведених механизама, битно институционално обележје био и договор о поштовању гласа мањина. Тиме се оспорава теза да је референдум по дефиницији средство „тираније већине".

4.5. Референдумска већина

На опасност од „тираније већине" упозоравао је још Медисон (*James Madison*) у Федералистичким списима (Madison 2008, 48–55). Често се критикује карактеристика референдума да фаворизује већину и потпуно искључује мањину. И Лајпхарт је у својим радовима о консоцијативној демократији указивао на такву опасност када је реч о референдумима. Он примећује да, иако референдуми могу да пруже демократску легитимизацију новим уставима, ипак су неопходна нека ограничења јер референдум може бити опасно средство (*blunt majoritarian instrument*) у рукама већине против мањине (Lijphart

[11] То потврђује и мишљење Венецијанске комисије. Наиме, Савет Европе је утврдио да мишљење које је Венецијанска комисија усвојила 2014. године поводом референдума на Криму исте године *mutatis mutandis* важи и у случају ратног стања. Наиме, у ситуацијама у којима нема демократских услова, попут рата, војних претњи или ванредног стања, није дозвољено одржавање референдума (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).

2004, 106). Заправо, због своје већинске природе с ефектом „победник односи све“ (*the winner takes all*) може бити „катализатор“ конфликта (Qvortrup 2018, 181). Тирни такав ефекат референдумског одлучивања зове „*majoritarian disincentive*“ (Tierney 2012, 271). Као најнегативнији ефекат већинског правила (*majority rule*), наводи се маргинализација интереса мањина путем поларизација (Palermo, Kössler 2017, 117). Лајпхарт је као један од механизама који ће спречити такав ефекат референдума предложио давање могућности мањини (*small minority*) бирача да иницирају одржавање референдума, позвавши се на пример Швајцарске, јер је у томе видео снажно средство јачања механизма заједничког вршења власти (*power-sharing*) (Lijphart 2004, 106). Ипак, такав предлог није најјаснији, нарочито имајући у виду да Лајпхарт није образложио како се тим механизмом могу постићи жељени ефекти.[12] Да би референдум могао да буде средство демократске легитимације у подељеном друштву, он мора да има одређене карактеристике, тј. мора бити „конструисан“ тако да одговара захтевима таквих друштава. Могуће решење је предвидети одређене „гласачке прагове“, односно већине другачије (веће) од просте. Тирни наводи три модела (Tierney 2012, 272–274). Први подразумева захтев да на референдуму гласа одређени број или проценат од укупног броја бирача (50% плус један глас, или се број потребних гласова изражава разломцима – 2/3, 3/4). Други подразумева захтев за постојањем „двоструке већине“ (*double majority*) – на пример, у Швајцарској када је реч о референдумима приликом промене устава, када се захтева да за одлуку гласа већина од укупног броја бирача и већина кантона, при чему се резултат гласања бирача у кантону рачуна као глас кантона (Јовичић 2006, 25). Треће решење подразумева да је довољно да за усвајање одлуке гласа више од половине изашлих бирача, при чему се тражи да је гласала већина од укупног броја уписаних бирача. Кворторуп тој подели додаје још један модел који означава као „захтев за етничком већином“. То је ситуација у којој одређена етничка група која је мањинска у држави, али се одређено питање на њу односи, мора да подржи предлог да би био усвојен (вид. детаљно Qvortrup 2005, 164–174).

Идеја с постављањем виших „прагова“ почива на претпоставци да ће тако пре самог гласања бити постигнут шири консензус, како би референдум успео. Или како је некадашњи канадски министар Стефан Дион (*Stéphane Dion*) рекао, у вези са сецесијом Квебека: „Не разбијајте

[12] Иако Лајпхарт није прецизирао о ком је механизму реч, могуће је да је имао на уму „народни вето“ из члана 141. Устава Швајцарске. У питању је право које се признаје групи од најмање 50.000 грађана да захтевају изношење на референдум тек изгласаног федералног закона.

