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Ján Husár, Regina Hučková (eds.)

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PREDHOVOR

Milí čitatelia, dostáva sa vám do rúk zborník vedeckých prác, ktorý je výstupom z konferencie Právo – obchod – ekonomika, najmä zo sekcie The Influence of European Legislation on National Legal Framework in Civil, Commercial, and Business Law: Emerging Trends in Cybersecurity, Data Protection and Digitalisation, pripravovanej v rámci projektu zameraného na rozvoj kybernetickej bezpečnosti a podporu povedomia o digitálnych hrozbách (projektu Kompetenčné centrum kybernetickej bezpečnosti na Univerzite Pavla Jozefa Šafárika v Košiciach – kód projektu 17R05 - 04 - V01- 00007 podporeného Európskou úniou v prostriedkov Plánu obnovy a odolnosti SR).

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Za editorov: Regina Hučková

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Small mid-cap enterprises – European “New kid on the block” for reduction of red tape and enhancing competitiveness?[1]

Stredne veľké podniky typu „small mid-cap“ – európska „nováčikovská“ kategória na znižovanie administratívnej záťaže a posilnenie konkurencieschopnosti?

Abstract
This article examines the possible emergence of small mid-cap enterprises as an increasingly significant yet long-underrecognised category within EU internal market law. While traditionally overshadowed by SMEs and large undertakings, ‘mid-caps’ face unique regulatory pressures, including abrupt loss of SME benefits and disproportionate compliance burdens. The article traces the evolution of EU enterprise categorisation, demonstrating that mid-caps have been informally present in sectoral legislation already some time before the Commission’s 2025 Recommendation proposed a horizontal definition. It analyses the proposed definitional criteria, their interaction with existing regulatory regimes, and the rationale for creating an intermediate category to enhance proportionality, competitiveness, and regulatory coherence. By consolidating fragmented practice, the Recommendation lays the groundwork for more calibrated policymaking and potential future integration into binding legislation. The article concludes that small mid-caps are not a “new kid on the block” but a refined category essential for a resilient and dynamic Single Market.
Keywords: *small mid-cap enterprises, entrepreneurs, entrepreneurship, social security, European Union.*
Abstrakt
Tento článok sa venuje možnému vzostupu malých mid-cap podnikov ako čoraz významnejšej, no dlhodobo prehliadanej kategórie vo vnútornom trhu EÚ. Kým doteraz stáli v tieni malých a stredných podnikov a veľkých podnikov, „mid-capy“ čelia osobitným regulačným tlakom, vrátane náhlej straty výhod určených pre MSP a neprimeranej záťaže pri plnení regulačných povinností. Článok sleduje vývoj kategorizácie podnikov v EÚ a ukazuje, že mid-capy boli v sektorovej legislatíve neformálne prítomné už skôr, než Európska komisia v roku 2025 navrhla horizontálnu definíciu. Analyzuje navrhované definičné kritériá, ich súlad s existujúcimi regulačnými rámcami a dôvody vytvorenia strednej kategórie s cieľom posilniť proporcionalitu, konkurencieschopnosť a regulačnú konzistentnosť. Zjednotením fragmentovanej praxe vytvára odporúčanie základ pre presnejšiu tvorbu politík a možnú budúcu integráciu do záväznej legislatívy. Článok uzatvára, že malé mid-capy nie sú „nováčikom“, ale prepracovanou kategóriou nevyhnutnou pre odolný a dynamický jednotný trh.
Kľúčové slová: *malé mid-cap podniky, podnikatelia, podnikanie, sociálne zabezpečenie, Európska únia.*

JEL Classification: K 29, K31, K33, K37, K39

INTRODUCTION

The Single Market[2] of the European Union is the European home market. It is a powerful catalyst for growth, prosperity and solidarity. Indeed, the European model combines an open economy, a high

[1] ORCID number: 0000-0002-4986-2328. This publication presents the results of scientific research carried out as part of project no. 064/WPG/2025/POT, financed by a grant awarded to the Krakow University of Economics.
[2] Interchangeably called the ‘common market’, the ‘single market’, or the ‘internal market’. All these notions refer to the same concept: a geographical area made up of the territories of the Member States, wherein there are (in theory) no barriers

degree of market competition and a strong legal framework and active policies to fight poverty and redistribute wealth. This model has allowed the EU to marry high levels of economic integration and human development with low levels of inequality. Europe has built a Single Market of 440 million consumers, while also achieving rates of income inequality that are around 10 percentage points below those seen in the United States and China[3]. With a GDP of EUR 18 trillion[4], the Single Market is the second largest economy in the world, accounting for almost 18% of the global economy[5] and providing the EU with scale, strength and agility. Bringing together 30 states and 26 million companies[6], the Single Market offers access to a wide range of products, services and investment opportunities.

The European Union's longstanding commitment to fostering a competitive internal market is grounded in its primary law. Article 173 of the Treaty on the Functioning of the European Union (TFEU)[7] mandates the Union and the Member States to "*ensure that the conditions necessary for the competitiveness of the Union's industry exist*," while Article 114 TFEU empowers the EU legislature to approximate national laws to facilitate the functioning of the internal market. Within this framework, small and medium-sized enterprises (SMEs) have traditionally been a central focus of regulatory policy, recognised as the backbone of the European economy and a key driver of innovation, employment, and growth. Yet, despite sustained legislative attention — including the *Small Business Act* (2008)[8], the *Start-up and Scale-up Initiative* (2016)[9], and most recently the *SME Relief Package* (2023)[10] — the Union's regulatory architecture has so far struggled to reflect the full diversity of its entrepreneurial landscape.

One particular gap lies in the treatment of companies that have outgrown the traditional SME definition[11] under Commission Recommendation 2003/361/EC[12] but still lack the scale, resources, and compliance capacity of large undertakings. These "*small mid-cap enterprises*" — often defined as companies with up to 500 employees — occupy a strategic yet legally under-recognised position within

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to trade, and which operate an identical external trade policy – cf. S. De Mars, *The internal (or common, or single) market* [in:] EU Law in the UK, Oxford, 2020, s. 269 et seq. The Treaty on the functioning of the European Union defines it (as 'internal market') in its Art. 26(2) as comprising 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. See also, M. Kiełbasa, *Prawa socjalne w Unii Europejskiej a granice swobód rynku wewnętrznego,* Warszawa 2017, p. 3 et seq. Throughout the text, the concepts of 'Single Market' and 'internal market' will be used interchangeably.

3 Cf. DRAGHI M., The *future of European competitiveness. Part A | A competitiveness strategy for Europe*, Luxembourg: Publications Office of the European Union, 2025, p. 11.

4 Cf. Eurostat (2024), *Gross domestic product at market prices, Data Browser*, retrievable at: https://ec.europa.eu/eurostat/databrowser/view/tec00001/bookmark/table?lang=en&bookmarkId=9f6e76be-7852-4ee3-949e-be5400a51298

5 Cf. International Monetary Found, World Economic Outlook, October 2024, retrievable at https://www.imf.org/en/Publications/WEO/Issues/2024/10/22/world-economic-outlook-october-2024

6 Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong*, 21 May 2025, COM/2025/500 final ['Single Market Strategy'], p. 1

7 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390, hereinafter also as the 'TFEU'.

8 Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Think Small First". A "Small Business Act" for Europe*, COM(2008) 394 final, 25 June 2008.

9 See e.g. Commission gives boost to start-ups in Europe, Press release, 22 November 2016, retrievable at: https://ec.europa.eu/commission/presscorner/detail/en/ip_16_3882

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - SME Relief Package, 12 September 2023, COM(2023) 535 final.

11 Under Art. 2(1) of the SME Commission Recommendation, the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

12 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, pp. 36–41 ['SME Commission Recommendation'].

the Single Market. Their significance has been increasingly acknowledged in sectoral legislation - e.g. in Regulation (EU) 2017/1129 [the so-called 'Prospectus Regulation'][13] or General Block Exemption Regulation (GBER)[14] and industrial policy, but a coherent horizontal framework remains absent. The European Commission's recent initiatives signal a shift towards formalising this intermediate category, not merely as a statistical refinement but as a normative instrument to calibrate legal obligations in a more proportionate and innovation-friendly manner.

The emergence of the small mid-cap category thus represents a potentially transformative development in EU company and internal market law. By aligning regulatory intensity more closely with enterprise capacity, it promises to advance core Treaty objectives — including competitiveness, proportionality, and subsidiarity — while mitigating the persistent problem of regulatory overreach that disproportionately burdens growth-oriented companies.

Given the above, this article examines the evolving legal recognition of small mid-caps, situating it within the broader trajectory of EU regulatory policy, and considers whether this "New kid on the block" might ultimately serve as a catalyst for a more differentiated, dynamic, and legally coherent internal market regime.

1. THE EVOLUTION OF ENTERPRISE CATEGORISATION IN EU LAW

1.1. The original SME framework and its limitations

The EU's official SME definition (established by Commission Recommendation 2003/361/EC) classifies enterprises as micro, small, or medium based on headcount and financial metrics (turnover or balance sheet total)[15].

In practice, this definition has become the common reference across many EU policies. It is binding for determining eligibility in areas like State aid, structural/cohesion funds, and EU research programmes[16]. Member States and financial institutions (e.g. the EIB) also rely on it to align SME support measures[17]. Under this framework, a medium-sized firm is capped at fewer than 250 employees and either ≤ €50 million in annual turnover or ≤ €43 million in balance sheet total. However, a critical limitation of the current SME definition is the abrupt transition that occurs once a firm outgrows the SME thresholds. Once a firm exceeds the threshold of 250 employees or EUR 50 million in turnover, it abruptly exits the SME regime regardless of its structural realities. While the SME status offers significant advantages — such as simplified reporting, preferential access to funding schemes, or exemptions from certain regulatory obligations — the transition out of this category often generates compliance shock.

This hard cut-off creates a so-called "cliff edge"[18]: an enterprise suddenly faces the full set of obligations for large companies, losing all SME-specific advantages at once. Notably, SME status brings several benefits that are forfeited upon exit from the category:

13 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30.6.2017, pp. 12–82.

14 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, pp. 1–78.

15 Cf. SME Commission Recommendation'], Annex Art.2 (threshold criteria).

16 RACZYŃSKA M., *Definition of micro, small and medium enterprise under the guidelines of the European Union,* Review of Economic & Business Studies, Volume 12, Issue 2/2019, p. 165 et seq.

17 Cf. BRENNAN S., *EU Introduces Small Mid-Caps to Cut Compliance Burdens Across Industrial Sectors, Foresight News, 20 June 2025,* retrievable at: https://www.useforesight.io/news/eu-introduces-small-mid-caps-to-cut-compliance-burdens-across-industrial-sectors

18 Cf. *European Commission to further reduce the administrative costs of EU businesses,* 21 May 2025, PwC Blogs, retrievable at: *https://blogs.pwc.de/de/german-tax-and-legal-news/article/249016/european-commission-to-further-reduce-the-administrative-costs-of-eu-businesses/*

- Simplified compliance and reporting: SMEs often enjoy streamlined reporting requirements and lighter administrative procedures under EU law[19]. For example, they may file abridged accounts or face less onerous paperwork in areas like data protection and environmental reporting.
- Preferential access to funding and support programs: Many EU funding schemes (e.g. innovation grants, cohesion funds) reserve quotas or tailored instruments for SMEs, recognizing their financing constraints. Losing SME status can mean losing eligibility for such targeted financial support.
- Regulatory exemptions or reduced fees: EU regulations frequently exempt SMEs from certain rules or fees to reduce burden. For instance, under chemical and product regulations, small enterprises might be exempt from some registration or due diligence requirements. Upon crossing the threshold, a firm must suddenly comply with all standard rules and fees applicable to large enterprises.

This abrupt loss of the above-mentioned benefits often results in a sort of a "compliance shock." Enterprises just above the SME threshold face a steep increase in regulatory costs and complexity virtually overnight. Studies have noted that the jump to full compliance – covering everything from labour law to reporting standards – can strain these companies' capacities and discourage growth[20]. In highly regulated sectors, some businesses reportedly delay expansion or hiring to avoid breaching the 250-employee mark, underlining how the cliff-edge acts as a growth disincentive[21].

A related restriction of the current definition is the absence of any intermediate category between SMEs and large enterprises. Companies that "graduate" from SME status are treated as "large" by regulators despite often being far smaller than traditional large corporations. Empirical evidence – including the European Commission's own *"Study to map, measure and portray the EU mid-cap landscape"*[22] – shows that firms just above the SME cutoff exhibit many similarities with smaller firms. They tend to be highly innovative, stronger, usually grow faster and deal better with digitalisation than SMEs, however they face certain similar challenges such as administrative burden or the lack of skilled employees[23] and they lack the scale and capital base of true large enterprises. In other words, a 300-employee manufacturing company is often much closer in spirit to a 200-employee enterprise than to a multinational of 10,000 staff. However, under the binary SME/large classification, both the 300-employee enterprise and the 10,000-employee giant enterprise are lumped together as "non-SME" and held to identical regulatory standards.

This mismatch between regulatory intensity and enterprise capacity has been widely criticized[24]. Policymakers note that mid-sized businesses shoulder disproportionately heavy compliance burdens relative to their resources, which can stifle their competitive potential. The European Commission itself acknowledged that regulations designed for big multinationals can be "*too burdensome, disproportionate or a hindrance*" when applied to firms only marginally above SME size[25]. In effect, the rigid SME definition imposes a one-size-fits-all regime on firms once they cross the threshold, without a gradual scaling of obligations to reflect their still-moderate scale.

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19 Cf. CADE – Civil Society Alliances for Digital Empowerment, *European Commission propose new regulation to ease compliance for small mid-cap firms*, retrievable at: https://cadeproject.org/updates/european-commission-propose-new-regulation-to-ease-compliance-for-small-mid-cap-firms/

20 See BRENNAN S., *EU Introduces Small Mid-Caps…*, op. cit.

21 *Ibidem*. See also CADE – Civil Society Alliances for Digital Empowerment, *European Commission propose new regulation to ease compliance for small mid-cap firms,* op. cit.

22 DACHS B., SIEDSCHLAG I., YAN W., YOVESKA M., BOEIRA F., IVORY S., *Study to map, measure and portray the EU mid-cap landscape*, 2022, retrievable at: https://op.europa.eu/en/publication-detail/-/publication/ad5fdad5-6a33-11ed-b14f-01aa75ed71a1/language-en/format-PDF/source-277396461

23 Cf. Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, C(2025) 3500 final, p. 1.

24 See e.g. DACHS B., SIEDSCHLAG I., YAN W., YOVESKA M., BOEIRA F., IVORY S., *Study to map, measure and portray the EU mid-cap landscape*, op. cit., p. 2-3, 51 et seq.

25 Cf. Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, p. 1.

The limitations of the 2003 SME framework have prompted calls to introduce an intermediate classification to smooth out this cliff-edge. Analysts and business groups have argued that a "small mid-cap" category would allow growing firms to continue receiving some tailored support until they are robust enough to handle the full regulatory load.

1.2. A concept hidden in sectoral legislation

However, contrary to the narrative that the Commission introduced an entirely novel concept in 2025, EU law has long recognised *mid-cap* enterprises in sector-specific instruments.

Firstly, a definition of small mid-cap enterprises is already in use under the General Block Exemption Regulation[26] and the Guidance on Risk Finance[27], for the purpose of identified market failures susceptible to be addressed through targeted public financial support from national resources[28]. Also, Article 2, point (103e) of the Commission Regulation (EU) No 651/2014[29] and the Commission Guidelines on State aid to promote risk finance investments[30] already contain a definition for small mid-cap enterprises.

Among other provisions relevant in this regard, Regulation (EU) 2015/1017 on the European Fund for Strategic Investments (EFSI Regulation)[31] contained an explicit definition of mid-cap companies for the purposes of European Investment Bank (EIB) and European Investment Fund (EIF) support.

Moreover, several Member States, such as France and Germany, have already introduced definitions for companies that are not small or medium-sized but are not large enterprises either. Following the logic of an EU single market without internal borders, the use of a common set of criteria when referring to small mid-caps would help to ensure a level playing field in the treatment of enterprises across the EU.

Although framed in a financial context, this definition influenced funding operations, financial guarantees and investment conditions across the EU. Other sectoral instruments, such as the Prospectus Regulation, also acknowledged mid-caps for tailored capital market rules.

Nonetheless, these references lacked horizontal uniformity. Each instrument used slightly different thresholds, leading to interpretative fragmentation. Upon careful consideration, one may conclude that these divergences were not the product of legal creativity, but rather of regulatory necessity operating without a centralised definitional anchor. The 2025 Recommendation on the definition of small mid-cap enterprises thus responds to a long-standing need for conceptual coherence.

1.3. The road to horizontal recognition

As evidenced above, the Recommendation on the definition of small mid-cap enterprises was not a sudden invention.

Quite the opposite, there were several policy developments which had paved the way for the very Recommendation.

26 Commission Regulation (EU) No 651/2014, op. cit.

27 Communication from the Commission – Guidelines on State aid to promote risk finance investments, C/2021/8712, OJ C 508, 16 December 2021, pp. 1–36.

28 Cf. Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, p. 2.

29 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1, ELI: http://data.europa.eu/eli/reg/2014/651/oj).

30 Communication from the Commission – Guidelines on State aid to promote risk finance investments, op. cit.

31 Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments, OJ L 169, 1.7.2015, pp. 1–38.

First of all, one could mention the Political Guidelines 2024–2029[32] in this regard, where the intention to create a new category of small mid-cap enterprises and reduce the regulatory burden for growing enterprises was announced.

Secondly, the Competitiveness Compass for the EU[33] emphasised the need for proportionate regulation and improved industrial competitiveness. Its authors indicated that *'increasing competitiveness and productivity will go hand in hand with empowering people'* and that '*Europe's competitiveness and what Europe stands for are inseparable'*[34].

The authors envisaged that one of the manners to achieve the competitiveness, aiming to ensure proportionate regulation adapted to companies' size, will consist in a new definition of small mid-caps which would soon be proposed. By creating such a new category of company, bigger than SMEs but smaller than large companies, thousands of companies in the EU will benefit from tailored regulatory simplification in the same spirit as SMEs[35]. Therefore, introduction of a definition of small mid-caps has been included among the 'Flagship Actions enablers'[36].

Then, the SME Relief Package[37] identified high administrative burden as a key obstacle to growth, particularly for firms exiting the SME definition. Indeed, administrative burden or regulatory obstacles are among the biggest problems for 55% of SMEs[38]. Indeed, predictable regulatory environment, good governance and an efficient institutional framework contribute to enhancing competitiveness, achieving fairness and providing relief. The authors of the Package noted that already in 2021, the Commission evaluated the SME definition and concluded that it remained relevant (with the average turnover of EU SME remaining well below the threshold)[39] . However, this evaluation was carried out on the basis of 2018 data and could not reflect the impacts of the pandemic, war in Ukraine and the energy crisis, which have shaken the EU's economy since then, and in particular have driven a significant surge in inflation that is only gradually coming down. Moreover, according to the authors, in light of current and future economic challenges – from digitalisation to demographic change – it may be appropriate to give greater recognition to the productivity gains over the past two decades, by taking them into account in defining the upper bounds of the SME status.

The 2021 evaluation further recognised the need to *"look into the challenges that companies meet once they have 'outgrown' the SME-phase"*[40] . For example, there may be threshold effects if the benefits of different measures in favour of SMEs are all lost in the event that a growing company exceeds one of those parameters.