државу са подршком од 50% плус један глас – сепаратистички лидери широм света не говоре дозволите нам да гласамо и видећете да половина мог народа жели да се отцепи“ (Qvortrup 2005, 166). Међутим, предвиђање било каквог прага носи и једну опасност. Наиме, нормирање одређене већине често може бити арбитрерно или скројено према интересима неке групе. Тако је канадски Врховни суд у својој одлуци од 1998. године, поводом сецесије Квебека, инсистирао на томе да је неопходно да на референдуму постоји „јасна већина“ (видети *infra* 5). Понекад проблем и није у томе која ће се већина тражити за доношење одлуке. Тако, у Северној Ирској није био постављен захтев да већина обе заједнице гласа за Споразум. Суштина је била да се пре самог гласања дође до споразума у кључним институцијама, односно да споразум постигне што је могуће већи број актера (Tierney 2012, 281).

Случај који је у извесној мери повезан с поштовањем права мањинских група и већином која је потребна за доношење одлуке односи се на формирање новог кантона Јуре у Швајцарској. Тај пример Томас Флајнер и Лидија Баста Флајнер означили су као „импресиван јер показује културу компромиса“ (Fleiner, Basta Fleiner 2009, 605). Реч је о тежњи региона Јуре да се издвоји из састава кантона Берна, при чему су се поставила два врло важна питања: да ли већина народа заиста жели да се „отцепи“ од кантона Берна и како на демократски начин утврдити границе Јуре (Fleiner, Basta Fleiner 2009, 605). Прво су становници региона Јуре гласали о томе да ли желе да се формира нови кантон Јура, који је до тада био у саставу кантона Берна. Након што је већина гласала „за“ (премда је реч о 50,7% бирача насупрот 46,9% који су гласали против; Jovanović 2007, 181), у оним деловима који су гласали „против“ грађани су могли на другом гласању да се изјасне о томе да ли желе да остану у саставу кантона Берна или да ипак буду део новог кантона. Онда је организован и трећи „круг гласања“, за грађане у општинама дуж новоутврђених граница о томе под чијом кантоналном јурисдикцијом желе да се нађу (Jovanović 2007, 181). Коначно, четврта фаза је подразумевала референдум на савезном нивоу о изменама Устава Швајцарске, чиме је Јура постала двадесет трећи кантон, односно двадесет шести, укључујући и полукантоне (Fleiner, Basta Fleiner 2009, 605–606; Linder 2021, 93–94). Из тог примера се види начин превазилажења једног спорног питања, и то на принципима консензуса. Та дугачка и сложена процедура примене каскадних референдума, коју је Флајнер назвао „креативном заштитом мањина“ (Linder 2021, 96)

била је организована тако да омогући стварање консензуса, и то не само у „танкој“ већини већ и у већини свих заједница на свим нивоима које су „погођене“ тим питањем (Fleiner, Basta Fleiner 2009, 606).[13]

5. ПРИМЕНА РЕФЕРЕНДУМА НА ПРИНЦИПИМА КОНСОЦИЈАТИВНЕ ДЕМОКРАТИЈЕ

У претходном делу рада приказани су ставови који упозоравају на опасности референдума у плуралним друштвима, сматрајући га инструментом већинске демократије. Истовремено, анализа је показала да његову примену не треба априорно одбацити те да референдум може имати интегративно дејство и у изразито плуралним, па и подељеним друштвима. Другим речима, иако није „конструисан“ као средство које је у стању да задовољи мноштво различитих интереса, референдум то може да буде под условом да има одређена својства. У наставку ће бити размотрено да ли је могућа таква примена референдума, на примеру Канаде и сецесије Квебека. Канада није узета за пример због питања сецесије већ због улоге референдума у том процесу. Наиме, пред грађане се поставило једно врхунско уставноправно питање које је изазвало велике потресе у канадском друштву – да ли једна покрајина може да се отцепи од остатка државе, при чему је покушано да се та одлука донесе на референдуму. Расплет те уставноправне драме пружа могућност да се одговори на основно питање – да ли је референдум могућ у системима невећинске демократије и под којим

[13] Тај пример показује и колики је значај преговора за превазилажење конфликта, при чему они морају бити такви да штите интересе свих страна. Тако је, после много преговора између Јуре, Берна и Швајцарске Конфедерације, организовано ново гласање 2013. године, овога пута о томе да ли грађани желе да покрену процедуру поновног уједињења кантона Јуре и Бернске Јуре, односно оних делова историјске покрајине Јура који су остали у саставу кантона Берна. Док су становници кантона Јура то широко прихватили, становници Бернске Јуре су одбили такав предлог, са изузетком становника града Мутје (*Moutier*), који су прихватили предлог стварања „јединствене“ Јуре. Због тога је организовано „коначно“ гласање на нивоу те општине 2017. године, на којем су грађани Мутјеа потврдили свој ранији став (са већином од око 52%), али је гласање касније поништено из процедуралних разлога (Linder 2021, 96). После низа преговора свих страна, резултати још једног референдума од 2021. године показали су решеност грађана те општине да буду у саставу кантона Јуре (shorturl.at/psNY7, последњи приступ 19. марта 2023; Mazidi, Minder 2019, 9–12). Резултати су званично проглашени, те се очекује да до 2026. године Мутје и званично буде у саставу кантона Јуре.

условима. С друге стране, Канада је пример плуралног друштва те су сви потенцијални недостаци референдума у ширем контексту дошли до изражаја управо у случају Квебека.

Парламент Канаде је 2000. године, после вишедеценијских покушаја да се побољша положај Квебека у оквиру канадске федерације и два референдума о отцепљењу те покрајине од Канаде (1980. и 1995), усвојио Закон о јасности,[14] којим је правно уредио поступак договорне сецесије. Тим законом је у дело спроведено саветодавно мишљење Врховног суда Канаде од 1998. године[15] (Маринковић 2002, 388–389), које је донето након што је Влада Канаде поставила питање дозвољености сецесије с уставноправног и међународноправног становишта.[16]

Врховни суд је указао на четири основна начела уставног система Канаде: федерализам, демократију, конституционализам и владавину права и заштиту права мањина (пара. 49). Суд није искључио могућност отцепљења једног дела територије, под условом да се поштује процедура, која је касније била детаљније уређена Законом о јасности.

У саветодавном мишљењу се истиче да референдум није довољан за одлуку о отцепљењу, али да несумњиво може бити демократски метод упознавања са погледима бирачког тела о важним политичким питањима. Међутим, Суд наглашава да и у том случају „јасна већина" мора да изрази мишљење о том питању (пара. 87). Тада се, уколико постоји јасна и недвосмислена воља, рађа обавеза свих страна да преговарају о будућим уставним променама (пара. 88). Одлука Суда је трпела бројне критике управо због тога што се у њој користе термини „јасно питање" и „јасна већина", иако уопште није јасно шта се под тим подразумева (видети *supra* 4.1, 4.5). Због тога је и донет тзв. Закон о јасности.

Њиме се предвиђа да влада покрајине која жели да иступи из федерације покреће поступак објављивањем референдумског питања. То питање је предмет контроле која је у надлежности Доњег дома канадског парламента. Приликом те контроле, Доњи дом Парламента ће нарочито размотрити да ли такво питање омогућава јасно изражавање

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

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

[16] Канадску федерацију, између осталог, карактерише и специфичан однос између англофонског и франкофонског становништва. Како примећује Маринковић, готово век и по дуг развој федерализма у Канади обележен је, пре свега, дезинтеграционим процесима, који се, између осталог, огледају у све израженијем расцепу на англофонски и франкофонски део (2002, 389–390).