The authors of the SME Relief Package emphasized that recent Commission study revealed the essential role of mid-caps in the EU economy[41]: small (250-499 employees) and large mid-caps (500-1499 employees) together account for more than 13% of overall employment in the European non-financial business sector. The share of mid-cap firms is particularly high in industrial ecosystems that

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32 Cf. *Europe's choice. Political Guidelines for the next European Commission 2024-2029*, retrievable at: https://commission.europa.eu/priorities-2024-2029_en

33 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Competitiveness Compass for the EU, 29 January 2025, COM(2025) 30 final.

34 *Ibidem,* p. 1.

35 *Ibidem,* p. 18.

36 *Ibidem,* p. 25.

37 SME Relief Package, 12 September 2023, COM(2023) 535 final, mentioned above.

38 Cf. Flash Eurobarometer 486, *SMEs, start-ups, scale-ups and entrepreneurship*, September 2020, retrievable at: https://europa.eu/eurobarometer/surveys/detail/2244

39 Cf. the latest evaluation in the Commission Staff Working Document. *Executive Summary of the Evaluation of Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium- sized enterprises* (2003/361/EC), SWD (2021) 280 final, p. 1-2.

40 *Ibidem,* p. 3.

41 DACHS B., SIEDSCHLAG I., YAN W., YOVESKA M., BOEIRA F., IVORY S., *Study to map, measure and portray the EU mid-cap landscape*, 2022, op. cit.

are key to the EU's competitiveness and technological sovereignty: electronics, aerospace and defence, energy, energy-intensive industries, and health.

They also noted that the Guidelines on State aid to promote risk finance investments contain a definition for small mid-caps[42] and allow support under certain conditions to these companies. The Commission also made it possible for Member States to support mid-cap companies under the Temporary Crisis and Transition Framework[43] and the revised General Block Exemption Regulation, already mentioned above.

Given the above, the Commission's commitment included, among other things:

a) analysis the impact of high inflation and longer-run increases in productivity, as well as the interaction with possible additional measures for mid-caps, to raise - when justified - the financial thresholds of the current SME definition;
b) development of a harmonised definition for small mid-cap companies;
c) thereafter, taking actions necessary to reflect a revised SME definition in relevant legislative acts, and
d) building a dataset based on the small mid-cap definition and assess possible measures to support these companies in their growth (including potential application in adapted form of certain measures favouring SMEs)[44].

These developments collectively pressured the Commission to create a single, cross-sectoral definition capable of supporting coherent policy design.

2. THE 2025 PROPOSED DEFINITION OF SMALL MID-CAP ENTERPRISES

2.1. Legal nature and purpose of the Recommendation

The Commission Recommendation of 21 May 2025 on the definition of small mid-cap enterprises constitutes a soft-law instrument under Article 292 TFEU. While not binding, Recommendations fulfil important functions: they interpret EU law, guide administrative practice, and encourage convergence among Member States, EU institutions, and financial actors such as the EIB and EIF.
The purpose of the Recommendation is twofold:

1. To harmonise the use of the concept "small mid-cap enterprise" across EU policies, thereby ensuring a level playing field and reducing fragmentation.
2. To facilitate proportionate regulatory treatment by distinguishing between SMEs, small mid-caps, and large enterprises.

As recital (1) makes clear, the overarching objective is to ensure that regulation applying to large companies does not impose disproportionate burdens on firms that have outgrown SME status but are not yet fully capable of absorbing large-enterprise obligations. By creating such a new category of company, bigger than SMEs but smaller than large companies, thousands of companies in the EU will benefit from tailored measures.

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42 Cf. Communication from the Commission – Guidelines on State aid to promote risk finance investments, C/2021/8712, OJ C 508, 16.12.2021, pp. 1–36. In its article 2.3.(30) 'small mid-cap' denotes '*an undertaking that is not an SME and whose number of employees does not exceed 499, calculated in accordance with Articles 3 to 6 of Annex I to the General Block Exemption Regulation, and the annual turnover of which does not exceed EUR 100 million or the annual balance sheet of which does not exceed EUR 86 million. For the purpose of the application of this definition, several entities will be considered as one undertaking if any of the conditions listed in Article 3(3) of Annex I to the General Block Exemption Regulation is fulfilled*'.

43 COM (2023) 1711.

44 Cf. SME Relief Package, Action 18, p. 20.

2.2. Core elements of the definition

Point 2 of the Annex to the Recommendation[45] provides as follows:
"The category of small mid-cap enterprises is made up of enterprises which are not small and medium-sized enterprises in accordance with Recommendation 2003/361/EC, employ fewer than 750 persons, and have an annual turnover not exceeding EUR 150 million or an annual balance sheet total not exceeding EUR 129 million."

Therefore, Therefore, the following criteria contained in this definition of small and mid-cap enterprises can be mentioned:

(a) Staff headcount (main criterion)
The staff threshold of fewer than 750 employees represents an enterprise approximately three times the size of an upper-limit SME. The Commission seems to be viewing the headcount as the most reliable indicator of enterprise scale.

(b) Financial ceilings (complementary criteria)
The financial thresholds ensure that exceptionally capitalised firms - despite a lower headcount - are excluded to maintain proportionality within the category.
An enterprise exceeds the category only when both turnover and balance sheet total are above the ceilings.

(c) Enterprise typology: autonomy, partner, and linked enterprises
The Recommendation incorporates the architecture of Recommendation 2003/361/EC by distinguishing:

- Autonomous enterprises[46],
- Partner enterprises[47], and
- Linked enterprises[48],

each with consequences for calculating staff numbers and financial indicators.
The aim of those categories seems to be to prevent circumvention by large corporate structures as well as to ensure coherent aggregation rules.

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[45] Cf. ANNEX to the Commission Recommendation on the definition of small mid-cap enterprises, 21 May 2025, C(2025) 3500 final.

[46] Point 3.1 of the Annex: '*An 'autonomous enterprise' is any enterprise which is not classified as a partner enterprise within the meaning of point 3.2 or as a linked enterprise within the meaning of point 3.5.'*

[47] Point 3.2. of the Annex: *'Partner enterprises' are all enterprises which are not classified as linked enterprises within the meaning of point 3.4 and where one enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of point 3.5, 25% or more of the capital or voting rights of another enterprise (downstream enterprise)'.* [Point 3.4 thereof contains derogations from the category of 'Partner enterprises'; see also point 3.3. of the Annex].

[48] Point 3.5. of the Annex: '*'Linked enterprises' are enterprises which have any of the following relationships with each other:*
(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.
There is a presumption that no dominant influence exists if the investors referred to in point 3.4, are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders'.

To facilitate access to equity financing:

- **Business angel investments up to EUR 5 million** do not create a linked enterprise relationship.
- **Venture capital and private equity funds** are not treated as linked enterprises if they maintain separate accounts and have a predefined exit strategy.

This approach seeks to avoid penalising firms that rely on external equity — a common practice among innovative scale-ups.
Enterprises with ≥25% public ownership are automatically excluded from the category. This maintains fidelity to market-oriented policy objectives and ensures that the category focuses on privately driven economic actors.

3. *RATIONALE* FOR INTRODUCING SMALL MID-CAPS

Taking the above into account, one may conclude that the emergence of a distinct category of small mid-cap enterprises responds to structural challenges that have long characterised the EU's enterprise landscape. As small and medium-sized enterprises grow, they frequently encounter the "growth barrier": a point at which crossing the SME thresholds exposes them to a sudden escalation of compliance and regulatory obligations. Firms that exceed the SME definition become subject to more complex reporting duties, heightened sector-specific regulatory thresholds, and more demanding labour law obligations applicable to larger employers. They may also lose eligibility for certain categories of State aid and face stricter rules when accessing capital markets. This cumulative regulatory shift often results in a "growth trap", discouraging firms from expanding beyond the SME ceilings. The experience of Member States such as France and Germany[49]—both of which have developed domestic classifications analogous to mid-caps[50]—illustrates the practical relevance of this phenomenon and underscores the need for more proportionate regulatory calibration at the Union level. The 2025 Recommendation seeks precisely to mitigate these obstacles by introducing an intermediate category that better reflects the operational realities of scaling enterprises.

At the same time, the EU's broader competitiveness agenda highlights the need to support innovation-driven growth. As emphasised in the Commission's Competitiveness Compass, sustained competitiveness requires enabling firms to scale efficiently, especially those that demonstrate high research and development intensity, strong digital adoption, rapid employment growth, and significant internationalisation capacity. Such firms often outperform traditional SMEs in strategic metrics yet remain structurally disadvantaged by regulatory frameworks designed either for significantly smaller entities or for fully-fledged large enterprises. The creation of a horizontal definition of small mid-caps establishes a legal foundation for targeted policy measures aimed at unlocking this group's full economic potential.

A further justification for introducing this intermediate category lies in the persistent administrative burden borne by firms marginally above the SME threshold. Mid-caps frequently navigate overlapping reporting requirements across various strands of EU legislation, face multiple and inconsistent statistical classifications, and encounter complex or ambiguous eligibility rules in the State aid context. Divergent national approaches exacerbate these challenges, resulting in inconsistent treatment across the Single Market. A harmonised Union-level definition thus enables both regulatory simplification and the coherent application of lighter regimes where justified.

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[49] Cf. Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, recital 5, p. 2.

[50] France categorises companies with a staff headcount between 250 and 4 999 as '*Entreprises de Taille Intermédiaire'* (see e.g. https://www.insee.fr/fr/metadonnees/definition/c2034). In turn, Germany covers companies with a staff headcount between 50 and 499 employees under the name '*Mittlere Unternehmen'* (see e.g. Institut für Mittelstandsforschung Bonn (ifm-bonn.org)) and frequently uses the term 'Mittelstand' to cover companies that are less defined by the number of employees, but rather by shared values such as independence, unity of ownership and management (https://www.kfw.de). See to this end, Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, p. 2.

Finally, the consolidation of a common definition contributes directly to the strengthening of the Single Market. Fragmented national classifications of mid-sized firms produce distortions in market access, funding conditions, and regulatory obligations. By recommending a unified definitional standard, the EU enhances legal certainty and ensures more predictable conditions for cross-border activity, public procurement participation, and the mobility of investment. In this sense, the recognition of small mid-caps is not merely a technical clarification but a strategic step towards a more integrated, equitable, and competitiveness-oriented internal market.

4. REGULATORY CONTEXT AND LEGAL IMPLICATIONS

The proposed introduction of a harmonised definition of small mid-cap enterprises inevitably interacts with several strands of existing EU regulatory architecture. Its most immediate point of contact lies with the longstanding framework governing small and medium-sized enterprises (SMEs). The Commission Recommendation of 21 May 2025 expressly stresses that the new category must not overlap with the SME definition contained in Recommendation 2003/361/EC, thereby preserving a clear conceptual and legal boundary between the two classifications[51]. Maintaining this boundary is essential for safeguarding the integrity of SME-specific instruments, preventing interpretative confusion within State aid law, and avoiding the dilution of categories whose distinctiveness is necessary for targeted policymaking. At the same time, the small mid-cap definition functions as a bridge for firms that have surpassed SME thresholds, facilitating a smoother regulatory transition by allowing policymakers to design support measures proportionate to the scale and capacities of such enterprises.

The Recommendation also carries important implications for the sphere of State aid law. Although it does not itself alter the legal framework established under Articles 107 and 108 TFEU, it aligns closely with instruments already employing mid-cap concepts, including the GBER and the 2021 Guidelines on State Aid to Promote Risk Finance Investments. These instruments recognise that firms beyond the SME category may still face market failures traditionally associated with smaller enterprises, particularly in the context of innovation financing and growth-stage investment. In light of this convergence, future amendments to State aid rules are expected to reference the 2025 definition, potentially enabling increased aid-intensity ceilings, simplified notification procedures, and broader eligibility for measures supporting digital transformation, research and development, and scaling-up activities.

In the field of EU financial instruments, the definition of small mid-caps promises to enhance coherence and predictability. The European Investment Bank and European Investment Fund have long relied on mid-cap classifications, especially under the European Fund for Strategic Investments (EFSI) and subsequently under the InvestEU programme[52]. The lack of a horizontal definition, however, resulted in discrepancies across instruments, complicating eligibility assessments and strategic planning. By recommending a unified definitional standard, the Commission strengthens the internal consistency of EU-level financial operations, supporting harmonised eligibility criteria, more coherent investment strategies, and improved transparency in the allocation of Union financial support.

Finally, the small mid-cap category intersects with labour and reporting obligations imposed by EU legislation. The threshold of 750 employees remains below several regulatory triggers applicable to large enterprises, such as those contained in the Corporate Sustainability Reporting Directive (CSRD),

[51] As worded by the Recommendation's authors: '*To allow enterprises to seamlessly scale out of the SME segment and into the segment of small mid-caps, it is important that the definitions for both SMEs and small mid-caps build on the same principles and that there is no overlap between the two definitions. Establishing what constitutes small mid-caps is also necessary to ensure consistency across policies and to help smoothen the transition for companies that grow out of the SME definition'* (recital 9, p. 3).

[52] Cf. Regulation (EU) 2015/1017. See also Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017, PE/74/2020/REV/1, OJ L 107, 26.3.2021, pp. 30–89.

which already applies to undertakings exceeding 500 employees[53]. In addition, certain health and safety rules and sector-specific regimes—for example in the transport and energy sectors—establish heightened compliance requirements above thresholds that small mid-caps may eventually reach. The establishment of a coherent intermediate category creates the possibility of future legislative alignment, permitting proportionate exemptions or simplified reporting templates that better reflect the operational realities of these firms while maintaining high levels of protection for workers and consumers. As Union legislation evolves, the existence of a clear definitional anchor for small mid-caps may therefore assist in ensuring that compliance obligations grow in tandem with enterprise capacity, thereby reinforcing the principles of proportionality and good regulation that underpin the internal market.

5. CONCLUDING REFLECTIONS: A "NEW KID ON THE BLOCK" OR A CONTINUITY RE(DE)FINED?

Although the Commission Recommendation of 21 May 2025 has been publicly framed as the introduction of a new category of enterprise, a closer examination reveals a far more nuanced reality. The concept of the small mid-cap enterprise is not an *ex nihilo* legislative creation, but rather the codification of a category that has circulated within EU regulatory and financial practice for nearly a decade. As it has been observed, the term appeared in the European Union law as early as 2015, most notably in the EFSI Regulation - Regulation 2015/1017 establishing the European Fund for Strategic Investments, where it was deployed to structure EIB and EIF financing operations. In this light, the definitional consolidation undertaken in 2025 is best understood as a refinement of existing practice rather than the invention of a novel economic category.

The Recommendation serves multiple, mutually reinforcing functions. First, it performs a codifying role by bringing coherence to terminology that had previously been scattered across sector-specific instruments. Union legislation or Union programmes to be amended or adopted and in which the term "small mid-cap enterprise", or a focus on enterprises that match the specifications set out in the Annex occurs, should refer to the definition set out in this Recommendation[54].

Secondly, it contributes to standardisation by establishing a single, cross-sectoral definitional anchor capable of guiding EU institutions, Member States and financial actors and beneficiaries.

Thirdly, it represents a strategic regulatory intervention designed to support proportionality, reduce administrative burden and bolster competitiveness within a segment of the market particularly vulnerable to regulatory disequilibrium. The presentation of small mid-caps as a "new kid on the block" thus reflects a narrative strategy rather than a substantive shift in the ontology of EU enterprise law.

Looking forward, the Recommendation lays the groundwork for significant future developments. It expressly mandates a review of its application by 31 May 2030[55], creating an institutional mechanism for adapting the definition to evolving economic circumstances.

In this regard, several trajectories can be envisaged. One possibility is the incorporation of the small mid-cap category into binding EU legislation, particularly in domains where regulatory thresholds currently rely on binary SME–large enterprise distinctions. Another likely development lies in the gradual extension of the definition to specific regulatory fields, including sustainability reporting, public procurement and other areas where differentiated obligations may enhance proportionality. The definition may also be aligned more closely with international classifications, such as those used by the OECD or the EIB, thereby strengthening the EU's coherence in global economic governance. Additionally, economic developments—such as inflationary dynamics or structural changes in sectoral productivity—may necessitate periodic recalibration of the financial and staffing thresholds. Should these developments evolve in a coordinated manner, the small mid-cap category has the potential to

[53] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, PE/35/2022/REV/1, OJ L 322, 16.12.2022, pp. 15–80.

[54] Cf. Commission Recommendation of 21.5.2025 on the definition of small mid-cap enterprises, point 2, p. 6.

[55] *Ibidem*, point 8, p. 6.

become a durable anchor for differentiated regulation and a key instrument in the Union's broader competitiveness agenda.

Taken together, these developments underscore that the formal recognition of small mid-cap enterprises marks an important milestone in the evolution of EU enterprise categorisation. While the concept is not "new" in a literal sense, its elevation to a horizontal policy instrument confers legal clarity and analytical visibility upon a segment of firms that has long played a strategic role in the European economy. These enterprises occupy a pivotal intermediate space: they retain the agility and entrepreneurial dynamism characteristic of smaller firms while simultaneously developing the structural sophistication required for scaling, internationalisation and innovation-driven growth. By formally acknowledging this category, the EU equips itself with a regulatory toolkit capable of better aligning compliance obligations with enterprise capacity, thereby operationalising core principles of proportionality and better regulation.

To conclude, the small mid-cap enterprise seems not to be an *arriviste* newcomer, but rather a refined legal and economic category whose consolidation promises to strengthen the Single Market. By reducing administrative burdens, enhancing competitiveness and enabling more targeted policy interventions, the definitional framework established in 2025 contributes meaningfully to the Union's long-term objective of fostering a resilient, innovative and dynamic internal market. Its future development will undoubtedly shape the contours of EU competitiveness policy for years to come.

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The creator's liability for „physical defects" of computer software in a B2B relationship under Polish law

Zodpovednosť výrobcu softvéru za jeho „fyzické vady" v obchodných (B2B) vzťahoch podľa poľskej právnej úpravy

Abstract

In Polish law, liability for defects in computer software is multifaceted. This liability can be borne by the creator, employer, licensor, or user. Each of these parties bears liability to a different extent and in a different manner, which applies to both the subjective and objective scope. Due to the breadth of the topic, this study presents the principles of the creator's liability for physical defects in software in B2B relationships. An analysis of the regulations confirms that this person's liability is not uniform and depends on whether the creator transfers property rights to the created program or grants a license for its use. Defining the principles of this liability requires reference to various legal acts and applying certain provisions accordingly. Hence, taking into account the widespread use of computer software, it is worth considering unifying legal regulations by extending the warranty regime also to computer software.
Keywords: *physical defect of computer software, liability for computer software defects.*

Abstrakt

V poľskom práve má zodpovednosť za vady počítačového softvéru viacero rovín. Túto zodpovednosť môže niesť tvorca, zamestnávateľ, poskytovateľ licencie alebo používateľ. Každý z nich zodpovedá v inom rozsahu a iným spôsobom, a to po subjektívnej aj objektívnej stránke. Vzhľadom na široký záber problematiky sa táto štúdia zameriava na zásady zodpovednosti tvorcu za fyzické vady softvéru v B2B vzťahoch. Analýza právnych predpisov potvrdzuje, že zodpovednosť tejto osoby nie je jednotná a závisí od toho, či tvorca prevádza majetkové práva k vytvorenému programu alebo udeľuje licenciu na jeho používanie. Určenie zásad tejto zodpovednosti si vyžaduje odkaz na viaceré právne predpisy a primerané použitie niektorých ustanovení. Keďže počítačový softvér je dnes široko využívaný, stojí za úvahu zjednotiť právnu úpravu rozšírením záručného režimu aj na počítačový softvér.
Kľúčové slová: *fyzická vada počítačového softvéru, zodpovednosť za vady softvéru.*

JEL Classification: K20

INTRODUCTION

Computer software, used in numerous fields, from national security to medical systems, banking and road infrastructure, and everyday applications, is intended to make life easier. However, wherever there is an algorithm (code), errors can occur: loopholes, hidden elements, or a lack of any protection against cyberattacks. This situation can be very dangerous for anyone using it (both businesses and consumers),

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but who is responsible for these errors: the software developer, the licensor, or the user? In practice, most computer programs are created with licensing in mind (this method of software use is most effective for legal, tax, and economic reasons). Therefore, publications in this field primarily concern the liability for defects of the licensor, i.e., the person who holds at least economic rights to the program and can dispose of these rights or enable others to use them in specific areas of use, as well as the issue of user safety. However, software can also be custom-made, with the intention of transferring proprietary rights to such software to third parties through a contract. The aim of this study is to present, using a dogmatic and legal analysis of the applicable provisions, the principles of the creator's liability for physical defects of software in B2B relations and to confirm the thesis that there is no clear solution to the issue of this liability in Polish law. Due to the broad scope of the issue, the study does not cover liability for damage resulting from dangerous defects in computer software, i.e. the so-called product liability[2].