воље народа у покрајини у вези с предлогом сецесије (одељак 1.3). Осим тога, Законом се налаже да се приликом оцене да ли је питање јасно узму у обзир сва гледишта која Доњи дом сматра релевантним (одељак 1.5).[17]

Ако је питање јасно, следећа фаза се састоји у преговорима, након којих се одржава референдум. У саветодавном мишљењу Суд је нагласио да све стране имају обавезу да учествују у преговорима (пара. 89). Они се воде у складу с начелима које је Суд идентификовао, између осталог, и да се „апсолутни", односно ултимативни предлози не могу прихватити (пара. 90). Суд се осврће и на оно што је у овоме чланку означено као „слаба тачка" референдума. Наиме, демократски принцип већине, у случају Канаде, не може бити значајнији или изнад неких других, попут владавине права, заштите права мањина или федерализма, односно он сâм примењен не може произвести било какво правно дејство (пара. 91). Свестан „плуралности" канадског друштва, Врховни суд подсећа да „Канађани никада нису прихватили да наш систем почива на правилу просте већине (*majority rule*)" (пара. 76) и да је зато неопходно поставити захтев за појачаном већином (*enhanced majority*) како би Устав обезбедио интересе мањине која такође мора да буде консултована имајући у виду да ће одлука утицати и на њу (пара. 76–77). Треба приметити да Закон о јасности ипак није на конкретан начин предвидео потребну већину. Њиме су дата упутства Доњем дому како да процени постојање „јасне већине" (одељак 2.2 и 2.3; Jovanović 2007, 193). Дакле, важно је да се у обзир узме највећи могући број различитих, а истовремено релевантних мишљења и ставова, како би се створила што шира основа за доношење одлуке. Поготово је значајно

[17] Контроли јасности референдумског питања у том закону посвећено је много пажње управо због тога што су питања постављана на референдумима од 1980. и 1995. године била толико дугачка и нејасна да су збуњивала бираче. Године 1980. оно је гласило: „Влада Квебека је јавно изнела свој предлог за постизање новог споразума с остатком Канаде, заснован на једнакости нација; тај споразум би омогућио Квебеку да стекне искључиво право да доноси своје законе, заводи своје порезе и успоставља везе с иностранством – другим речима, сувереност – и у исто време да остане с Канадом у економској заједници, укључујући и заједничку валуту; било какве промене у политичком статусу које би произашле из тих преговора биће, путем референдума, изнете пред народ; да ли се, под овим условима, саглашавате да дате Влади Квебека мандат да преговара о предложеном споразуму између Квебека и Канаде?" На референдуму одржаном 1995. године питање је било формулисано нешто краће, али и даље нејасно: „Да ли се слажете да Квебек треба да буде суверен након што упути формалну понуду Канади за ново економско и политичко партнерство у оквиру Предлога закона о будућности Квебека и споразума потписаног 12. јуна 1995?" (нав. према: Маринковић 2002, 394, 396).

помињање (аутохтоних) мањинских народа у Закону о јасности, што говори да они нарочито могу бити погођени референдумском одлуком већине. Зато се њима и пружа заштита (која је посредна) јер је Доњи дом дужан да њихове ставове узме у обзир.

У надлежности тог дома канадског парламента је да врши још један облик контроле референдумског процеса и то *ex post* – наиме, да ли постоји јасно изражена воља јасне већине грађана на спроведеном референдуму (контрола јасности референдумског питања може се означити као *ex ante*). То значи да референдумска одлука мора бити „оснажена“ актом Доњег дома који доноси одлуку којом верификује референдумски резултат.

6. ЗАКЉУЧАК

У овом раду је разматрано место референдума у подељеним друштвима, и то у онима која се сматрају консоцијативним демократијама. Анализа је имала два циља – да се утврди да ли референдум може бити примењен у консоцијативним демократијама и, ако је тако, под којим условима.