Polish law regulates mandatory liability for physical defects in goods (warranty for defects, regulated by the Civil Code[3] and applicable to B2B transactions, and liability for non-conformity of goods with the contract, regulated by the Consumer Rights[4] Act and applicable to B2C transactions) and voluntary liability under the guarantee (also regulated in the Civil Code). However, in the case of computer software, the situation is complicated not only by the fact that the provisions of Polish law may allow for the avoidance of liability for physical defects, but above all by the fact that, under the Copyright and Related Rights Act[5] (art. 2 sentence 1 pts 1), a computer program is considered a work. Furthermore, the situation of complex defects must be considered, i.e., a defect in the computer recording (computer program) on the one hand and a defect in the medium on the other.

1. BASIS OF LIABILITY FOR DEFECTS IN COMPUTER SOFTWARE

When analysing the provisions on warranty for defects in things of the possibility of using them as a basis for liability for defects in computer software, it should be considered that they may apply to the creator of this program in the event of his transferring the property rights to the program to a third party under a sales contract[6]. Pursuant to art. 555 CC, the provisions on the sale of things apply accordingly to the sale of energy, rights and water, which means that it is possible to apply the provisions on warranty for defects in the sale of computer software as well. However, these provisions will not apply to the liability of the software licensor, because a computer program is not a thing, and the granting of a license is not a sale within the meaning of Article 535 CC, but a specific agreement separate from it.

Due to the possibility of applying both the liability regulated by the Civil Code and the Copyright Act to liability for computer software defects, the question arises as to which of these regimes will take precedence. The Copyright Act is a specific regulation in nature, as opposed to the general regulation of the Civil Code. Therefore, based on the principle of *lex specialis*, the provisions of this Act should be referred to first, and not the provisions of the Civil Code on warranty for defects, although the latter will be applied to the extent not regulated by the Copyright Act.

Pursuant to art. 55, section 1 PA, if the work contains defects, the ordering party may set an appropriate deadline for the author to remove them, and after the deadline has expired, the ordering party

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2 On this topic, see e.g. BUITEN, M. C., Product liability for defective AI, European Journal of Law and Economics 2024, no. 57(2), pp.189–210; BORGHETTI, J. S., et al., Relevance of risk-benefit for assessing defectiveness of a product: A comparative study of thirteen European legal systems, European Review of Private Law 2021, no. 29, pp. 91–132; CASTELLANO, A., TOHMÉ, F., & CHISARI, O. O., Product liability under ambiguity. European Journal of Law and Economics 2020, no. 49(3), pp. 473–487.

3 Act of 23 April 1964, Civil Code, consolidated text Journal of Laws 2025, item 1071, as amended, hereinafter CC or Civil Code.

4 Act of 30 May 2014 on Consumer Rights, consolidated text Journal of Laws 2024, item 1796 as amended.

5 Act of 4 February 1994 on copyright and related rights, consolidated text Journal of Laws 2025 item 24 as amended, hereinafter PA or Copyright Act.

6 Compare: MARCINIAK P., Problem odpowiedzialności za błędy w oprogramowaniu IoT, Przegląd ustawodawstwa gospodarczego 2020, no 10, p. 39.

may withdraw from the contract or demand an appropriate reduction in the agreed remuneration, unless the defects are the result of circumstances for which the author is not responsible. In any case, the author retains the right to a portion of the remuneration received, but no more than 25% of the contractual remuneration. These claims expire upon acceptance of the work. (art. 55, section 3 PA).

Article 55, section 2 PA states that if a work has legal defects, the ordering party may withdraw from the contract and demand compensation for the damage suffered. Article 55, section 4 PA states that if the ordering party fails to notify the author within six months of delivery of the work of its acceptance, non-acceptance, or contingent acceptance on making specific changes within an appropriate deadline set for this purpose, the work is deemed to have been accepted without reservations. The parties may agree on a different deadline. The above-mentioned provision was adopted to protect copyright in individually created works, not computer software. However, it is appropriately used because software is considered a work. This solution, although widely used, is not adequate for liability for defects in software intended for mass consumption[7].

2. SUBJECTIVE AND OBJECTIVE SCOPE OF LIABILITY FOR COMPUTER SOFTWARE DEFECTS

An analysis of the content of art. 55 PA indicates that determining the subjective and objective scope of this provision is of significant importance for determining the principles of the creator's liability for defects in computer software.

The first doubt concerns the subjective scope of Article 55 of the PA, as the provision refers to the „author" and the „ordering party". The Copyright Act uses the concept of the creator in various meanings, but the doctrine is of the opinion that on the basis of Article 55 it should be interpreted narrowly and its application should be limited only to the creator in the strict sense[8]. This interpretation is supported by the fact that the person entitled to the rights in the event of a computer software defect has the right to demand its removal, which, in principle, cannot be done without the involvement of the creator in the strict sense[9]. The doctrine believes that in a situation where the seller of the program is not the creator in the strict sense, but another entity, the provisions of the Civil Code regulating liability for physical defects of the sold item should be applied accordingly[10]. This means that a seller who is not the creator in the strict sense cannot avoid liability under the warranty for defects by claiming lack of fault in the occurrence of the defect, as liability under the warranty is independent of fault. Furthermore, such an entity has no basis for retaining any part of the consideration received, and the buyer's rights are equivalent[11].

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7 Ibidem, p. 40.

8 See: BARTA J. (ed.), MARKIEWICZ R. (ed.), Prawo autorskie i prawa pokrewne. Komentarz, Warszawa: Wolters Kluwer, 2011, p. 377; WŁODARSKA-DZIURZYŃSKA K. [in:] TARGOSZ T., WŁODARSKA-DZIURZYŃSKA K., Umowy przenoszące autorskie prawa majątkowe, Warszawa: Wolters Kluwer, 2010, p. 318; SZYJEWSKA-BAGIŃSKA J. [in:] FERENC-SZYDEŁKO E. (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Warszawa: C.H. Beck, 2016, p. 518; TARGOSZ T. [in:] FLISAK D. (ed.), Prawo autorskie i prawa pokrewne, Warszawa: Wolters Kluwer, 2015, p. 812, however, as regards art. 55, section 2 PA, the author does not exclude the assumption that it should also be applied to contracts to which the author is not a party; see: TARGOSZ T. [in:] FLISAK D., op. cit., p. 830, NIŻANKOWSKA-HORODECKA A-M. [in:] MARKIEWICZ R. (ed.), Komentarz do ustawy o prawie autorskim i prawach pokrewnych, [in:] Ustawy autorskie. Komentarze. Tom I, Warszawa: Wolters Kluwer, 2020, LEX komentarz do art. 55, pts 19. Differently see: ŻOK K., Podstawa odpowiedzialności za usterki zamówionego programu komputerowego, Państwo i Prawo 2013, no.11, pp. 62-74, who believes that: „Narrowing the scope of this regulation only to contracts with the person who actually created the computer program would significantly limit the importance of this provision due to the specific nature of the creation of this intangible asset. A broad interpretation of the concept of creator is further justified by the specific copyright regulations for software".

9 NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 19.

10 See: WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 315.

11 Compare: ibidem.

The next issue that may raise doubts concerns the interpretation of the term „ordered computer program", as it is about answering the question whether it applies only to a future computer program (one that does not yet exist at the time of conclusion of the contract) or also to an already existing program[12]. Assuming that this only applies to software that is to be created in the future would lead to differentiation of liability, as the legal situation of the entity transferring the copyright to an existing computer program would be „worse" than that of the entity transferring the rights to a program that is to be created in the future[13]. The impossibility of applying the provisions of art. 55 PA to the former would mean a transition to the warranty regime and burdening the creator with further-reaching liability for defects. Such differentiation does not seem justified, and therefore regardless of whether the subject of the contract transferring economic copyrights is a future or existing computer program at the time of concluding the contract, art. 55 PA will apply[14]. Taking into account the above statements, it can be concluded that since an agreement transferring economic copyrights may concern both future computer software and software existing at the time of concluding the agreement, the concept of the creator of a computer program may be used interchangeably with the concept of the seller of such a program[15].

Doubts regarding the interpretation of the term „ordering party" should be resolved similarly to those regarding the term „creator". Therefore, if art. 55 PA applies to both future and existing software, the term „ordering party of a computer program" can be used interchangeably with the term „acquirer of economic rights to a computer program"[16].

The scope of art. 55 PA should cover not only agreements transferring copyrights, but also certain license agreements related to these rights[17]. In the case of license agreements[18] concerning property rights to computer software, the liability regimes will be divided differently than in the case of agreements on the transfer of these property rights. If a license is granted by the author in the strict sense, the occurrence of a defect in the licensed software gives rise to the licensor's liability as the author in the strict sense, i.e., under art. 55 PA. This interpretation results from the identification of agreements transferring copyrights with license agreements concerning those rights. However, a problem arises in the case of licensing agreements in which the license is granted not by the author in the strict sense, but by another entity which is entitled to the copyright under a licensing agreement concluded with the

12 See: NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 23-24.
13 LORANC-BORKOWSKA J., Odpowiedzialność za wady produktów informatycznych, Kwartalnik Prawo Zamówień publicznych 2016, no 1, p. 79.
14 See: BARTA J. (ed.), MARKIEWICZ R. (ed.), op. cit., p. 377; ŚLĘZAK P., Umowy w zakresie współczesnych sztuk wizualnych, Warszawa: Wolters Kluwer, 2012, p. 287; WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 315; SZPYT K., Obrót dobrami wirtualnymi w grach komputerowych. Studium cywilnoprawne, Warszawa: C.H. Beck, 2018, p. 250; see also: TRAPLE E., Umowy o eksploatację utworów w prawie polskim, Warszawa: Wolters Kluwer, 2010, p. 315, the author points out that the provision refers directly to future works, while in the case of contracts relating to already existing works it can be referred to by analogy and NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 24, the author believes that: "such a statement is contrary to the literal wording of the provision, after all, the „ordering party" (and this is the wording used by the legislator) is a person who orders the work, and is therefore in a situation in which the work does not yet exist at the time of ordering", although he further acknowledges that the provision could be applied by analogy to existing works. Differently NIEWĘGŁOWSKI A., Prawo autorskie. Komentarz, wyd. II, Warszawa: Wolters Kluwer, 2025, LEX komentarz do art. 55, pts 2, the author believes that art. 55 PA applies to contracts for the creation of a work (the subject of the performance is a future work), while in other cases (existing works) the provisions of the Civil Code regarding sales contracts and donations apply. See also: MICHALAK A, Odpowiedzialność cywilnoprawna w obrocie oprogramowaniem komputerowym w erze sztucznej inteligencji, Warszawa: C.H. Beck, 2021, p. 243 i n.
15 LORANC-BORKOWSKA J., op. cit., p. 80.
16 Ibidem, p. 81.
17 Compare: BARTA J. (ed.), MARKIEWICZ R. (ed.), op. cit.; T. TARGOSZ, Komentarz do art. 55 ustawy o prawie autorskim i prawach pokrewnych, LEX , pts 2; NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 20.
18 In licensing agreements, the term licensor is broad and covers: the creator of a computer program, the entity that manages the copyright under the authorization of the creator, as well as the employer that acquires the copyright due to employing the programmer under an employment contract.

author in the strict sense. In this situation, the application of the provisions regulating liability under the warranty for physical defects does not seem justified, because the license agreement is not a sales agreement and the software is not an item. Therefore, if in a situation where the economic copyright to a computer program is held by an entity that is not the creator in the strict sense and it is impossible to apply either the liability under art. 55 PA or the liability under the warranty for defects in goods to the defects of this program, it seems appropriate to apply the liability *ex contractu* under art. 471 CC[19].

3. COMPUTER SOFTWARE DEFECTS

The Copyright Act in relation to computer programs provides for liability for faults and legal defects[20]. Due to the fact that the term „fault" has not been defined by the Act, both the doctrine[21] and jurisdiction[22] are of the opinion that in the absence of a legal definition of this concept, the definition of a physical defect from the Civil Code can be used to define it. The fact that the legislator does not use the concept of a physical defect in art. 55, section 1 PA probably results from the nature of the subject of the contract, the essence of which is not physical, as it is an intangible asset. Hence, the term „physical defects" would not be objectively accurate[23]. In the strict sense, the concept of a physical defect can be applied to physical media of computer software.

Based on the code concept of a physical defect (applying art. 556^1 § 1 CC accordingly)[24], it can be stated that faults in computer software consist in the non-conformity of this software with the contract, i.e. e.g. incorrect execution of the program's basic functions, failure to perform or improper execution of all or some of the functions specified in the documentation, lack of program compatibility with the operating system specified by the creator (assuming that the hardware requirements are met), lack of ergonomic operation of the program, absence of all agreed modules in the program[25]. The enumeration of potential physical defects in the form of non-conformity with the contract contained in the Civil Code is exemplary; unnamed defects may occur, i.e. such software features of which the creator was silent about and which affect the use of the software[26]. The provision of art. 556^1 § 1 will also apply to a physical defect of the carrier of a computer program if the software is transferred on a defective carrier.

In order to define a legal defect, as in the case of a physical defect, one can refer to art. 556^3 KC[27]. Applying the content of art. 556^3 CC accordingly[28], it can be considered that a legal defect occurs when the software is owned by a third party or if it is encumbered with the right of a third party[29], and also if the limitation in the use or disposal of the program results from a decision or ruling of a competent

19 Compare: MARCINIAK P., op. cit., p. 41.

20 Compare: ŚLĘZAK P., op. cit., p. 288.

21 WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 321; KĘPIŃSKI M. [in:] BARTA J., System prawa prywatnego, t. 13, Prawo autorskie, Warszawa: C.H. Beck, 2013, p. 503; BARTA J. (ed.), MARKIEWICZ R. (ed.), op. cit., p. 378; GOŁASZEWSKA A. [in:] MACHAŁA W., SARBIŃSKI R.M., Prawo autorskie i prawa pokrewne, Warszawa: Wolters Kluwer, 2019, p. 974.

22 Judgment of the Court of Appeal in Warsaw of November 17, 2005, VI ACa 372/05, LEX no 1120254; Judgment of the Provincial Administrative Court in Warsaw of November 29, 2016, VI SA/Wa 1077/16, LEX no 2178089.

23 See: GRZESZAK T., Umowa o stworzenie utworu w ustawie o prawie autorskim i prawach pokrewnych, Przegląd Prawa Handlowego 1995, no 1, p. 11; WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 321; NIEWĘGŁOWSKI A., op. cit., pts 5. See also: Judgment of the Court of Appeal in Poznań of March, 2016, III AUa 956/15, LEX no 2025554.

24 Compare: NIŻANKOWSKA-HORODECKA A-M., op. cit, pts 135.

25 See: MARCINIAK P., op. cit., p. 40.

26 Compare: NIEWĘGŁOWSKI A., op. cit., pts 8.

27 LORANC-BORKOWSKA J., op. cit.,p. 77; see also: KĘPIŃSKI M. op. cit., p. 741; WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 345.

28 The view that the application of the Code's definition of a legal defect in relation to copyright is inappropriate does not seem justified, taking into account the wording of art. 555 CC, which provides for the possibility of applying the provisions on the sale of goods also to the sale of copyright., compare: WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 326; NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 118.

29 See also: PODRECKA M., PODRECKI P., Prawa własności intelektualnej jako przykład wady prawnej w świetle art. 556 § 2 KC, Monitor Prawniczy 2005, no 10, p. 481 i n.; NIEWĘGŁOWSKI A., op. cit., pts 9.

authority; in the case of the sale of the right, the seller is also responsible for the existence of the right. A legal defect[30] in computer software may occur in the event of the sale of property rights to a program, e.g. one that is plagiarized. In the case of a legal defect, the defect of the medium and the defect of the computer recording on that medium must also be taken into account.

Furthermore, in the event of a legal defect, liability for acts of unfair competition must also be taken into account. The Act on Combating Unfair Competition[31] in art. 3, section 1, generally defines an act of unfair competition as an action contrary to the law or good practices if it threatens or violates the interests of another entrepreneur or customer. Then, art. 3, section 2 CUC introduces an exemplary catalogue of acts of unfair competition, among which there is no act of unfair competition consisting in the use of stolen or otherwise misappropriated software. Nevertheless, the general definition of an act of unfair competition also allows for the illegal use of software to be covered, but its application means that art. 3, section 1 CUC must be interpreted in the circumstances of a specific case. It is important to determine whether the use of copyright in computer software or its sale may raise legal concerns and constitute grounds for an act of unfair competition. It is also important to assess whether such actions occurred in circumstances that could be considered detrimental to the interests of another entrepreneur or customer. It will be possible to refer to the provisions regulating named acts of unfair competition, as such actions may include, among others, misleading (selling illegally produced computer software so as to give the impression that the product being sold comes from a creator acting in accordance with the law), imitation (copying software whose copyright is owned by another person) or violating trade secrets. Due to the above, it is worth considering enriching the typology of acts of unfair competition with those related to the illegal use of software.

The specific nature of contracts transferring copyrights implies the necessity[32]:

- determining whether a fault exists in a given case or not,
- demarcation of the boundary between a fault and a legal defect, and
- determining whether in a given case the computer program has a defect or whether the obligation was not fulfilled due to the delivery of a work other than the one ordered.

The reason for the difficulty is that when determining whether something is defective, it is easier to make an objective assessment using appropriate criteria than in the case of intangible goods.

In turn, the problem of drawing the line between faults and legal defects of a computer program is of significant importance for determining the principles of the creator's liability. A similar problem with separating physical defects from legal defects may occur under the Civil Code, but it does not cause major difficulties when it comes to the seller's liability for defects, because, as a rule, liability under the warranty regime for individual defects is not very differentiated, unlike agreements on the transfer or use of copyrights. So how can we assess a situation in which a computer program constitutes, for example, partial or complete plagiarism? Such a program certainly has a physical defect under the contract, as it lacks the properties that software should possess given the purpose specified in the contract or resulting from the circumstances or its intended use. However, in this case, the software is also encumbered with third-party rights[33].

The last issue that needs to be resolved is to determine whether the ordered computer software was delivered in performance of the contract or not. The issuance to the ordering party and its receipt of computer software other than that specified in the contract shall result in the author being liable for non-

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[30] Compare: STUGLIK A., Odpowiedzialność licencjodawcy za wady programu (oprogramowania) komputerowego, Monitor Prawniczy 2002, no 9, p. 410.

[31] Act of 16 April 1993 on Combating Unfair Competition consolidated text Journal of Laws 2022, item 1233, as amended, hereinafter CUC.

[32] WŁODARSKA-DZIURZYŃSKA K., op. cit., p. 323.

[33] LORANC-BORKOWSKA J., op. cit., p. 79.

compliance with the contract[34]. Furthermore, it should be assumed that the delivery of a computer program other than the agreed one results in the creator failing to perform the contract and gives rise to contractual liability under general principles, independent of the liability under the Copyright Act[35].

4. LIABILITY FOR PHYSICAL DEFECTS OF COMPUTER SOFTWARE

In the absence of comprehensive regulation regarding defects in works under the Copyright Act, certain provisions regulating liability under the warranty for defects in things will be applied accordingly to liability for defects in computer software, in particular regarding:

- art. 557 § 1 CC, releasing the creator from liability for defects if the ordering party was aware of the defect at the time of concluding the contract,
- art. 560 § 3 CC, specifying how to reduce the price when the software has defects and
- art. 566 CC, constituting the basis for claims for compensation for damage suffered by the ordering party as a result of software defects and for limited claims when the damage is a result of circumstances for which the creator is not responsible[36].

Pursuant to art. 55, section 1 PA, the creator is liable for a software fault(s) if he is responsible for its creation. This liability is based on the principle of blame[37] (similarly to the liability for non-performance or improper performance of the contract specified in art. 471 CC)[38], i.e. differently than the risk-based liability under the warranty for defects. The Ordering Party's rights are arranged sequentially, as the law first sets an appropriate deadline for the creator to remedy software defects, and only after its ineffective expiry does it entitle the Ordering Party to withdraw from the contract or demand a reduction in remuneration. Such behavior will be possible when faults result from circumstances for which the creator is responsible. In other circumstances, art. 566 § 1 CC will apply, under which the ordering party will be able to demand compensation for the damage it suffered due to concluding the contract without being aware of the existence of a fault (claim under the so-called negative interest in the contract), i.e., for example, reimbursement of the costs of concluding the contract[39]. The Creator will satisfy the claim if he delivers the software free of faults to the ordering party within the specified time limit. If the faults are partially removed – the ordering party's request will not be fulfilled and the ordering party may then, alternatively, withdraw from the contract or demand a price reduction. Sometimes, however, it is necessary to consider whether all the faults could have been noticed at once, as it may happen that only the removal of one fault will allow the detection of other faults, e.g. the software does not work at all, and after restoring this function the customer notices other faults. In such a situation, the ordering party should first request the creator to remove the faults within an appropriate period of time[40]. In the event of the expiry of the deadline, the ordering party may freely choose between withdrawing from the contract or reducing the remuneration. By submitting a declaration of withdrawal from the contract, the ordering party has the effects specified in art. 59 PA, i.e. he may demand that the author return everything he received under the contract, but he must remember about the so-called author's advance payment, because in accordance with art. 55, section 1,

[34] Under the warranty for defects regime, the delivery to the buyer and the receipt by the buyer of an item other than that specified in the contract gives rise to liability on the part of the seller for non-conformity with the contract. (so also: PISULIŃSKI J., Sprzedaż konsumencka, [in:] RAJSKI J. (ed.), System prawa prywatnego, T. 7, Prawo zobowiązań – część szczegółowa, Warszawa: C.H. Beck, 2004, p. 182.

[35] Compare: TARGOSZ T., op. cit., pts 19.

[36] LORANC-BORKOWSKA J., op. cit., p. 81.

[37] Instead of many: NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 41.

[38] See: WŁODARSKA-DZIURZYŃSKA K., op. cit., pp. 327-328.

[39] So also: NIŻANKOWSKA-HORODECKA A-M., op. cit., pts 85.

[40] See: TARGOSZ T., op. cit., pts 29.

sentence 2 PA, the author has the right to retain no more than 25% of the remuneration amount. In the event of a price reduction, art. 560 § 3 CC should be applied accordingly, i.e. the reduced price should be in such proportion to the price resulting from the contract as the value of the software with the defect is to the value of the software without the fault.

The above solutions regarding liability for faults will apply unless the parties formulate clauses in the contract regarding the creator's liability for faults[41]. According to most legal scholars[42], art. 55, section 1 PA allows for a full modification of liability for faults in a computer program, including its exclusion, unless the creator of the software would intentionally cause damage to the buyer.

The regulation of liability for defects in computer software is supplemented by art. 55, section 3 PA, which states that the ordering party's claims expire upon acceptance of the software, and any doubts as to whether the software has been accepted or not are resolved by art. 55, section 4 PA. The provision states that if the ordering party remains silent for a period of 6 months from the delivery of the software, it shall be deemed to have been accepted. In the event of a legal defect in the software, in accordance with art. 55, section PA, the ordering party may withdraw from the contract and demand compensation for the damage suffered. The possibility of exercising this right by the ordering party is not dependent on whether the creator of the defect is liable - it is independent of fault, and therefore analogous to liability under the warranty for defects. Moreover, the lack of a sequence in which the rights are used means that it is not necessary to use other protection instruments first.

It should also be noted that liability for defects does not arise if the ordering party was aware of them at the time of conclusion of the contract or delivery (applying by analogy art. 557 CC) of the subject of the contract.

5. LIABILITY UNDER THE GUARANTEE FOR DEFECTS IN THE COMPUTER PROGRAM

In addition to mandatory liability for physical defects in computer software, it is also possible to benefit from a guarantee, provided it is granted. The guarantee is voluntary, and its granting depends on the will of the guarantor, who in this case will be the creator of the computer program.

By providing a guarantee, the software creator ensures not only its „appropriate" quality, i.e. the absence of defects, but also that the program has certain properties resulting from the guarantee statement. The guarantee may be granted by submitting a guarantee declaration either in the form of a document or in an advertisement. Such a statement defines the obligations of the guarantor (creator) and the rights of the buyer in the event that the sold program does not have the properties specified in this statement (art. 577 § 1 CC). The guarantor formulates the guarantee statement in a clear and comprehensible manner, and when the type of information allows – in a commonly understandable graphic form. If the computer program is placed on the market in the Republic of Poland, the guarantee statement must be drawn up in Polish. This requirement does not apply to proper names, trademarks, trade names, designations of origin of goods, or terminology that is customarily used in scientific and technical contexts (art, 577^1 § 1 CC).

The guarantor is free to define their obligations, and in the absence of specific provisions in this regard, the regulations of the Civil Code apply. The guarantor's obligations may, in particular, consist of refunding the purchase price, replacing or repairing the software, or providing other services (art. 577 § 2 CC). However, if a quality guarantee is granted, it is presumed—unless otherwise specified—that the guarantor is obliged to remove a physical defect or deliver software free from defects, provided that such defects are revealed within the period specified in the guarantee statement (art. 577 § 3 CC).

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41 See: BRZOZOWSKA-PASIEKA M., [in:] SARBIŃSKI R. M. (ed.), SICIAREK M. (ed.), Prawo autorskie. Komentarz do wybranych przepisów, LexisNexis 2014, LEX, komentarz do art. 55, pts 12.

42 See: NIŻANKOWSKA-HORODECKA A-M., op. cit, pts 13.

The duration of the guarantee depends on the guarantor's statement, and if the guarantee period is not specified, it is two years from the date the computer program was delivered to the buyer (art. 577 § CC).

Guarantee liability covers only defects resulting from causes inherent in the sold software (art. 578 CC). Therefore, if the guarantee statement does not specify which features of the computer software are covered by the guarantee, the guarantor is liable for physical defects (though not all) that cause the product to be non-conforming to the contract[43].

According to the applicable legal regulations, the guarantor fulfills the obligations arising from the granted guarantee toward any person who can prove that a guarantee statement was made to them or their legal predecessor. The basis for exercising guarantee rights is the possession of a guarantee document by such a person. Due to the contractual nature of guarantee liability, it should be assumed that the rights arising from the guarantee „follow the item" meaning they are not tied to a specific buyer but are transferred to subsequent purchasers who, by accepting the guarantee document and exercising the rights under it, express their consent to accept the guarantee.

6. LIABILITY UNDER WARRANTY AND LIABILITY UNDER GUARANTEE

The relationship between statutory warranty and guarantee is defined in art. 579 CC. According to this provision, the buyer may exercise their rights under the statutory warranty independently of the rights arising from the guarantee. Exercising the rights under the guarantee does not affect the seller's liability under the statutory warranty. However, if the buyer exercises their rights under the guarantee, the limitation period for exercising rights under the statutory warranty is suspended on the day the seller is notified of the defect. This period resumes on the day the guarantor refuses to fulfill their obligations under the guarantee or when the time limit for doing so expires without result.

Thus, when a physical defect occurs, the buyer has the option to choose between different liability regimes. Moreover, choosing to exercise rights under the guarantee suspends the running of the limitation period for statutory warranty claims. This means that using the guarantee does not exclude the possibility of invoking the statutory warranty for the same defect. If the guarantor refuses to fulfill or fails to meet the deadline for performing the warranty obligations, the entitled person may then rely on the statutory warranty. The buyer may decide how to pursue their rights at any time during the concurrent period in which both the guarantee and the statutory warranty remain in effect.

CONCLUSION

As it results from the analysis of the title issue, the problem of liability for defects in computer software has no clear solution in Polish law, therefore the research thesis has been confirmed. Although liability under warranty regulates liability for defects in things, a computer program is not a thing, but a work. Hence, in the first place, the provisions of the Copyright Act apply to determine the principles of liability of the creator of computer software towards its professional purchaser, and only then the provisions on liability under warranty apply accordingly. In addition, the creator's liability for defects in computer software should be assessed through the prism of the sales contract and the license agreement[44]. The basic regulation in this respect, i.e. art. 55 PA, will be applied to contracts to which the author in the strict sense is a party and on the basis of which the buyer is enabled to use computer software, regardless of whether it exists at the time of concluding the contract or is yet to be created.

[43] Compare: KACZMAREK-TEMPLIN B., STEC P., SZOSTEK D., (ed.) Ustawa o prawach konsumenta. Kodeks cywilny (wyciąg). Komentarz, Warszawa 2014, p. 518. These would not include, for example, defects consisting of the absence of properties that the seller assured the buyer of, or defects resulting from the seller's silence regarding the purpose specified by the buyer at the time of concluding the contract.

[44] And in the secondary market also contracts for specific work, see: NIŻANKOWSKA-HORODECKA A-M., op. cit, pts 22.

Because being liable for defects in the manner specified by the Copyright Act depends on being the creator in the strict sense and it is irrelevant what type of contract this person concludes. Therefore, this will take place in the event of the creator transferring ownership of the copyright to computer software in a sales contract, as well as in the event of concluding a license agreement covering these rights. However, in those contracts to which the creator is not a party in the strict sense, the provisions of the Civil Code regulating liability for defects in goods under warranty (sales contract) or liability under general principles, i.e. for non-performance or improper performance of an obligation (license contract) will apply. It is necessary to separate liability for defects in computer software from liability for defects in the medium of that software.

Relying primarily on copyright law to determine liability for software faults – where such liability is based on fault—places the buyer at a disadvantage compared to applying the rules of warranty. When liability depends on proving fault, the software creator cannot be held responsible if their fault in causing the defects cannot be established. In this respect, the warranty regime provides stronger protection, as it is not based on fault. Moreover, the Copyright Act does not offer a comprehensive framework for liability, and its gaps must therefore be filled by referring to the provisions on warranty. Basing liability for software defects on two separate legal regimes does not promote legal certainty and may fail to ensure adequate protection. Consequently, given the need to apply the incomplete provisions of the Copyright Act while simultaneously supplementing them with warranty rules, it seems reasonable—both for the sake of simplicity and consistency—to adopt a unified liability regime for software defects based on warranty for defects. This is all the more justified since the concept of a physical defect is now understood as non-conformity with the contract. Furthermore, liability for legal defects in computer software is already governed by the warranty provisions.

Mandatory protection may be further reinforced by a guarantee, provided that one is granted. In practice, a guarantee can influence market competitiveness and serve a promotional function. When it comes to computer software in particular, the preventive role of a guarantee is especially important, as it is intended to inspire the buyer’s confidence.

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The problem of the reliability of creating sources of law using artificial intelligence in a rule-of-law state

Problém spoľahlivosti tvorby prameňov práva pomocou umelej inteligencie v právnom štáte

Abstract
This article attempts to present the impact of new technologies on the creation of sources of law. The hypothesis verified in the study is: is the creation of sources of law using AI reliable. The conclusion is that despite the positive aspects of AI, attention must be paid to the many risks it carries, and one must be aware that human oversight is indispensable in order to avoid, as illustrated in the article with examples from Polish legal practice, errors in creating reliable legislation that are unacceptable in a democratic state governed by the rule of law.
Keywords: *artificial intelligence, sources of law, legislation process, risk of defective legislation, a rule-of-law state.*

Abstrakt
Tento článok sa pokúša predstaviť vplyv nových technológií na tvorbu prameňov práva. Hypotéza overovaná v štúdii znie: je tvorba prameňov práva s využitím umelej inteligencie spoľahlivá? Záverom je, že napriek pozitívnym aspektom umelej inteligencie je potrebné venovať pozornosť mnohým rizikám, ktoré so sebou nesie, a uvedomiť si, že ľudský dohľad je nevyhnutný, aby sa predišlo – ako to ilustrujú príklady z poľskej právnej praxe – chybám pri tvorbe spoľahlivej legislatívy, ktoré sú v demokratickom právnom štáte neprípustné.
Kľúčové slová: *umelá inteligencia, pramene práva, legislatívny proces, riziko chybnej legislatívy, právny štát.*

JEL Classification: KO, K1, K2, K4

INTRODUCTION

To begin with, it should be emphasized that technological development, including artificial intelligence, is inevitable, immense, and presents contemporary societies with ever new challenges. One such challenge is the impact of modern technologies, including AI, on the sources of law.

In this article, the Author undertakes to indicate to what extent we can already observe the influence of new technologies on the creation of sources of law. The hypothesis verified in the study is: is the creation of sources of law using AI reliable?

The adopted scientific research method is critical analysis of sources: literature and enacted law. It appears that in the proposed scope of the intersection and mutual influence of law and technology there exists interesting and valuable literature (both academic and popular-scientific), yet it lacks articulation and discussion of the research problem identified in this article.

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1. THREATS FROM ARTIFICIAL INTELLIGENCE

Basic AI tools, such as ChatGPT, are currently – also thanks to their gratuitous availability – increasingly used by "ordinary people." Practically anyone who has access to the Internet and to computer or smartphone equipment can make use of them. AI tools are also used in the operation of systems managed by public authorities.

As for the risks associated with the increasingly widespread use of AI, it seems that, in general, they can be grouped into two categories: the risk of AI replacing humans and the risk of AI taking control over humans (while AI itself remains uncontrolled by humans).

For example, the following risks posed by AI are indicated: "lack of transparency, influencing human choices and social biases, violation of privacy, security threats, concentration of power in the hands of a few corporations, revolution in the labor market, economic inequalities, the breaking of interpersonal bonds, dependence on AI tools, disinformation and manipulation"[2]. It is also rightly noted that there is a physical threat posed by machines equipped with AI when they become mobile[3].

In the context of defending democracy – which is generally considered the best form of state system[4], where it is not the law of force but the force of law that is regarded as the foundation of the rule of law[5]– particular concern is raised by the actions of contemporary authoritarian systems, which have made new technologies an excellent tool for controlling and manipulating subordinates. It suffices to say that they use "advanced computer systems to process vast amounts of unstructured data currently available on the Internet. Facial recognition technologies, which in real time check images against enormous databases, as well as algorithms probing social media for signs of opposition activity – all these innovations change the rules of the political game and increasingly serve to impose the direction of discourse and suppress political opponents"[6]. Unfortunately, there is a justified concern that advanced technology will also be used for similar purposes by governments we classify as democratic (see, for example, information on the use of the Israeli Pegasus spyware system to surveil the opposition in Poland and WhatsApp users in USA[7]). It is emphasized that AI also possesses the characteristic of integrating and enhancing the functions of other technologies in new ways[8].

The signatories of the 2023 open letter also emphasize the aspect of humans being surpassed by technology and losing control over it. "Contemporary AI systems are now becoming human-competitive at general tasks, and we must ask ourselves: *Should* we let machines flood our information channels with propaganda and untruth? *Should* we automate away all the jobs, including the fulfilling ones? *Should* we develop nonhuman minds that might eventually outnumber, outsmart, obsolete and replace us?

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2 NOGACKI, R., CIECIERSKI, M. *Prawne problemy ze sztuczną inteligencją. Czy prawo powstrzyma „bunt maszyn"?*, 29.02.2024, https://www.pap.pl/mediaroom/prawne-problemy-ze-sztuczna-inteligencja-czy-prawo-powstrzyma-bunt-maszyn.

3 *Ibidem*, p. 13.

4 F. Fukuyama indicated, that "liberal democracy may constitute the "end point of mankind's ideological evolution"": FUKUYAMA, F. *The End Of History and the Last Man*, The Free Press, New York 1992, chapter „By way of an introduction", p. xi.

5 More about the concept of rule-of-law state: MORAWSKI, L. *Wstęp do prawoznawstwa*, Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", Toruń 1999, pp. 237-247.

6 NOGACKI, R., CIECIERSKI, M. *Prawne…, op. cit.*

7 MENTZEN, S. Wypowiedź na posiedzeniu Sejmu nr 1 w dniu 28.11.2023, https://www.sejm.gov.pl/sejm10.nsf/wypowiedz.xsp?posiedzenie=1&dzien=5&wyp=103&type=P&symbol=WYPOWIEDZ_ POSLA&id=241 (the speech of Member of Parliament Sławomir Mentzen from the Confederation party concerning the establishment of an investigative committee in the Polish Sejm); Makowiec P., *Nowe ofiary Pegasusa. Również w Polsce,* 20.02.2025, https://cyberdefence24.pl/cyberbezpieczenstwo/nowe-ofiary-pegasusa-rowniez-w-polsce (information on parliamentary committees on Pegasus in Poland); Makowiec P., *Użytkownicy WhatsAppa inwigilowani Pegasusem. Koniec procesu,* 23.12.2024, https://cyberdefence24.pl/cyberbezpieczenstwo/uzytkownicy-whatsappa-inwigilowani-pegasusem-koniec-procesu (information on the lawsuit in the USA filed by WhatsApp's owner, Meta, against the creator of Pegasus: NSO Group).

8 NOGACKI, R., CIECIERSKI, M. *Prawne…, op. cit.*

Should we risk loss of control of our civilization? Such decisions must not be delegated to unelected tech leaders. Powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable. This confidence must be well justified and increase with the magnitude of a system's potential effects“[9].

It can therefore be inferred that there is a risk that uncontrolled AI may become, for the rule of law, the titular "clash of civilizations"[10]. New technologies and cyberspace influence not only the content of law but also the process of its creation and application[11]. Digitization, and particularly AI, also becomes a challenge in international relations, as it can be used as a new arena of conflict[12].

2. THE PROBLEM OF THE RELIABILITY OF CREATING SOURCES OF LAW USING ARTIFICIAL INTELLIGENCE

There is no doubt that, in a state governed by the rule of law, sources of law have fundamental significance. If sources of law are created in accordance with the prescribed procedure and contain principles consistent with the fundamental tenets of a democratic state, they undoubtedly constitute a guarantee of the rule of law operating within a given state territory.