Референдум може изгледати као демократско средство доношења политичких одлука. Замисао тога института јесте да народ непосредним изјашњавањем доноси одлуку. Ту се представничка демократија, као уобичајени облик вршења власти, „повлачи“, а грађани најнепосредније врше сувереност. Отуда референдум није „свакодневно“ средство већ се користи онда када се постави питање од најширег друштвеног значаја. То се односи и на ситуације решавања тешких политичких питања. Међутим, бројни аутори примећују да, иако теоријски ситуација изгледа једноставно, у пракси „нема очигледних доказа да су референдуми успешније средство од неких других механизама у превазилажењу тешких политичких криза када је бирачко тело подељено око оних питања која су од суштинске важности за њега“ (Jovanović 2007, 168–169). У подељеним друштвима су испреплетани различити интереси. Због тога одлука о важном питању не може бити заснована искључиво на већинском начелу. Суштина је у томе да ће одлука у друштву бити легитимна само ако се различите групе у друштву сложе о њеној садржини, из чега произлази да се легитимност не може мерити независним стандардом правде већ пристанком оних којима се влада (Chambers 1998, 143). Референдум, међутим, често не може да задовољи тако бројне интересе. Зато је и посматрана могућност његове примене

у плуралним или чак подељеним друштвима јер у њима макар одлуке уставотворног карактера не би требало да буду засноване на принципу већине већ на задовољењу најширег могућег броја интереса.

Референдуму се могу упутити три групе критика. Прва се тиче референдумског питања које често може бити формулисано тако да његов исход буде жељени резулатат. Друго, дефицит делиберативности, који подразумева немогућност артикулисања великог броја различитих интереса, у ситуацији у којој се одлучивање своди на алтернативу да или не. Коначно, у подељеним друштвима су нарочито спорна питања којом већином се доноси одлука и какав је положај мањина.

Анализа је показала да референдум не треба олако одбацити, чак ни у подељеним друштвима. Наиме, Лајпхарт се у својим каснијим радовима бавио и предлагањем решења за таква друштва. У вези с тим, Поповић наводи да је обликовање установа у консоцијативним системима један од најзанимљивијих видова уставног инжењеринга. Тај задатак има и велику практичну вредност јер се у друштвима која су подељена, нарочито по језичкој и етничкој линији, конструисању уставних установа мора приступити посебно опрезно (Милосављевић, Поповић 2019, 216–217). Другим речима, референдум може функционисати и у дубоко подељеним друштвима, само што у том случају мора да испуни одређене услове, односно мора бити „конструисан“ тако да отклони или у највећој могућој мери ублажи недостатке који су раније наведени.

Отуда, пажња мора бити померена са самог гласања на референдумску процедуру. Када постоји озбиљна подела по неком политичком питању, неопходна је артикулација различитих интереса. Другим речима, проблем мора бити јасно дефинисан, а на основу тога неопходно је поставити јасно референдумско питање. Од његове формулације може да зависи и исход референдума. Могућа су различита решења – контрола од уставносудског органа или од политичких органа, при чему је важно унапред предвидети ограничења (у форми закона) у формулисању питања. Некада се највише вредности могу заштити и постављањем материјалних ограничења – прописивањем да нека питања не могу бити предмет референдумског одлучивања. Осим тога, било би добро предвидети и гарантовати вођење дискусије у току референдумске кампање. Уопште, јавна дебата мора бити таква да омогући слободно формирање воље бирача. Она може бити организована тако да укључује различите облике партиципације највећег могућег броја различитих група у друштву, а нарочито је важно да мањина не буде маргинализована. У вези с тим се могу предвидети и механизми којима се штите интереси мањинā. Тако је, на пример, формиран кантон Јура у Швајцарској. Коначно, када је

реч о потребном броју гласова за успех референдума, пракса показује да се мора тражити одређена квалификована већина. Она, међутим, мора бити постигнута тако да задовољи интересе најширег могућег броја различитих група у друштву, а нарочито да обухвати мањине. Та питања је разматрао и Врховни суд Канаде у својој одлуци о сецесији Квебека, где је управо уочио значај јасно формулисаног питања и јасне већине, као и потребу да се заштите бројни (различити) ставови у референдумском процесу.