It is necessary to point out numerous risks in the above matter. In this article, the Author signals two issues worthy of attention.

The first concerns the quality of the idea expressed by a specific legal provision, the correctness of the given concept, the substantive value of the provision. Here, one can refer to readers' personal experience in assessing texts written using AI. In the Author's perception, these are often texts that are, *de facto*, "about nothing," lacking greater meaning and content, linguistically more or less correct assemblages of sentences that, however, do not provide the reader with significant value. One of the creators expressed this quite bluntly, pointing out (about AI): "it is a consummate bullshitter, and I mean that in a technical sense. Bullshit is a convincing-sounding **nonsense** [bold emphasis by the Author], devoid of truth, and AI is very good at creating it. You can ask it to describe how we know dinosaurs had a civilization and it will **happily** [bold emphasis by the Author] make up a whole set of facts explaining, quite convincingly, exactly that"[13].

AI can provide us with practically endless proposals for legislation; however, it remains a matter for assessment whether these proposals will make sense and be connected to the developed legal heritage of humanity[14], as well as whether they will be ethical[15].

The second issue is related to the first, but it is worth articulating it separately: it concerns attentiveness to details, minor matters such as a comma or a single word, which, however, may prove to have significant consequences.

9 *Pause Giant AI Experiments: An Open Letter*, 22.03.2023 r., https://futureoflife.org/open-letter/pause-giant-ai-experiments/.

10 HUNTINGTON, S.P. *Zderzenie cywilizacji* [original title: *The Clash of Civilizations and the Remaking of World Order*], Wydawnictwo Muza, Warszawa 2011.

11 Cf. CHAŁUBIŃSKA-JENTKIEWICZ, K. *Cyberodpowiedzialność. Wstęp do prawa cyberbezpieczeństwa*, Wydawnictwo Adam Marszałek, Toruń 2023, p. 9.

12 RADZIEJEWSKI, B. *Nowy porządek globalny. Mocarstwa, średniacy i niewidzialne siły kierujące światem*, Wydawnictwo Nowej Konfederacji, pp. 284, 286.

13 MOLLICK E. ChatGPT Is a Tipping Point for AI [in:] *The year in Tech 2024*, Harvard Business Review Press, Boston 2024, p. 37.

14 Cf. JOSIFOVIC, S. *Legal and administrative frameworks as foundations for AI alignment with human volition*, AI and Ethics (2025) 5, Springer, https://doi.org/10.1007/s43681-024-00640-1, pp. 3061-3062.

15 GŁĄB, K.M. Moralność sztucznej inteligencji [in:] *Prawo sztucznej inteligencji i nowych technologii, part 3*, FISCHER B., PĄZIK A., ŚWIERCZYŃSKI M., Wolters Kluwer Polska, Warszawa 2023, p. 319. The author indicated, among others, "The Delphi Project shows that AI (so far) cannot understand human morality. However, the Allen Institute for AI experiment has enormous value, as it demonstrates that AI (probably) should never be used to make complex ethical decisions."

In Poland, there was already one serious court case concerning a comma, and it had to be resolved by the Polish Constitutional Tribunal. It concerned criminal liability. In the 2003 judgment, the Constitutional Tribunal stated that even a matter seemingly as trivial as the addition of a comma in the Penal Code through a procedure not provided for in the Act (that is, not by statute, but by the Prime Minister's announcement) constitutes an action inconsistent with the Polish Constitution. The Tribunal explained that "an indispensable element of the principle of a democratic state governed by the rule of law is the rules of lawmaking". Since the law requires that it be an act that establishes the rules of criminal liability in Poland, it is not permissible, through a Prime Minister's correction, to "adjust" even such an issue as a comma, as in this case the change had a substantive character (defining what constitutes a punishable harm to health)[16].

There was also in Poland a case and a major political scandal concerning two words: "or journals" – the so-called *Rywin's affair*. It concerned the introduction, as a result of corruption, of changes to the Broadcasting Act[17]. This change consisted in removing from this act two words: "lub czasopisma" ("or journals"). The absence of these words in the act meant that publishers of journals could buy nationwide television stations, whereas publishers of daily newspapers could not[18].

It must be borne in mind that AI is based on determining probability. Embedded in its method of creation (training) is the fact that it may be mistaken[19]. AI will try to reduce a problem to issues it already knows – in contrast to a human being, who has the ability to respond flexibly to the unknown[20].

CONCLUSION

It can certainly be indicated that artificial intelligence is an excellent tool that significantly accelerates work, including in the area of drafting and editing law. However, for law to meet the conditions imposed by the rule of law i.e., to be, among other things, consistent with constitutional principles, systemically coherent, understandable to citizens, and carefully crafted from a professional standpoint, the process of lawmaking should not be entrusted to AI without human oversight[21]. Attention must be paid to those voices that see the surrender of such control as a threat to democracy[22].

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16 Cf. Judgment of the (Polish) Constitutional Tribunal of 7 July 2003, case no. SK 38/01. The Tribunal explained: "In the announcement of 13 October 1997 on the correction of errors (Journal of Laws No. 128, item 840) point 3 received the following wording: 'in the Act of 6 June 1997 – Penal Code (Journal of Laws No. 88, item 553) in Article 156 § 1 point 2, instead of the words "ciężkiej choroby nieuleczalnej lub długotrwałej choroby realnie zagrażającej życiu" the words "ciężkiej choroby nieuleczalnej lub długotrwałej, choroby realnie zagrażającej życiu" should appear. **The change thus consisted in adding a comma after the word "długotrwałej**"" [bold emphasis by the Author] (justification, point 3).

17 *"Afera Rywina" - jeden z najgłośniejszych skandali korupcyjnych ostatnich lat*, 27.12.2012, https://wiadomosci.wp.pl/afera-rywina-jeden-z-najglosniejszych-skandali-korupcyjnych-ostatnich-lat-6031284507661441a.

18 *Aleksandra Jakubowska skazana za "lub czasopisma"*, 19.07.2011, https://wiadomosci.onet.pl/kraj/aleksandra-jakubowska-skazana-za-lub-czasopisma/bgpsr.

19 Wyjaśnia to: SADŁOWSKI, A. Sztuczna inteligencja jako system predykcyjny [in:] Fischer B., Pązik A., Świerczyński M. (eds), *Prawo sztucznej inteligencji i nowych technologii*, Wolters Kluwer Polska, Warszawa 2021, p. 400. The Author states there: "In developing artificial intelligence, we should build new models through generalization rather than specialization for a specific task. Nevertheless, the cost of such a solution will be the acceptance of the fact that models built in this way will make mistakes".

20 Sala F., Sala-Tefelska M., Bujok M., *ChatGPT…, op. cit.*, p. 16.

21 Cf. NOWAKOWSKI, M. Etyczna sztuczna inteligencja. Sposób na pogodzenie ze sobą pozornie sprzecznych interesów [in:] NOWAKOWSKI, M. (ed.), *Sztuczna inteligencja. Wybrane aspekty zarządzania projektami AI&Data*, Warszawa 2025, C.H. Beck, p. 83.

22 PIOTROWSKI, R. [in:] Grzebyk P. (ed.), *Nowe technologie jako źródło wyzwań dla systemu prawa w Polsce. Nowe technologie a prawa człowieka. Między utopią a dystopią*, Scholar 2025, accessed *via* Lex el., pkt 5: „The possibilities of replacing humans with artificial intelligence require reconsideration of the concept of a system defined as democratic. A system deserves the name of democracy if it allows, sometimes necessarily in society, the limitation of human rights while preserving the rights of minorities. However, such a limitation can be made in a democratic system only by people exercising legislative, executive, and judicial power, and not by forms of artificial intelligence that may be applied".

The article points out that AI may fail to meet our expectations both regarding the ideological value of a given provision and its drafting from a technical standpoint. There is a concern that AI will not understand such subtle issues as a change in the meaning of a provision caused by the absence of a punctuation mark, the omission of a word, or, for example, the use of a synonym or a completely different word.

This article does not claim to provide a comprehensive treatment of the subject and, by highlighting the problems identified, may serve as an encouragement to conduct in-depth research in the indicated areas.

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Evaluating Long-Term Shareholder Engagement Instruments under Directive 2017/828[2]

Hodnotenie nástrojov dlhodobej angažovanosti akcionárov podľa smernice 2017/828 (SRD II)

Abstract

The issue of shareholder engagement, including methods of enhancing it, is central to corporate governance discussions. This study employs statistical analysis and the dogmatic method to examine shareholder engagement in selected EU Member States from 2014 to 2024. Particular attention is given to the impact of Directive 2017/828 (SRD II), which aims to promote long-term shareholder engagement through increased transparency and governance mechanisms. While the findings indicate a rise in the percentage of shares represented at general meetings, it remains unclear whether this trend directly results from implementing the provisions of Directive 2017/828. The analysis focuses in particular on companies listed on the regulated market operated by the Warsaw Stock Exchange and compares engagement in selected EU capital markets such as Germany and Italy. The research addresses the phenomenon of rational apathy and rational reticence among shareholders, especially in the context of the separation of ownership and control in listed companies. It assesses the actual capacity of institutional investors to counteract these challenges under the current regulatory framework.
Keywords: *shareholders engagement, regulated market, shareholder, Directive 2017/828 (SRD II).*

Abstrakt

Otázka angažovanosti akcionárov, vrátane spôsobov jej posilňovania, stojí v centre diskusií o správe a riadení spoločností. Táto štúdia využíva štatistickú analýzu a dogmatickú metódu na skúmanie angažovanosti akcionárov vo vybraných členských štátoch EÚ v období rokov 2014 – 2024. Osobitná pozornosť sa venuje vplyvu smernice 2017/828 (SRD II), ktorej cieľom je podporiť dlhodobú angažovanosť akcionárov prostredníctvom zvýšenej transparentnosti a mechanizmov riadenia spoločností. Hoci zistenia naznačujú nárast percenta akcií zastúpených na valných zhromaždeniach, zostáva nejasné, či tento trend priamo vyplýva z implementácie ustanovení smernice 2017/828. Analýza sa zameriava najmä na spoločnosti kótované na regulovanom trhu prevádzkovanom Varšavskou burzou cenných papierov a porovnáva angažovanosť akcionárov vo vybraných kapitálových trhoch EÚ, ako sú Nemecko a Taliansko. Výskum sa zaoberá fenoménom racionálnej apatie a racionálnej zdržanlivosti medzi akcionármi, najmä v kontexte oddelenia vlastníctva a kontroly v kótovaných spoločnostiach. Hodnotí tiež skutočnú schopnosť inštitucionálnych investorov čeliť týmto výzvam v rámci súčasného regulačného rámca.
Kľúčové slová: *angažovanosť akcionárov, regulovaný trh, akcionár, smernica 2017/828 (SRD II).*

JEL Classification: K15, K20, K22

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INTRODUCTION

Shareholder engagement is at the centre of the corporate governance debate. As the literature indicates, in order to increase shareholder engagement, it is necessary to provide shareholders with appropriate instruments to facilitate the effective oversight of management and to strengthen their influence on key company decisions.[3] Furthermore, according to the literature, shareholder engagement is a fundamental component of the balance between the rights of the supervisory board and the shareholders.[4] Shareholder engagement also enables the functioning of effective (efficient) mutual control mechanisms between the company's governing bodies and reduces the effects of agency conflicts.[5]

The multitude of different definitions makes it difficult to adopt a single general definition of shareholder engagement. In general terms, engagement can be divided into formal and informal engagement.[6] Formal engagement is defined as the participation of shareholders in the operation of the companies in which they invest. The concept of informal engagement, on the other hand, covers all activities undertaken by shareholders in the course of supervising the enterprise with the express intention of influencing corporate governance policies.[7]

While the scale of informal engagement is difficult to quantify, it is certainly possible to measure formal engagement, with certain assumptions and simplifications. For this reason, the research focused on formal engagement, with the percentage of shares represented at ordinary (annual) general meetings being adopted as its main indicator.

In this study, shareholder engagement is understood primarily as participation in general meetings of companies listed on regulated markets and the exercise of voting rights at such meetings. While shareholders formally hold a wider range of rights (e.g. the right to information, to challenge resolutions, or to bring derivative actions), these are rarely exercised in practice, especially by minority shareholders.[8] Accordingly, the presence of shareholders at general meetings and their voting activity serves as one of the most reliable indicator of actual engagement. Such participation not only reflects the willingness of shareholders to influence corporate governance, but also provides a tangible measure of their engagement in decision-making processes.

Taking the above into account, the main objective of the study was to examine whether the instruments encouraging long-term shareholder engagement adopted by the EU legislator under Directive 2017/828[9] have led to an increase in shareholder engagement, understood as an increase in the

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[3] MICHALSKI, M. Reżim legitymacyjny w spółce akcyjnej. In Przegląd Prawa Handlowego. 2011, No. 2, p. 25.

[4] ELST, CH VAN DER. Shareholder Rights and Shareholder Activism: The Role of the General Meeting of shareholders. In European Corporate Governance Institute (ECGI) – Law Working Paper. 2012, No. 188, p. 2.

[5] HILL, J. Visions and Revisions of the Shareholder. In The American Journal of Comparative Law. Vol. 48, 2000, No. 1, p. 60; JENSEN, M.C., FAMA, E.F. Separation of Ownership and Control. In The Journal of Law & Economics. Vol. 26, 1983, No. 2, pp. 301-310.

[6] RINGE, W.G. Shareholder Activism: A Renaissance. In: GORDON J. N., RINGE W.G. (eds.) The Oxford Handbook of Corporate Law and Governance. Oxford: Oxford University Press, 2018, p. 389.

[7] OPALSKI, A. Europejskie prawo spółek. Warsaw: LexisNexis, 2010, p. 296; ARSALIDOU D., Institutional investors, behavioural economics and the concept of stewardship. In Law and Financial Markets Review. Vol. 6, 2012, Issue 6, p. 410; JAKUPAK, T. Shareholder Activism. In Journal for the International and European law, economics and market integrations. Vol. 1, 2014, No. 2, p. 73.

[8] Nevertheless, it should be emphasised that the exercise of these rights may also indicate the level of shareholder engagement.

[9] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (OJ L 132, 20.5.2017, p. 1–25), hereinafter: Directive 2017/828.

percentage of shares represented at general meetings. The work mainly uses statistical analysis tools, along with the legal-dogmatic (doctrinal) research, which is intended to provide a theoretical and legal basis for the considerations on the subject presented in the article.

1. REASONS FOR THE LACK OF SHAREHOLDER ENGAGEMENT

Firstly, it should be noted that the problem of shareholder engagement stems primarily from the structure of capital companies. In such companies, ownership is separated from management[10]. Shareholders provide the company with capital resources enabling it to commence operations, while the day-to-day management of the company is entrusted to managers (directors).[11] Shareholders are therefore not involved in the company's operational and strategic decision-making. This, in turn, is intended to increase shareholder value, in particular through an increase in the value of the companies and thus the value of the shares held by shareholders.

The effects of separating ownership and management on shareholder disengagement are also reinforced by other factors that occur in the area of dispersed shareholding in listed companies. One of the most important causes is the issue of rational apathy among shareholders. In the literature, the issue of rational apathy refers to the passive attitude of shareholders consisting in the failure to exercise their ownership rights to obtain information about the functioning of the company.[12] The exercise of rights attached to shares, in particular in relation to the control of managers, is possible, but involves certain costs for shareholders, which may be higher than the expected benefits. For this reason, a shareholder acting in an economically rational manner consequently refrains from taking control measures, including the exercise of corporate rights and remains a passive entity.[13] The problem of rational shareholder apathy is also linked to the free rider problem. This concept assumes that all shareholders benefit from the efforts of an engaged shareholder, especially passive shareholders who, unlike the engaged shareholder, are not incurring costs related to controlling the managers.[14]

A parallel problem to the rational apathy of shareholders described above is the problem of rational reticence. This problem particularly affects institutional investors and stems from the investment strategy adopted by these entities. These strategies do not assume the active exercise of the rights arising from shareholder status, as they may not improve the results (rates of return) achieved by these entities.. In contrast to rational apathy, which is based on the belief that the costs of participation exceed the potential benefits due to the insignificance of an individual shareholder’s influence, rational reticence results from a deliberate strategic decision by institutional investors, for whom active involvement could disrupt their broader investment model rather than being simply unprofitable on an individual level.

However, it should be emphasised that these factors are not the only reasons for the lack of shareholder engagement. This lack of engagement, consisting in the failure to exercise the rights attached to the shares held, may result from the adopted investment strategy, involving passive investing, for example. Lack of engagement may also result from the shareholders not knowing about their rights

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[10] It should, however, be emphasized that while in many capital companies across Europe ownership is commonly separated from management, this pattern is not universally applicable. In particular, in Central and Eastern European countries, ownership structures often remain more concentrated, with shareholders and management largely overlapping (major shareholders often nominate members of company’s bodies).

[11] DYBIŃSKI, J. Delimitacja nadmiernie wygórowanych odpraw (tzw. złotych spadochronów) dla członków zarządów spółek publicznych w świetle natury spółki akcyjnej. In Czasopismo Kwartalne Całego Prawa Handlowego, Upadłościowego oraz Rynku Kapitałowego. 2009, No. 1, p. 13.

[12] See more: GORDON, J.N. The Mandatory Structure of Corporation Law. In Columbia Law Review. Vol. 89, 1989, No. 7, p. 1576; BOLODEOKU, I.O. Corporate Governance in the New Information and Communication Age: An Interrogation of the Rational Apathy Theory. In J*ournal of Corporate Law Studies*. 2007, Vol 7, Issue 1, pp. 109-141; AHERN, D. The Mythical Value of Voice and Stewardship in the EU Directive on Long-term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make. In Cambridge Yearbook of European Legal Studies. Vol. 20, 2018, p. 111.

[13] ENRIQUES L., ROMANO A., Institutional Investor Voting Behavior: A Network Theory Perspective. In University of Illinois Law Review. 2019, No. 1, p. 233.

[14] MAUGERI, M. Proxy Advisors, esercizio del voto e doveri “fiduciari” del gestore. In Orizzonti del Diritto Commerciale. 2016, No. 1, p. 2.

and how to exercise them. The latter applies in particular to individual shareholders who acquire only a small number of shares.

These factors lead to shareholders not actively exercising their rights, which leads to inadequate corporate governance. This, in turn, may result in opportunistic behaviour on the part of managers and strategic shareholders.

2. SHAREHOLDER ENGAGEMENT IN LIGHT OF THE PROVISIONS OF DIRECTIVE 2017/828

In order to limit the effects of the lack of shareholder engagement, a number of legislative initiatives have been taken in many jurisdictions to enhance the exercise of shareholder rights. Such measures have been taken, in particular, at the level of the European Union. Over the past twenty-five years, the EU legislator has adopted numerous legal acts that were intended to enable shareholders to exercise effective control over the company. On the one hand, these had the aim of adopting regulations to make it easier for shareholders, in particular non-resident shareholders.[15] On the other hand, they tried to bring about changes in shareholder perspectives, from short term to long term.