Ипак, као што је у раду истакнуто, чини се да је мање важно какав ће бити исход гласања него каква ће бити референдумска процедура. Из претходно реченог произлази да правилно организована кампања и уопште процес који претходи одлучивању може бити она фаза која ће обезбедити легитимитет. Како Санстајн примећује, под добрим условима, у процесу преговарања се може разјаснити основ неспоразума (Sunstein 2001, 8). Тако се може задовољити најшири могући број интереса, па ће легитимацијско средство бити читав процес, а не резултат референдума. Који су то механизми, зависи од услова у конкретном друштву. Томе је могуће упутити критику да су сви механизми који су раније наведени претерано сложени, али „сложена" друштва, хетерогена, а нарочито дубоко подељена, често захтевају и пренормираност, како би се спречиле могуће злоупотребе. Због тога референдум није средство које је ограничено на већинску демократију већ институт којисе, уз извесна институционална „оснаживања", може применити и у невећинским системима. Штавише, референдум задржава све своје важне функције чак и у подељеним друштвима – он и тада (ако је добро „постављен") представља механизам непосредног вршења власти грађана. Референдум има потенцијал да се обликује тако да различитим групама омогући да изразе своје ставове и да тако отклони неспоразуме и спречи даље поделе у друштву.

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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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УПУТСТВО ЗА АУТОРЕ

Анали Правног факултета у Београду објављују текстове на српском и енглеском језику.

У Аналима се објављују научни чланци, критичке анализе, коментари судских одлука, прилози из међународног научног живота и прикази. Прихватају се искључиво аналитички, а не дескриптивни прикази научних и стручних књига.

Предајом текста, аутор изјављује да текст није ни објављен ни прихваћен за објављивање те да неће бити предат за објављивање било ком другом медију. Аутор такође изјављује да је носилац ауторског права, да је обавештен о правима трећих лица и да је испунио захтеве који произлазе из тих права.

Пријем свих текстова биће потврђен електронском поштом. Редакција ће размотрити подобност свих радова да буду подвргнути поступку рецензирања. Подобни текстови шаљу се на двоструку анонимну рецензију.

Информације о уредничкој политици *Анала Правног факултета у Београду* видети на: *https://anali.rs/eticki-kodeks/*.

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2. апстракт и кључне речи,
3. рукопис и списак литературе,
4. додаци, табеле и слике.

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- пуну адресу за кореспонденцију и адресу електронске поште.

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1.1.1. Прво слово велико курзив

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– Према Коциолу (Koziol 1997, 73–87)...

– О томе је опсежно писао Коциол (Koziol 1997, 73–87).

– Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags– und Universitätsbuchhandlung.

Пожељно је да у цитатима у тексту буде наведен податак о броју стране на којој се налази део дела које се цитира.

Исто тако и / Исто / Као и Константиновић (1969, 125–127);

Према Бартош (1959, 89 фн. 100) – *тамо где је фуснота 100 на 89. страни*;

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(видети, на пример, Бартош 1959; Симовић 1972)

(видети посебно Бакић 1959)

(Станковић, Орлић 2014)

Један аутор

Цитат у тексту (Т): Као и Илај (Ely 1980, број стране), тврдимо да...

Навођење у списку литературе (Л): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

Т: Исто као и Аврамовић (2008, број стране), тврдимо да...

Л: Аврамовић, Сима. 2008. *Rhetorike techne – вештина беседништва и јавни наступ.* Београд: Службени гласник – Правни факултет Универзитета у Београду.

Т: Васиљевић (2007, број стране),

Л: Васиљевић, Мирко. 2007. *Корпоративно управљање: правни аспекти*. Београд: Правни факултет Универзитета у Београду.

Два аутора

Т: Као што је указано (Daniels, Martin 1995, број стране),

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

Т: Као што је показано (Станковић, Орлић 2014, број стране),

Л: Станковић, Обрен, Миодраг Орлић. 2014. *Стварно право.* Београд: Номос.

Три аутора

Т: Као што су предложили Сесил, Линд и Бермант (Cecil, Lind, Bermant 1987, број стране),

Л: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

Више од три аутора

Т: Према истраживању које је спровео Тарнер са сарадницима (Turner *et al*. 2002, број стране),

Л: 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.