The most important piece of EU legislation on the subject of long-term shareholder engagement is Directive 2017/828. The provisions of this act regulate the following: (i) related party transactions, (ii) remuneration policy and remuneration reports, (iii) identification of shareholders, communication with shareholders and facilitation of the exercise of shareholders' rights, and (iv) transparency of institutional investors, asset managers and proxy advisors.[16] At the same time, the provisions of Directive 2017/828 are not intended to apply to all listed companies, but are generally addressed to companies whose shares are admitted to trading on a regulated market. When implementing Directive 2017/828, Member States could go beyond the minimum framework of the directive and establish regulations other than those they were obliged to (known as gold-plating). For example, with regard to Polish law, the legislator, when implementing the provisions of this legislation, essentially limited itself to transposition based on the literal wording, without going beyond the minimal provisions of Directive 2017/828.

The recitals of the Directive 2017/828 repeatedly refer to the issue and importance of shareholder engagement and the consequences of a lack thereof. In particular, Recital 2 of Directive 2017/828 states that the financial crisis revealed that shareholders frequently supported managers taking excessive short-term risks. Moreover, in light of the EU legislator's statement in Recital 2 of Directive 2017/828, there is clear evidence that the level of monitoring of investee companies and the level of engagement by institutional investors and asset managers has often been inadequate, focusing too much on short-term returns. This may lead to suboptimal corporate governance and performance. In Recital 14 of Directive 2017/828, the EU legislator indicates that effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the various bodies and shareholders. Greater engagement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including in terms of environmental, social and governance factors, in particular as referred to in the Principles for Responsible Investment, supported by the United Nations. In addition, greater engagement of all shareholders, in particular employees, in corporate governance is an important factor ensuring a more long-term approach by listed companies, which needs to be encouraged and taken into consideration.

15 These provisions are subject to Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17-24).

16 For more, see BIRKMOSE, H.S., SERGAKIS, K. (eds.) The Shareholder Rights Directive II: A Commentary. Cheltenham: Elgar Commentaries in Corporate and Company Law, 2021; LIEDER, J., BIALLUCH, M. In KINDLER, P., LIEDER J., (eds) European Corporate Law: Article-by-Article Commentary. Munich/Freiburg: Bloomsbury Publishing, 2021, pp. 870-971.

Although this does not directly follow from the literal wording of Directive 2017/828, the interpretation of the provisions of this legal act leads to the conclusion that institutional investors (e.g. investment funds and pension funds) should have a special role in the engagement of shareholders and the active exercise of rights arising from the acquired share.[17] This approach is consistent with views in the literature indicating that institutional investors should play a key role in shareholder engagement.[18] In addition, the literature also presents the view that the activity of institutional investors can significantly reduce issues related to the inability of shareholders (in particular individual shareholders) to effectively exercise ownership rights as a result of the high dispersion of share ownership.[19]

However, the EU legislator failed to introduce a legal definition of the term "shareholder engagement", nor any other guidelines on how to understand this term. In light of the provisions of Directive 2017/828, engagement seems to be understood as participation in general meetings and the exercise of other corporate rights related to shares, in particular voting rights. It is, therefore, a formal expression of commitment. For this reason, this study seeks to determine whether there has been an increase in the percentage of shares represented at general meetings of companies in selected Member States in the period 2014-2024.

3. SHAREHOLDER ENGAGEMENT IN SELECTED MEMBER STATES

The results of the statistical analysis are the subject of author's own research and that of third parties. The data used for the own research were determined for each company separately for each year covered by the analysis, and then aggregated to calculate statistical characteristics for the collected data from the selected sample of companies. The data in the own research were determined on the basis of current reports published by listed companies on the basis of the provisions of the Act on Public Offering[20] and the Regulation of the Minister of Finance on current and periodic information.[21]

The scope of our author's research covers companies whose shares were admitted to trading on the regulated market operated by the Warsaw Stock Exchange in the above period. The research covered companies that were included in the WIG20,[22] mWIG40[23] and the sWIG80[24] indices as of 1 March 2025. The portfolio of companies included in the above indices was determined as at 22 November 2024, after

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17 In this direction, for example, see Recital 15 of Directive 2017/828, which states that institutional investors and asset managers are often important shareholders of listed companies in the European Union and can therefore play an important role in the corporate governance of those companies, but also more generally with regard to their strategy and long-term performance. However, the experience of recent years has shown that institutional investors and asset managers often do not engage with companies in which they hold shares and there is evidence to suggest that capital markets often exert pressure on companies to perform in the short term, which may jeopardise the long-term financial and non-financial performance of companies. This may, among other negative consequences, lead to a suboptimal level of investments, for example in research and development, to the detriment of the long-term performance of both the companies and the investors.

18 ZHAO, Y. Corporate Governance and Directors' Independence. Alphen aan den Rijn: Wolters Kluwer, 2011, p. 122; PACCES, A. M. Shareholder Activism in the CMU. In BUSCH, D., AVGOULEAS, E., FERRARINI, G. (eds). Capital Markets Union in Europe. Oxford: Oxford University Press, 2018, p. 511; BALP, G., STRAMPELLI, G. Institutional Investor ESG Engagement: The European Experience. In European Business Organization Law Review. Vol. 23, 2022, pp. 869-904; MAZUR, P. Bezpośredni dialog między radą nadzorczą a akcjonariuszami spółek publicznych z perspektywy polskiego prawa spółek. In Przegląd Prawa Handlowego. 2022, No. 10, p. 44.

19 SAVVA, R. Shareholder Power as an Accountability Mechanism: The 2017 Shareholder Rights Directive and the Challenges towards Enhancing Shareholder Rights. In Journal for International and European Law, Economics and Market Integrations. Vol. 5, 2018, Issue 2, p. 280.

20 Act on Public Offering and the Conditions Governing the Introduction of Financial Instruments to the Organised Trading System and Public Companies of 29 July 2005 (Journal of Laws of 2025, item 623, as amended).

21 Regulation of the Minister of Finance on current and periodic information provided by issuers of securities and conditions for recognising as equivalent information required by the laws of a non-member state (Journal of Laws of 2018, item 757, as amended).

22 Stock market index of the 20 largest companies listed on the Warsaw Stock Exchange.

23 Stock market index of the 40 largest companies not including the 20 companies included in the WIG20 index.

24 Stock market index of the 80 largest companies, after the companies included in the WIG20 and mWIG40 indices.

the quarterly adjustment of 20 December 2024. The analysis includes companies based in the Republic of Poland that published a current report between 2014 and 2024 containing the resolutions passed at ordinary general meetings and a list of shareholders holding at least 5% of the votes at these meetings. As a result of the criteria adopted, the analysis covered 91 companies, including 17 companies from the WIG20 index, 24 companies from the mWIG40 index and 50 companies from the sWIG80 index.

Table 1: Average percentage (%) of shares represented at ordinary general meetings held between 1 January 2014 and 31 December 2024 for companies with registered offices in the Republic of Poland included in the research sample.

Average percentage of shares represented at AGMs	Calendar year										
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
For all companies included in the research sample, including:	62.72	61.58	64.15	63.29	64.08	67.72	65.93	63.86	64.64	67.91	66.97
For companies included in the WIG20 index	63.89	62.95	64.51	65.89	68.46	68.44	67.71	67.59	67.78	72.32	72.33
For companies included in the mWIG40 index	67.50	67.58	69.33	67.65	67.52	68.61	66.25	64.04	64.38	68.07	66.85
For companies included in the sWIG80 index	60.03	58.23	61.55	60.31	60.94	67.05	65.17	62.50	63.70	66.33	65.21

Source: Own research

The research carried out shows that the average percentage of shares represented at ordinary general meetings increased during the period analysed in a selected sample of companies. However, as indicated, it is not possible to identify the reasons for this increase. For example, the proportion of notified shareholders[25] in the total number of votes also increased during the period analysed. Therefore, it is possible that the notified shareholders conducted acquisition processes during the analysed period, which resulted in an increase in their share in the total number of votes, which in turn resulted in an increase in the number of shares held, translating into an increase in the percentage of shares represented at ordinary general meetings. The following table shows the average share of the total number of votes

[25] Notification shareholders are shareholders who have participated in annual general meetings and whose share of the total number of votes of such companies amounted to at least 5%.

held by notified shareholders participating in annual general meetings taking place between 2014 and 2024.

Table 2: The average percentage share of votes in the total number of votes held by notified shareholders participating in ordinary general meetings held in the period from 1 January 2014 to 31 December 2024 for the companies included in the research sample.

Average share of the total number of votes by notified shareholders participating in AGMs	Calendar year										
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
For all companies included in the research sample, including:	58.57	57.83	59.49	59.05	58.92	61.48	61.41	60.01	60.40	63.15	61.67
For companies included in the WIG20 index	54.52	54.51	55.21	54.65	54.57	54.68	56.03	56.41	56.42	59.04	60.52
For companies included in the mWIG40 index	63.73	62.41	63.29	61.63	60.50	61.55	61.52	59.24	59.54	62.23	60.26
For companies included in the sWIG80 index	57.47	54.78	57.40	56.89	58.17	62.86	62.14	60.89	61.82	64.43	62.30

Source: Own research

In order to enable a comparison of changes in the average percentage of shares represented at annual general meetings of companies with their registered office in Poland, it is expedient to compile this information on the average percentage of shares represented at general meetings of companies whose shares are admitted to trading on a regulated market operated in other selected Member States. The selection of the Member States for this comparative analysis was determined primarily by the diversity of their corporate governance models and regulatory traditions, while also taking into account their relevance and influence within the capital markets in EU. Consequently, the study does not aim to provide an exhaustive picture of shareholder participation across the entire European Union, but rather to offer an indicative benchmark that allows for a more nuanced assessment of shareholder engagement in Poland. This information is presented in the table below:

Table 3: Average percentage of shares represented at annual general meetings held between 2014 and 2024 for a sample of companies whose shares were listed on regulated markets in selected Member States.

Average percentage of shares represented at AGMs for the sample of companies	Calendar year										
	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Germany (DAX)	55.10	54.90	59.90	60.00	63.20	63.90	67.10	66.30	68.30	67.20	67.70
Italy (FTSE MIB)	66.60	65.14	66.64	66.51	67.50	69.00	70.40	69.00	70.40	71.80	71.80
Spain (IBEX 35)	67.60	67.77	68.17	71.70	72.20	72.30	70.90	71.60	71.80	74.00	73.50
France (CAC40)	64.50	65.30	65.80	65.40	67.10	68.70	70.10	71.10	72.00	74.80	75.70
Netherlands (AEX)	68.40	70.40	70.49	72.14	72.94	73.40	71.30	74.30	75.90	79.10	80.10

Source: Georgeson: 2024 European AGM Season Review (for the period from 2020 to 2024), Georgeson: Georgeson's 2020 AGM Season Review (for the period from 2018 to 2019), Georgeson: Georgeson's 2017 Proxy Season Review (for the period from 2014 to 2017).

Although the presented statistical results indicate an increase in the average percentage of shares represented at ordinary general meetings of companies, caution should be exercised in drawing conclusions regarding the reasons for this growth, particularly with respect to the impact of legal institutions introduced under Directive 2017/828 on enhancing such engagement. The growth observed in the given timeframe may instead result from higher market turnover and the expanding interest of investors in equity securities. Furthermore, it should be underlined that the data shows only a relatively low increase in shareholder engagement in Poland, whereas in several Western European countries the growth has been more substantial. This divergence may stem from structural differences, such as the less developed role of institutional investors, as well as broader factors like market maturity and the effectiveness of investor protection frameworks.

CONCLUSIONS

The article shows that the lack of shareholder engagement can be attributed to a variety of different causes. It highlights that no single factor is responsible, but rather a combination of elements contributes to low participation levels. Although the presented research results indicate an increase in the average percentage of shares represented at ordinary general meetings of companies whose shares have been admitted to trading on a regulated market in Poland in the period 2014-2024, it is not possible to clearly indicate what caused this increase. In particular, it cannot be clearly stated that the increase in the percentage of shares represented at general meetings is due to the adoption of the institutions adopted under Directive 2017/828. In particular, it is possible that the changes in question were also influenced by other factors, such as a general increase in shareholder awareness, changes in the ownership structure of companies, the development of technologies enabling remote participation in meetings,[26] or the actions of issuers themselves in communicating with shareholders (investors).

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Personal Data Protection in the Context of Artificial Intelligence and Machine Learning: Profiling and Automated Decision-Making under the GDPR[2][3]

Ochrana osobných údajov v kontexte umelej inteligencie a strojového učenia: profilovanie a automatizované rozhodovanie podľa GDPR

Abstract

In today's digital society, where artificial intelligence and machine learning permeate everyday life and business, the protection of personal data becomes a fundamental challenge for safeguarding basic rights and freedoms. This article examines the legal framework of the GDPR in the context of AI and ML, focusing on profiling and automated decision-making without human intervention. It identifies problems in the application of relevant GDPR provisions and highlights risks of discrimination, lack of transparency, and privacy violations. The results of comparative analysis of normative techniques and jurisdictional differences lead to a synthesis of perspectives, critical reflection, and proposals for legislative reform.
Keywords: *personal data protection, artificial intelligence, machine learning, GDPR, profiling, automated decision-making.*

Abstrakt

V dnešnej digitálnej spoločnosti, kde umelá inteligencia a strojové učenie prenikajú do každodenného života a podnikania, sa ochrana osobných údajov stáva zásadnou výzvou pre zabezpečenie základných práv a slobôd. Tento článok skúma právny rámec GDPR v kontexte AI a ML so zameraním na profilovanie a automatizované rozhodovanie bez ľudského zásahu. Identifikuje problémy pri uplatňovaní relevantných ustanovení GDPR a poukazuje na riziká diskriminácie, nedostatku transparentnosti a porušovania súkromia. Výsledky komparatívnej analýzy normatívnych techník a rozdielov v jurisdikciách vedú k syntéze perspektív, kritickej reflexii a návrhom legislatívnych reforiem.
Kľúčové slová: *ochrana osobných údajov, umelá inteligencia, strojové učenie, GDPR, profilovanie, automatizované rozhodovanie.*

JEL Classification: K300

INTRODUCTION

In today's digital society, where artificial intelligence (AI) and machine learning (ML) technologies are rapidly evolving, the issue of personal data protection and individual rights acquires a new dimension. Profiling and automated decision-making without human intervention are becoming a common part of everyday life, and their legal, ethical, and social consequences are the subject of intense

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[2] In the preparation of this work, we partially utilized artificial intelligence, specifically the ChatGPT-4o tool. Artificial intelligence was used primarily for legal research, data analysis, and similar supportive activities. However, this use in no way interfered with our own academic and scientific work. Artificial intelligence did not serve as a substitute for our creative contribution.

[3] This contribution was created as part of the project supported by the Slovak Research and Development Agency, based on Contract No. VV-xx MVP-24-0038 titled: Analysis of Liability for Offenses Committed on the Internet Using Machine Learning Methods.

professional discussion. Due to the topicality and importance of this issue, this article focuses on personal data protection in the context of AI and ML, with an emphasis on the legal framework for profiling and automated decision-making under the General Data Protection Regulation (GDPR), the Artificial Intelligence Act (AI Act), and the NIS2 Directive on cybersecurity.

Our hypothesis is that the current EU legal framework, represented mainly by the GDPR, AI Act, and NIS2, provides a comprehensive basis for the protection of individual rights in the digital environment. However, in practice, it faces several application and interpretative challenges that require further development de lege ferenda. We assume that effective protection of data subjects' rights in the context of AI and ML is possible only with the thorough implementation of existing regulations, their harmonization, and the addition of new regulatory and ethical mechanisms.

The aim of this article is to systematically analyze the legal framework for personal data protection in the digital society, identify the main challenges and risks associated with profiling and automated decision-making, compare the current state (de lege lata) with future proposals (de lege ferenda), and formulate recommendations for legislative and regulatory practice in the EU and Slovakia.

The article uses mainly the comparative method, which allows for the comparison of legal regulations at the EU level and in individual Member States, the descriptive method for describing the current state of legal regulation and analyzing specific cases, as well as the analytical method for identifying risks, weaknesses, and proposals for their elimination. If necessary, other scientific methods will also be used, such as normative analysis or synthesis of knowledge from interdisciplinary sources.

Systematically, the article is divided into four chapters, which aim to logically structure and analyze the basic foundations of personal data protection, legal and ethical aspects of profiling and automated decision-making, their practical consequences, as well as legislative and regulatory challenges de lege lata and de lege ferenda. In the conclusion, the article attempts to confirm or refute the stated hypothesis and provide concrete recommendations for further development of legal regulation in this area.

1. LEGAL FRAMEWORK FOR PERSONAL DATA PROTECTION IN THE EU

In today's digital society, personal data protection is a fundamental pillar of European law, responding to the rapid development of technologies, especially artificial intelligence and machine learning. The legal framework of the European Union in this area is based on several key regulations that complement each other and create comprehensive protection of individuals' fundamental rights. [4]

1.1. GDPR – The Cornerstone of Personal Data Protection

The General Data Protection Regulation (GDPR) represents the basic EU legal act in the field of personal data protection. Its aim is to set uniform rules for the processing of personal data and at the same time create space for innovation in the digital environment while preserving individual rights (Art. 1 and 5 GDPR). The GDPR establishes fundamental principles of data processing: lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality. These principles must be taken into account by controllers and processors also when designing systems using ML and AI.

The GDPR grants data subjects a wide range of rights. Special attention is paid to Article 22 GDPR, which regulates the right not to be subject to a decision based solely on automated processing, including profiling, if such a decision produces legal effects or similarly significantly affects the person.[5]

[4] MASCHKANOVÁ, Kristína. Privacy in the Age of AI [online]. AmCham Slovakia, 2024 [cited 2025-09-27]. Available at: https://amcham.sk/publications/issues/2024-2-innovation-in-the-digital-age/article/274091/privacy-in-the-age-of-ai.

[5] BELL, Tim. The 'hidden obligation' rides again! EU representatives under GDPR, DSA, NIS2 and others [online]. IAPP, 22 February 2024 [cited 2025-10-17]. Available at: https://iapp.org/news/a/the-hidden-obligation-rides-again-eu-representatives-under-gdpr-dsa-nis2-and-others/.

1.2. Profiling and Automated Decision-Making

For the field of AI and ML, two institutes defined in the GDPR are crucial: profiling and automated decision-making. Profiling is defined in Art. 4(4) GDPR as any form of automated processing of personal data consisting of the evaluation of personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that person's performance at work, economic situation, health, preferences, interests, reliability, behavior, location or movements. Such use of algorithms enables the discovery of hidden patterns in data and often leads to decisions without direct human intervention, which brings risks of discrimination, stigmatization, or unfair distribution of benefits and burdens in society if adequate safeguards and fairness principles are not implemented.

Automated decision-making, especially if it has legal effects or significantly affects the data subject, is regulated in Art. 22 GDPR. The data subject has the right not to be subject to such a decision, except where the decision is necessary for entering into or performance of a contract, is based on explicit consent, or is authorized by Union or Member State law. Transparency of these processes and informing data subjects about the purpose of processing, legal basis, and recipients of data are prerequisites for the possibility to object, request human intervention, and challenge the outcome.[6]

Legislation emphasizes risk assessment and data protection by design. In case of high risk to the rights and freedoms of individuals, it is mandatory to carry out a Data Protection Impact Assessment (DPIA) under Art. 35 GDPR. In the context of AI, this means that the controller must consider the impacts before implementing the system, especially where automated decision-making and profiling penetrate key areas of life. This preventive approach is essential to prevent abuse and violations of fundamental rights and puts pressure on the development of legislative tools and regulatory strategies.

1.3. AI Act – A New Horizon for AI Regulation

In 2024, the Artificial Intelligence Act (Regulation (EU) 2024/1689) was adopted, introducing harmonized rules for the development, marketing, and use of AI systems in the EU. The AI Act is directly applicable in all Member States and aims to promote trustworthy, safe, and human-centric AI, emphasizing the protection of fundamental rights, health, safety, democracy, and the environment (Art. 1 AI Act).[7]

The AI Act categorizes AI systems according to risk (prohibited, high-risk, limited risk, minimal risk) and sets specific requirements for high-risk AI systems that may significantly affect fundamental rights or the safety of individuals (Art. 6, Annex III AI Act). These requirements include the obligation to carry out a fundamental rights impact assessment, ensure transparency, explainability, human oversight, data quality, cybersecurity, and other risk management measures (Art. 8 –15 AI Act). The AI Act also explicitly refers to the obligation to comply with the GDPR and other EU data protection regulations (Art. 2 AI Act).[8]

1.4. NIS2 – Cybersecurity as Part of Data Protection

Directive (EU) 2022/2555 on measures for a high common level of cybersecurity in the Union extends cybersecurity requirements in the digital space and sets obligations for entities operating in

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6 ARROWS, Law Firm. Compliance with AI Act and GDPR [online]. 18 March 2025 [cited 2025-10-17]. Available at: https://arws.cz/news-at-arrows/compliance-with-ai-act-and-gdpr.

7 GIRA Group. Interconnection between NIS2 Directive, AI Act, GDPR and proposed EPR [online]. Gira Group, [cited 2025-09-28]. Available at: https://www.gira.group/post/interconnection-between-nis2-directive-ai-act-gdpr-and-proposed-epr.

8 NISEVIC, Maja, CUYPERS, Arno, DE BRUYNE, Jan. Explainable AI: Can the AI Act and the GDPR go out for a Date? [online]. Leuven: KU Leuven, 2024. Date of creation: January 15, 2024. [cited 2025-09-28]. Available at: https://ssrn.com/abstract=5056022.

critical sectors, including providers of digital services and infrastructures. NIS2 requires organizations to adopt appropriate technical and organizational measures to manage risks and ensure the resilience of networks and information systems processing personal data, including data used in AI and ML systems. Cybersecurity is thus an integral part of personal data protection, and both the GDPR and AI Act explicitly refer to it (Art. 32 GDPR, Art. 15 AI Act, Art. 21 NIS2).[9]

It is worth noting that NIS2 does not directly regulate the processing of personal data like GDPR, nor algorithms like the AI Act. However, it indirectly affects profiling and automated decision-making through requirements for system and network security. NIS2 applies to "essential" and "important" entities in the digital economy, which are obliged to implement appropriate measures for managing cyber risks and to report incidents. This means that if an organisation uses AI/ML for profiling (e.g., a bank automatically assessing credit risk) and falls under the entities covered by NIS2, it must ensure a high level of cyber resilience for its systems.

Profiling and automated decisions depend on data and models – if a cyber incident occurs (e.g., theft or alteration of data, attack on an algorithm), it could lead to incorrect or manipulated decisions with serious consequences for individuals. The NIS2 Directive helps prevent such situations by requiring organisations to identify risks and protect systems against attacks. For example, NIS2 mandates stronger risk management frameworks and regular security audits, which also apply to AI systems deployed within the infrastructure. This reduces the risk of unauthorised interference with profiling algorithms or leakage of personal profile data.

Another noteworthy aspect of NIS2 is the new responsibility requirement – if a serious security incident occurs (e.g., a personal data breach or a cyberattack affecting automated decision-making), the affected entities must report the incident to the competent authorities within 24 hours. This indirectly strengthens data protection: organisations will be motivated to better secure systems to avoid penalties, and in the event of an incident, a rapid response will follow (coordination with NIS2 authorities as well as data protection authorities).

It should also be noted that NIS2 does not weaken the rights of data subjects under GDPR. The protection of personal data as regulated by GDPR remains fully in force. NIS2 adds another layer – it addresses the security aspect. For example, if a profiling system falls under NIS2, the operator must, in addition to fulfilling GDPR obligations (e.g., lawfulness of processing, data subject rights, DPIA), also ensure the cybersecurity of that system (e.g., data encryption, secure access management, network monitoring). This ensures that profiling takes place in a trusted environment and the risks of compromise are minimised.[10]

1.5. Hierarchy and Interaction of Legal Regulations

The GDPR serves as lex generalis for personal data protection, while the AI Act and NIS2 represent lex specialis for specific areas of digital technologies and cybersecurity.[11] The AI Act explicitly states that its provisions apply without prejudice to rights and obligations under the GDPR, Directive 2002/58/EC (ePrivacy), Directive 2016/680/EU (data protection in law enforcement), and other relevant

9 GIRA Group. Interconnection between NIS2 Directive, AI Act, GDPR and proposed EPR [online]. Gira Group, [cited 2025-09-28]. Available at: https://www.gira.group/post/interconnection-between-nis2-directive-ai-act-gdpr-and-proposed-epr.

10 Profiling and (automated) decision-making under the GDPR [online]. [cit. 2025-09-02]. Dostupné z: https://www.sciencedirect.com/science/article/abs/pii/S0267364922000103

11 OO, May. Mapping GDPR, NIS2, DORA, the EU AI Act & EU Data Act – It's Time to Think Horizontally [online]. May's Solo Founder Life in ꜱᴋ, Substack, 28 September 2025 [cited 2025-09-26]. Available at: https://mayooaigp.substack.com/p/mapping-gdpr-nis2-dora-the-ai-act

regulations (Art. 2 AI Act). In case of conflict, the protection of fundamental rights and freedoms of individuals takes precedence.[12] [13]

1.6. Interdisciplinary Dimension and Practical Significance

Personal data protection in the context of AI and ML requires close cooperation between lawyers, technology experts, ethicists, and users. Only in this way is it possible to design and operate systems that are not only innovative but also safe, fair, and respectful of fundamental rights. In practice, this means that every AI or ML project must be designed and operated in compliance with the GDPR, AI Act, and NIS2 from the outset, with particular attention to high-risk applications, transparency, explainability, and effective exercise of data subjects' rights.[14]

2. LEGAL ASPECTS OF PROFILING AND AUTOMATED DECISION-MAKING

Profiling and automated decision-making are among the most discussed legal institutes in the context of personal data protection in the digital society. Their importance is growing, especially with the development of artificial intelligence and machine learning, which enable the processing of large volumes of data and the making of decisions without direct human intervention.[15]

2.1. Profiling under the GDPR

Profiling is defined in Article 4(4) of the General Data Protection Regulation as any form of automated processing of personal data consisting of the evaluation of personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that person's performance at work, economic situation, health, preferences, interests, reliability, behavior, location, or movements. Profiling is the basis of many modern digital services, from personalized advertising to credit scoring, but it also poses significant risks of discrimination, stigmatization, and invasion of privacy.

The legal regulation requires that any controller carrying out profiling ensures the lawfulness of processing, algorithmic transparency, and provides data subjects with clear information about the purpose and consequences of profiling. Data subjects have the right to object to profiling that concerns them, and in the case of profiling for direct marketing purposes, they have the right to immediate termination of such processing (Art. 21 GDPR).

2.2. Automated Decision-Making and Its Limits

Automated decision-making is regulated in Article 22 GDPR, which grants the data subject the right not to be subject to a decision based solely on automated processing, including profiling, if such a decision produces legal effects or similarly significantly affects them. Exceptions to this prohibition are strictly defined—automated decision-making is permissible only if it is necessary for entering into or performance of a contract, is authorized by Union or Member State law, or is based on the explicit

[12] NISEVIC, Maja, CUYPERS, Arno, DE BRUYNE, Jan. Explainable AI: Can the AI Act and the GDPR go out for a Date? [online]. Leuven: KU Leuven, 2024. Date of creation: January 15, 2024. [cited 2025-09-28]. Available at: https://ssrn.com/abstract=5056022.

[13] European Commission. Slovakia AI Strategy Report [online]. AI Watch, 2019 [cited 2025-09-23]. Available at: https://ai-watch.ec.europa.eu/countries/slovakia/slovakia-ai-strategy-report_en.

[14] OO, May. Mapping GDPR, NIS2, DORA, the EU AI Act & EU Data Act – It's Time to Think Horizontally [online]. May's Solo Founder Life in SK, Substack, 28 September 2025 [cited 2025-09-26]. Available at: https://mayooaigp.substack.com/p/mapping-gdpr-nis2-dora-the-ai-act.

[15] ARROWS, Law Firm. Compliance with AI Act and GDPR [online]. 18 March 2025 [cited 2025-10-17]. Available at: https://arws.cz/news-at-arrows/compliance-with-ai-act-and-gdpr.

consent of the data subject. Even in these cases, the controller must ensure the data subject's right to human intervention, the possibility to express their point of view, and to contest the decision.

Automated decision-making is typical especially in areas where rapid and efficient processing of large amounts of data is required—such as banking, insurance, employment, or public administration. However, these are also areas where risks of discrimination, unfair treatment, and lack of transparency in decision-making processes arise.[16]

2.3. Risks and Requirements for Transparency and Fairness

Profiling and automated decision-making can lead to the creation of so-called "black boxes," where the outcome of a decision is incomprehensible to the data subject and cannot be effectively challenged. The GDPR therefore emphasizes algorithmic transparency, explainability of decisions, and the obligation of the controller to provide the data subject with understandable information about the logic involved, as well as the significance and envisaged consequences of such processing (Art. 13 and 14 GDPR).

There is a high risk of discrimination, especially when algorithms are trained on historical data that may contain biases or reflect existing social inequalities. The controller is therefore obliged to implement measures to minimize these risks, including regular algorithm audits, testing for discriminatory patterns, and introducing mechanisms for error correction.

2.4. Relationship to the AI Act and NIS2

The Artificial Intelligence Act extends requirements for transparency, fairness, and auditability, especially for high-risk AI systems that use profiling or automated decision-making. The AI Act establishes the obligation to carry out a fundamental rights impact assessment, ensure explainability of decisions, and enable the effective exercise of data subjects' rights. The NIS2 Directive also emphasizes the cybersecurity of systems processing personal data within profiling and automated decision-making.

Profiling and automated decision-making are an integral part of the digital economy, but their legal regulation in the EU is based on strict protection of fundamental rights, transparency, and fairness.[17] Controllers must ensure not only compliance with the GDPR but also with the requirements of the AI Act and NIS2, with particular attention, in our view, to algorithmic explainability, prevention of discrimination, and the effective exercise of data subjects' rights.

3. PRACTICAL CONSEQUENCES OF PROFILING AND AUTOMATED DECISION-MAKING

Profiling and automated decision-making based on personal data have an increasing impact on the daily lives of individuals in the digital society. Their practical consequences are evident in various sectors—from financial services, employment, healthcare, to public administration and education. This chapter analyzes the specific risks these processes bring and highlights the need for effective protection of data subjects' rights.[18]

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16 LEVITINA, Anna. Humans in automated decision-making under the GDPR and AI Act [online]. CIDOB, 2024 [cited 2025-09-26]. Available at: https://www.cidob.org/en/publications/humans-automated-decision-making-under-gdpr-and-ai-act.

17 NISEVIC, Maja, CUYPERS, Arno, DE BRUYNE, Jan. Explainable AI: Can the AI Act and the GDPR go out for a Date? [online]. Leuven: KU Leuven, 2024. Date of creation: January 15, 2024. [cited 2025-09-28]. Available at: https://ssrn.com/abstract=5056022.

18 GIRA Group. Interconnection between NIS2 Directive, AI Act, GDPR and proposed EPR [online]. Gira Group, [cited 2025-09-28]. Available at: https://www.gira.group/post/interconnection-between-nis2-directive-ai-act-gdpr-and-proposed-epr.

3.1. Discrimination and Social Inequality

One of the most serious practical consequences of profiling and automated decision-making is the risk of discrimination. Algorithms trained on historical data may unconsciously reproduce and deepen existing prejudices and inequalities in society. For example, in the area of credit or insurance, automated systems may disadvantage certain population groups based on gender, age, ethnicity, or other sensitive attributes, even though such differentiation is prohibited under EU law. Similar risks arise in automated recruitment, where algorithms may favor candidates based on inappropriate or irrelevant criteria.[19]

3.2. Loss of Control and Transparency

Automated decision-making often leads to a loss of control by individuals over their own fate. Data subjects frequently do not realize that they have been profiled or that a decision about them was made by an algorithm. The lack of transparency and explainability in decision-making processes means that individuals cannot effectively defend themselves against unfair or erroneous decisions. Although the GDPR grants the right to explanation and human intervention, in practice the exercise of these rights is often complicated and depends on the willingness of the controller to provide understandable information.[20]

3.3. Impacts on Privacy and Psychological Well-being

Profiling can lead to invasions of privacy, as it enables the creation of detailed digital profiles about individuals' behavior, preferences, and habits. Such profiles may be misused for targeted marketing, manipulation, or even political influence. Automated decision-making can also cause feelings of helplessness, frustration, and distrust towards institutions, negatively affecting the psychological well-being of data subjects.

3.4. Challenges in Public Administration and Healthcare

In public administration, profiling and automated decision-making are used, for example, in the allocation of social benefits, assessment of applications for state services, or selection of students for educational programs. Errors or biases in algorithms can lead to unfair rejection of applications or disadvantage vulnerable groups. In healthcare, automated systems can influence diagnosis and treatment, and incorrectly set algorithms may result in wrong decisions with serious consequences for individuals' health.[21]

3.5. Protection Mechanisms and Recommendations for Practice

The practical consequences of profiling and automated decision-making show that the mere existence of legal guarantees is not sufficient. Their effective implementation in practice is crucial—controllers must ensure regular audits of algorithms, testing for discrimination, transparency in decision-making processes, and effective mechanisms for exercising data subjects' rights. The AI Act and the NIS2

[19] LUKÁCS, Adrienn – VÁRADI, Szilvia. GDPR-compliant AI-based automated decision-making in the world of work. Computer Law & Security Review, 2023, 50: 105848. ISSN 0267-3649. Available at: https://doi.org/10.1016/j.clsr.2023.105848.

[20] GASIMOVA, Chinara. Privacy and Transparency in an AI-driven world: Does algorithmic transparency fit on data privacy under GDPR? [online]. Lund University, Faculty of Law, 2023. Master Thesis. Available at: https://lup.lub.lu.se/student-papers/search/publication/9132352.

[21] GASIMOVA, Chinara. Privacy and Transparency in an AI-driven world: Does algorithmic transparency fit on data privacy under GDPR? [online]. Lund University, Faculty of Law, 2023. Master Thesis. Available at: https://lup.lub.lu.se/student-papers/search/publication/9132352.

Directive emphasize the obligation of explainability, auditability, and cybersecurity of systems that use profiling and automated decision-making.

Profiling and automated decision-making have a significant impact on the daily lives of individuals and society. Their practical consequences can be positive (efficiency, personalization of services) but also negative (discrimination, loss of control, invasion of privacy). Therefore, it is essential that legal guarantees are not only declared but also genuinely applied in practice, and that interdisciplinary cooperation between lawyers, technologists, ethicists, and users is ensured.

4. LEGISLATIVE, REGULATORY, AND ETHICAL CHALLENGES IN THE CONTEXT OF THE AI ACT, GDPR, NIS2 (DE LEGE LATA AND DE LEGE FERENDA)

The development of artificial intelligence and machine learning presents new challenges for legal science and practice, requiring not only the thorough application of existing regulations (de lege lata), but also their further development and harmonization (de lege ferenda). This chapter analyzes the current state of legal regulation in the field of personal data protection, profiling, and automated decision-making in the context of the AI Act, GDPR, and NIS2, identifies the main regulatory and ethical challenges, and proposes recommendations for the future.[22]

4.1. De lege lata: Current Legal Status

De lege lata, the legal framework for personal data protection in the EU is based on three fundamental pillars: the General Data Protection Regulation, the Artificial Intelligence Act, and the Cybersecurity Directive.[23]

The GDPR is the basic regulation for personal data protection, establishing principles of lawfulness, fairness, transparency, purpose limitation, data minimization, integrity, and confidentiality. Profiling and automated decision-making are regulated in Articles 4 and 22 GDPR, with data subjects having the right to explanation, human intervention, and the possibility to challenge decisions.[24]

The AI Act, adopted in 2024, introduces the categorization of AI systems according to risk and sets strict requirements, especially for high-risk systems that may significantly affect fundamental rights or the safety of individuals.[25] These requirements include the obligation to carry out a fundamental rights impact assessment, ensure transparency, auditability, explainability, human oversight, and cybersecurity. The AI Act explicitly refers to the obligation to comply with the GDPR and other EU data protection regulations (Art. 2(7) AI Act).[26]

The NIS2 Directive extends cybersecurity requirements in the digital space and sets obligations for entities operating in critical sectors, including providers of digital services and infrastructures. NIS2 requires the adoption of appropriate technical and organizational measures to manage risks and ensure

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[22] NISEVIC, Maja, CUYPERS, Arno, DE BRUYNE, Jan. Explainable AI: Can the AI Act and the GDPR go out for a Date? [online]. Leuven: KU Leuven, 2024. Date of creation: January 15, 2024. [cited 2025-09-28]. Available at: https://ssrn.com/abstract=5056022.

[23] European Commission. Slovakia AI Strategy Report [online]. AI Watch, 2019 [cited 2025-09-23]. Available at: https://ai-watch.ec.europa.eu/countries/slovakia/slovakia-ai-strategy-report_en.

[24] MASCHKANOVÁ, Kristína. Privacy in the Age of AI [online]. AmCham Slovakia, 2024 [cited 2025-09-27]. Available at: https://amcham.sk/publications/issues/2024-2-innovation-in-the-digital-age/article/274091/privacy-in-the-age-of-ai.

[25] BELL, Tim. The 'hidden obligation' rides again! EU representatives under GDPR, DSA, NIS2 and others [online]. IAPP, 22 February 2024 [cited 2025-10-17]. Available at: https://iapp.org/news/a/the-hidden-obligation-rides-again-eu-representatives-under-gdpr-dsa-nis2-and-others/.

[26] ARROWS, Law Firm. Compliance with AI Act and GDPR [online]. 18 March 2025 [cited 2025-10-17]. Available at: https://arws.cz/news-at-arrows/compliance-with-ai-act-and-gdpr.

the resilience of networks and information systems processing personal data, including data used in AI and ML systems.[27]

4.2. De lege lata: Regulatory and Ethical Challenges

The main challenges de lege lata include:

- **Fragmentation of interpretation and implementation:** Despite harmonization at the EU level, there are differences in the application of the GDPR, AI Act, and NIS2 in individual Member States, leading to legal uncertainty and the risk of forum shopping.
- **Insufficient explainability and auditability of algorithms:** High-risk AI systems often function as "black boxes," complicating the exercise of data subjects' rights and effective oversight.
- **Risk of discrimination and reproduction of biases:** Algorithms may unconsciously deepen existing inequalities if not regularly audited and tested for discriminatory patterns.
- **Ethical dilemmas:** Automated decision-making without human intervention raises questions of responsibility, dignity, and fairness, especially in sensitive areas such as healthcare, employment, or public administration.[28]

4.3. De lege ferenda: Proposals for Legislative, Regulatory, and Ethical Changes

De lege ferenda, it is necessary to:

- **Harmonize interpretation and implementation:** Adopt binding guidelines from the EDPB and the European AI Office to ensure a uniform interpretation of the GDPR, AI Act, and NIS2 throughout the EU.
- **Introduce mandatory regular audits of algorithms:** Operators of high-risk AI systems should be required to conduct independent audits, test algorithms for discrimination, and publish results in an understandable form.
- **Strengthen the right to explanation and human intervention:** Expand the right of data subjects to understandable explanations of AI decisions and ensure a real possibility of human intervention in automated processes.
- **Promote interdisciplinary cooperation:** Create platforms for cooperation between lawyers, technologists, ethicists, and users in the design and evaluation of AI systems.
- **Increase education and awareness:** Systematically educate both professionals and the general public about risks, rights, and means of protection in the field of AI and automated decision-making.
- **Introduce ethical codes and impact assessments:** Require ethical impact assessments for AI systems in sensitive areas and promote transparency and responsibility throughout the AI lifecycle.[29]

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[27] OO, May. Mapping GDPR, NIS2, DORA, the EU AI Act & EU Data Act – It's Time to Think Horizontally [online]. May's Solo Founder Life in SK, Substack, 28 September 2025 [cited 2025-09-26]. Available at: https://mayooaigp.substack.com/p/mapping-gdpr-nis2-dora-the-ai-act.