Т: Поједини аутори сматрају (Варади *et al*. 2012, број стране)...

Л: Варади, Тибор, Бернадет Бордаш, Гашо Кнежевић, Владимир Павић. 2012. *Међународно приватно право*. 14. издање. Београд: Правни факултет Универзитета у Београду.

Институција као аутор

Т: (U.S. Department of Justice 1992, број стране)

Л: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

Т: (Завод за интелектуалну својину Републике Србије 2015, број стране)

Л: Завод за интелектуалну својину Републике Србије. 2015. *95 година заштите интелектуалне својине у Србији*. Београд: Colorgraphx.

Дело без аутора

Т: (*Journal of the Assembly* 1822, број стране)

Л: 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.

Цитирање више дела истог аутора

Клермонт и Ајзенберг сматрају (Clermont, Eisenberg 1992, број стране; 1998, број стране)...

Баста истиче (2001, број стране; 2003, број стране)...

Цитирање више дела истог аутора из исте године

Т: (White 1991a, page)

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

Истовремено цитирање више аутора и дела

(Grogger 1991, број стране; Witte 1980, број стране; Levitt 1997, број стране)

(Поповић 2017, број стране; Лабус 2014, број стране; Васиљевић 2013, број стране)

Поглавље у књизи

Т: Холмс (Holmes 1988, број стране) тврди...

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

Поглавље у делу које је издато у више томова

Т: Шварц и Сајкс (Schwartz, Sykes 1998, број стране) тврде супротно.

Л: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664. *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Књига са више издања

Т: Користећи Гринов метод (Greene 1997), направили смо модел који...

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

Т: (Поповић 2018, број стране), *Р:* Поповић, Дејан. 2018. *Пореско право*. 16. издање. Београд: Правни факултет Универзитета у Београду.

Навођење броја издања није обавезно.

Поновно издање – репринт

Т: (Angell, Ames [1832] 1972, 24)

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

Чланак

У списку литературе наводе се: презиме и име аутора, број и година објављивања свеске, назив чланка, назив часописа, година излажења часописа, странице. При навођењу иностраних часописа који не нумеришу свеске тај податак се изоставља.

Т: Тај модел користио је Левин са сарадницима (Levine *et al*. 1999, број стране)

Л: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

Т: На то је указао Васиљевић (2018, број стране)

Л: Васиљевић, Мирко. 2/2018. Арбитражни уговор и интеркомпанијскоправни спорови. *Анали Правног факултета у Београду* 66: 7–46.

Т: Орлић истиче утицај упоредног права на садржину Скице (Орлић 2010, 815–819).

Л: Орлић, Миодраг. 10/2010. Субјективна деликтна одговорност у српском праву. *Правни живот* 59: 809–840.

Цитирање целог броја часописа

Т: Томе је посвећена једна свеска часописа *Texas Law Review* (1994).

Л: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

Т: Осигурање од грађанске одговорности подробно је анализирано у часопису *Анали Правног факултета у Београду* (1982).

Л: Анали Правног факултета у Београду. 6/1982. *Саветовање: Нека актуелна питања осигурања од грађанске одговорности*, 30: 939–1288.

Коментари

Т: Смит (Smith 1983, број стране) тврди...

Л: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

Т: Према Шмаленбаху (Schmalenbach 2018, број стране), јасно је да...

Л: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*Л:* Томић, Јанко, Саша Павловић. 2018. Упоредноправна анализа прописа у области радног права. Радни документ бр. 7676. Институт за упоредно право, Београд.

Т: (Glaeser, Sacerdote 2000)

Л: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Лична кореспонденција/комуникација

Т: Као што тврди Дамњановић (2017),

Л: Дамњановић, Вићентије. 2017. Писмо аутору, 15. јануар.

Т: (Welch 1998)

Л: Welch, Thomas. 1998. Letter to author, 15 January.

Стабилни интернет протокол (URL)

Т: Према Заводу за интелектуалну својину Републике Србије (2018),

Л: Завод за интелектуалну својину Републике Србије. 2018. Годишњи извештај о раду за 2017. годину. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, последњи приступ 28. марта 2018.

Т: According to the Intellectual Property Office (2018)

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Т: (Богдановић 2019, број стране)

Л: Богдановић, Лука. 2019. Економске последице уговарања клаузуле најповлашћеније нације у билатералним инвестиционим споразумима. *Номос*, том 11, у штампи.

Т: (Spier 2003, број стране)

Л: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Прихваћено за објављивање

Т: У једном истраживању (Петровић, прихваћено за објављивање) посебно се истиче значај права мањинских акционара за функционисање акционарског друштва.

Л: Петровић, Марко. Прихваћено за објављивање. Права мањинских акционара у контексту функционисања скупштине акционарског друштва. *Правни живот*.

Т: Једна студија (Joyce, прихваћено за објављивање) односи се на Колумбијски дистрикт.

Л: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Судска пракса

***Ф(усноте)**:* Врховни суд Србије, Рев. 1354/06, 6. 9. 2006, Paragraf Lex; Врховни суд Србије, Рев. 2331/96, 3. 7. 1996, *Билтен судске праксе Врховног суда Србије* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16.

Т: За референце у тексту користити скраћенице (ВСС Рев. 1354/06; CJEU C-20/12 или Giersch and Others; Opinion of AG Mengozzi) конзистентно у целом чланку.

Л: Не треба наводити судску праксу у списку коришћене литературе.

Закони и други прописи

Ф: Законик о кривичном поступку, *Службени гласник РС* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 и 55/2014, чл. 2, ст. 1, тач. 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).

Т: За референце у тексту користити скраћенице (ЗКП или ЗКП РС; Regulation No. 1052/2013; Directive 2013/32) конзистентно у целом чланку.

Л: Не треба наводити прописе у списку коришћене литературе.

4. ПРИЛОЗИ, ТАБЕЛЕ И СЛИКЕ

Фусноте у прилозима нумеришу се без прекида као наставак на оне у остатку текста.

Нумерација једначина, табела и слика у прилозима почиње са 1 (једначина А1, табела А1, слика А1 итд., за прилог А; једначина Б1, табела Б1, слика Б1 итд., за прилог Б).

На страни може бити само једна табела. Табела може заузимати више од једне стране.

Табеле имају кратке наслове. Додатна објашњења се наводе у напоменама на дну табеле.

Треба идентификовати све количине, јединице мере и скраћенице за све уносе у табели.

Извори се наводе у целини на дну табеле, без унакрсних референци на фусноте или изворе на другим местима у чланку.

Слике се прилажу у фајловима одвојено од текста и треба да буду јасно обележене.

Не треба користити сенчење или боју на графичким приказима. Ако је потребно визуелно истаћи поједине разлике, молимо вас да користите шрафирање и унакрсно шрафирање или друго средство означавања.

Не треба користити оквир за текст испод или око слике.

Молимо вас да користите фонт *Times New Roman* ако постоји било какво слово или текст на слици. Величина фонта мора бити најмање 7.

Графици не садрже било какву боју.

Наслови слика су наведени и на засебној страници са двоструким проредом под називом – Легенда коришћених слика.

Слике не могу бити веће од 10 cm x 18 cm. Да би се избегло да слика буде значајно смањена, објашњења појединих делова слике треба да буду постављена у оквиру слике или испод ње.

CIP – Каталогизација у публикацији
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АНАЛИ Правног факултета у Београду : часопис за правне и друштвене науке = The Annals of the Faculty of Law in Belgrade : Belgrade law review / главни и одговорни уредник Марија Караникић Мирић. – [Српско изд.]. – Год. 1, бр. 1 (1953)–. – Београд : Правни факултет Универзитета у Београду, 1953– (Београд : Донат граф). – 24 cm

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Факултетски научни часопис *Анали Правног факултета у Београду* излази од 1953. године (ISSN: 0003-2565) као потомак часописа *Архив за правне и друштвене науке* који је излазио од 1906. године.

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