[28] OO, May. Mapping GDPR, NIS2, DORA, the EU AI Act & EU Data Act – It's Time to Think Horizontally [online]. May's Solo Founder Life in SK, Substack, 28 September 2025 [cited 2025-09-26]. Available at: https://mayooaigp.substack.com/p/mapping-gdpr-nis2-dora-the-ai-act.

[29] GIRA Group. Interconnection between NIS2 Directive, AI Act, GDPR and proposed EPR [online]. Gira Group, [cited 2025-09-28]. Available at: https://www.gira.group/post/interconnection-between-nis2-directive-ai-act-gdpr-and-proposed-epr.

4.4. Conclusion and Recommendations for Practice

The comparison of de lege lata and de lege ferenda shows that the EU legal framework is robust, but its effectiveness depends on thorough implementation, harmonization, and continuous development in response to new technological and societal challenges. In practice, it is crucial that lawyers, developers, ethicists, and users cooperate in the creation and operation of AI systems that are not only innovative but also fair, transparent, and safe.

CONCLUSION

In conclusion, this article presents a comprehensive synthesis of findings regarding personal data protection in the context of artificial intelligence and machine learning, with a focus on profiling and automated decision-making without human intervention. The analysis was based on the current legal framework of the European Union, represented mainly by the General Data Protection Regulation, the Artificial Intelligence Act, and the Cybersecurity Directive, examining their application, identifying key challenges, and proposing de lege ferenda recommendations.

Our ambition was to confirm or refute the hypothesis that the current EU legal framework provides robust, but not always sufficiently effective tools for protecting individuals' fundamental rights against the risks associated with profiling and automated decision-making in AI and ML environments. Based on the analysis, we can state that the aim of the article was fulfilled—we systematically assessed the legal status (de lege lata), identified application challenges, and, in connection with Chapter 4, presented concrete de lege ferenda proposals reflecting the need for further harmonization, increased transparency, auditability, and ethical responsibility in the field of AI.

We conclude that although the GDPR, AI Act, and NIS2 create a comprehensive basis for the protection of data subjects' rights, their effectiveness depends on thorough implementation, uniform interpretation, and continuous development in response to new technological and societal challenges. We confirmed that truly effective protection requires not only the consistent application of existing regulations but also their further development and supplementation with new regulatory and ethical mechanisms reflecting the interdisciplinary nature of the issue.

Our hypothesis was thus essentially confirmed—the EU legal framework is robust, but its practical effectiveness depends on the ability to respond to the dynamics of the digital society and the willingness of all stakeholders (lawyers, technologists, ethicists, policymakers, and users) to actively cooperate in the creation and operation of AI systems that are not only innovative but also fair, transparent, and safe. We believe that our de lege ferenda recommendations, presented in the final chapter, will contribute to further professional discourse and improvement of legal regulation in this area for the benefit of individuals and society.

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Overview of copyright legal cases against artificial intelligence companies – can we expect any changes in valid law?

Prehľad súdnych sporov o autorské práva proti spoločnostiam zaoberajúcim sa umelou inteligenciou – môžeme očakávať nejaké zmeny v platných zákonoch?

Abstrakt

V súčasnosti prebieha niekoľko súdnych sporov týkajúcich sa autorských práv proti spoločnostiam zaoberajúcim sa generatívnou umelou inteligenciou („AI"), najmä v Spojených štátoch. Medzi hlavné nároky patrí nezákonné použitie autorského diela na trénovanie modelov AI, práva autorov na výstupy generované AI a zodpovednosť za porušenie autorských práv pri komerčnom využití AI. Článok poskytuje prehľad prípadov, ako aj stanovisko k ochrane autorských práv.
Kľúčové slová: *autorské práva, umelá inteligencia, porušenie, ochrana.*

Abstract

A number of copyright court legal cases against generative artificial intelligence („AI") companies are currently pending, especially in the United States. The major claims include an illegal use of author's work for AI models training, rights of authors to outputs generated by AI and a liability of copyrights infringement in a commercial use of AI. The paper provides an overview of the cases as well as a position on protection of copyrights.
Keywords: *copyrights, artificial intelligence, infringement, protection.*

JEL Classification: K110

INTRODUCTION

The world has been facing rapid development of advanced technology, including software that generates outputs from generative artificial intelligence models offered by commercial companies to their subscribers. The models need data to be trained on. Commercial companies have been using all kinds of data for training their models, including copyrighted data that is the intellectual property of their authors.

The aim of this paper is to conduct a legal analysis of training artificial intelligence models using copyrighted data. Through pending legal court cases, especially in the United States of America, a hypothesis has emerged that using copyrighted data without a license from authors, i.e., pirated data, for training models and further commercial use by artificial intelligence models towards their subscribers is illegal.

Analytical and comparative methods have been used for this paper.

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1. ARTIFICIAL INTELLIGENCE

1.1. What is artificial intelligence?

Alan M. Turing is considered an “inventor” of the field of artificial intelligence due to his article called “Computing Machinery and Intelligence,” published in Mind in 1950.[2] In this article, Turing explored the question of whether machines can think. According to John McCarthy, artificial intelligence is the science and engineering of making intelligent machines, especially intelligent computer programs. He predicted that human-level intelligence can be achieved by writing and assembling vast knowledge bases of facts in the languages now used for expressing knowledge. And that artificial intelligence can be applied, among others, to computer vision as „three-dimensional information that is not just a set of two-dimensional views“.[3]

Intelligent systems can perform independently of a human being (i.e., without any supervision) with a high level of autonomy, some of which can be developed subject to their interaction with their surroundings.[4]

1.2. Generative artificial intelligence

Ronald Kneusel describes generative artificial intelligence as an umbrella term for models that create novel output, either independently (randomly) or based on a prompt supplied by the user. Generative models do not produce labels but text, images, or even video. Under the hood, generative models are neural networks built from the same essential components. Three kinds of generative artificial intelligence models include generative adversarial networks (GANs), diffusion models, and large language models.[5] To train the network, a training dataset is needed. The training datasets can be obtained from either open or non-open data databases. The training data can be subject to copyright owned by the authors of such data (the author’s work).

2. LEGAL ISSUES OF TRAINING OF GENERATIVE ARTIFICIAL INTELLIGENCE MODELS ON COPYRIGHTED DATA

2.1. Czech Republic

The Czech Copyright Act[6] protects, among others, an author’s creative objectively perceived work, such as a literary work, music, photography, film, audiovisual work, or a database, in case it has been created by an author’s individual intellectual outcome.[7] An author can only be a natural person who created the work. As such, the author can decide on a way of using the work.[8] Any other person needs a contractual licence (exclusive or non-exclusive) signed in a written form with the author or with a person maintaining the author’s property copyrights in line with the Czech Civil Code.[9]

Nevertheless, the law includes exceptions from a contractually licensed legal regime. Under Article 3 and 4 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (hereinafter referred to as “2019 EU Copyright Directive”) which was transposed into the Czech Copyright Act with an effect from 5th

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6 Act no. 121/2000 Coll., Copyright Act, as amended

7 Ibid. Section 2 (1) and (2)

8 Ibid. Section 12 and subs.

9 Section 2358 and subs. of Act no. 89/2012 Coll., Civil Code, as amended

January 2023, there is a free lawful access given to text and data mining, including those protected by a copyright, for reproductions and extractions. Such reproductions may, however, be retained only as long as is necessary for the purposes of text and data mining. This legal free licence is applicable unless a right holder has expressly reserved, i.e., prohibited, the usage of the work for text and data mining in an appropriate manner, such as machine-readable means in the case of content made publicly available online. Should the work be used for text and data mining conducted for "public needs" as a basis for "public licences" established by the 2019 Copyright Directive – for scientific purposes, by universities, research organizations, or cultural heritage, it is not possible to prohibit such use of data by its right holder.

Irrespective of the law, in practice, companies offering their users to work with generative artificial intelligence models gain the training data from any available portal, file, open data access, or database available online, regardless of whether such data are protected by copyrights. To get the data for training, they use web scraping, web crawling, or harvesting methods of data collection. Holders of copyrights are not even aware of the fact that their work is used in the training of a generative artificial intelligence. They have no tools to find it out.

By an obligatory acceptance of the Terms and Conditions of companies with generative artificial intelligence models[10], users contribute to the training models of companies by allowing them to use the outputs generated by the model upon their submitted prompts to train the models. This makes a business model of the companies offering a generative artificial intelligence a lot easier and more successful from a business and financial point of view.

However, a positive regulatory move in favour of copyright holders to protect their rights can be seen in the Artificial Intelligence Act adopted on 13 June 2024[11]. Under Article 53 (1) (c), providers of general-purpose artificial intelligence models, including models of generative artificial intelligence, are obliged to put in place a policy to comply with EU law on copyright and related rights, including rights of holders to prohibit using their copyrighted work (data) for text and data mining.

Given the fact that such a regulatory obligation to come up with a policy could be viewed as too general, on 10th July 2025, the General-Purpose AI Code of Practice (hereinafter referred to as "Code of Practice")[12], prepared by independent experts, was published by the EU-AI Office established within the European Commission as the AI centrum of expertise with a priority to launch a European AI governance system. The Code of Practice covers key concepts related to general-purpose AI models as a voluntary tool for providers of general-purpose artificial intelligence models, including generative ones. The Code of Practice also includes the Copyright Chapter next to Chapters on Transparency and Safety and Security. The Copyright Chapter was signed by companies playing a major role in the field of artificial intelligence models.[13] Under the Copyright Chapter of the Code of Practice, the signatories shall be responsible for the implementation of five measures in their artificial intelligence models:

(i) Draw up, keep up-to-date and implement a copyright policy to comply with EU law on copyright and related rights for all general-purpose AI models the signatories place on the EU market. Signatories commit to describing such a policy in a single document and assigning responsibilities within their organizations for the implementation and oversight of the policy.
(ii) Reproduce an extract only lawfully accessible copyright-protected content when crawling the World Wide Web. Signatories shall not circumvent effective technological measures that are designed to prevent or restrict unauthorized acts in respect of works and other protected subject

[10] Midjourney's Terms of Service. Available Online: https://docs.midjourney.com/hc/en-us/articles/32083055291277-Terms-of-Service [2025-09-29]

[11] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Artificial Intelligence Act

[12] General-Purpose AI Code of Practice. Available from: https://digitalstrategy.ec.europa.eu/en/policies/contents-code-gpai

[13] Signatories include: Accexible, AI Alignment Solutions, Aleph Alpha, Almawave, Amazon, Anthropic, Bria AI, Cohere, Cyber Institute, Domyn, Dweve, Euc Inovacao Portugal, Fastweb, Google, Humane Technology, IBM, Lawise, LINAGORA, Microsoft, Mistral AI, Open Hippo, Open AI, Pleias, re-inventa, ServiceNow, Virtuo Turing, WRITER; Available at: https://digital-strategy.ec.europa.eu/en/policies/contents-code-gpai

matters. Furthermore, they shall exclude from their web-crawling websites that make available to the public content, and which are recognised as persistently and repeatedly infringing copyright and related rights. To comply with such measures, a dynamic list of hyperlinks to lists of these websites issued by relevant EU bodies will be made publicly available on an EU website.

(iii) Identify and comply with rights reservations when crawling the World Wide Web by employing web-crawlers that read and follow instructions expressed in accordance with the Robot Exclusion Protocol (robots.txt) as specified in the Internet Engineering Task Force Request for Comments No. 9309 and any subsequent version. Another commitment is to identify and comply with other appropriate machine-readable protocols to express rights reservations in line with the 2019 EU Copyright Directive.

(iv) Mitigate the risk of copyright-infringing outputs by implementing appropriate and proportionate technical safeguards to prevent their models from generating outputs that reproduce training content protected by EU copyright law in an infringing manner and from prohibited uses of their models in a copyright-infringing manner.

(v) Designate a point of contact for electronic communication with affected rightsholders and enable the lodging of complaints not only to the rightsholders but also to their authorized representatives, including collective management organizations, concerning the non-compliance of signatories with their commitments pursuant to this Copyright Chapter. Signatories are due to act on complaints in a diligent, non-arbitrary manner and within a reasonable time.

In summary, an implementation of the Copyright Chapter of the Code of Practice with its preventive measures should distinctly improve the position of rightsholders in the European Union in the near future.

2.2. United States of America

While the European Union is implementing the Artificial Intelligence Act and seeking a voluntary implementation of the Copyright Chapter of the Code of Practice by its signatories within their businesses, a situation in the United States is opposite. Several major litigations have been initiated in courts.[14]

Court case Disney/Universal versus Midjourney

On 11th June 2025, leading film and television studios Disney Enterprises, Inc., Marvel Characters, Inc., MVL Film Finance LLC, Lucas Film Ltd. LLC, Twentieth Century Fox Film Corporation (collectively referred to as "Disney"), jointly with Universal City Studios Productions LLLP and DreamWorks Animation L.L.C. (collectively referred to as "Universal"), as plaintiffs, filed a lawsuit in the U.S. District Court in California against a generative artificial intelligence model company Midjourney, Inc., as defendant[15]. The plaintiffs have alleged that Midjourney has been infringing the plaintiff's exclusive rights under the Copyright Act[16] by (a) copying, publicly displaying and/or distributing plaintiffs copyrighted work, (b) offering its image service without appropriated copyright protection measures to prevent such infringement, and (c) offering its forthcoming video service without appropriate copyright protection measures to prevent such infringement, and (d) causing huge damages. The defendant owns and operates an artificial intelligence image and video generation service, allowing Midjourney subscribers to submit a text prompt and receive a downloadable, high-quality image or video

[14] Other pending court cases include e.g. The New York Times versus OpenAI and Microsoft, Getty Images versus Stability AI

[15] Available from: https://www.courtlistener.com/docket/70513159/disney-enterprises-inc-v-midjourney-inc/

[16] The Copyright Act 1976 as amended and codified. Available from: https://ipmall.info/sites/default/files/hosted_resources/lipa/copyrights/Copyright1976.pdf

in response. Midjourney is described as a virtual vending machine, generating endless unauthorized copies of Disney's and Universal's copyrighted works – characters doing any number of requested actions. It has been emphasized that Midjourney has technical means to limit copyright infringement through the existing filters, preventing the generation of violence or nudity. The defendant is purposefully not willing to introduce the same measures to protect plaintiffs' copyrights despite their call. The plaintiffs are requesting that the court issue a preliminary and/or permanent injunctive relief enjoining and restraining Midjourney and all its officers, agents, servants, and employees from continuing in such illegal conduct and conduct a standard jury trial on the merits of the case.

Midjourney has rejected that its business model is based on piracy conduct. Its major argument includes that the training of its AI model falls into the "fair use" principle of the copyrighted work, with no need to receive a licence from copyright holders in line with U.S. law. Furthermore, Midjourney argues that their generative AI model is of a transformational nature, as it is aimed not to copy the copyrighted work but to extract data from it to create something new and original.

Court case Warner Bros. Discovery versus Midjourney

On 4th September 2025, another legal action on infringement of copyrights against Midjourney was filed at the California District court by another major film and television studio, Warner Bros. Discovery. This legal case will likely be processed jointly in one proceeding with the Discovery/Universal case, as their claims seem to be identical. At least attorneys-at-law of Disney/Universal have asked the court to scarf both cases together.[17]

Court case Andrea Bartz/Charles Graeber/Kirk Wallace Johnson versus Anthropic PBC

In August 2024, the plaintiffs (authors of books) claimed that Anthropic PBC (hereinafter referred to as "Anthropic"), operating a generative large language model (LLM), Claude, infringed their copyrights by (i) pirating copies of their works for Anthropic's library and (ii) reproducing their works to train Anthropic's LLMs. In support of their copyright infringement claims, the plaintiffs alleged, among other arguments, that use of their books to train Anthropic's LLMs could result in the production of works that compete and displace demand for their books. Also, the plaintiffs alleged Anthropic's unauthorized use has the potential to displace an emerging market for licensing the plaintiff's works for the purpose of training LLMs.

It should be noted that the court has issued a landmark decision and stated that the generative intelligence models are of a transformational nature. Furthermore, a judge ruled that (i) Anthropic's digitalization of books it purchased in print form for use as part of its central library was a fair use because the digital copies were a replacement of the print copies it discarded after digitalization, and (ii) Anthropic's use of "pirated" copies of books in its central library was infringing. In its fair use analysis, the court differentiated between Anthropic's copying of millions of copyrighted materials for the purpose of training its LLMs, and Anthropic's retention of copies of books and text for building its central library. Use of the books at issue to train Anthropic's LLMs was "exceedingly transformative" and a fair use under Section 107 of the Copyright Act. Specifically, the court noted that authors cannot exclude others from using their work to learn. It noted that, for centuries, people have read and re-read books, and that the training was for the purpose of creating something different, not to supplant the work.

As for the pirated copies Anthropic never paid for, the court thought it was clear that the pirated copies displaced demand for the author's work, copy for copy. Per the court's opinion, "no damages from pirating copies could be undone by later paying for copies of the same works."[18]

To remedy damages for pirated copies, on 5th September 2025, the parties entered into a settlement agreement under which Anthropic PBC shall pay USD 3,000 per work to 500,000 authors, in total USD

17 Available from: https://www.courtlistener.com/docket/71271014/warner-bros-entertainment-inc-v-midjourney-inc/

18 Available from: https://www.afslaw.com/perspectives/alerts/landmark-ruling-ai-copyright-fair-use-vs-infringement-bartz-v-anthropic

1.5 billion. In addition, the pirated copies should be deleted by Anthropic from their databases.

3. REMUNERATION TO AUTHORS

The 2019 EU Copyright Directive has authorized the EU member states to solely decide about a national law allowing the rightholders to receive fair compensation for the digital uses of their works or other subject matter under the exception or limitation provided for in the Directive for illustration for teaching being under the "public licence". In setting the level of fair compensation, the educational objectives and the harm to rightholders should be taken into account.[19]

Furthermore, it is stipulated that authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration and those natural persons need the protection provided by the 2019 EU Copyright Directive to be able to fully benefit from the rights harmonized under this directive.[20]

The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, considering the author's or performer's contribution to the overall work and all circumstances of the case, such as market practices or the actual exploitation of the work.[21] As for remuneration payable to the authors or performers under the "public licenses," member states can apply any appropriate way of payment, including lump sum payments, taking into account the specifics of each sector. For that purpose, authors and performers need information to access the economic value of their rights, including a continuous one.[22] It is important that the contractual counterparts share adequate and accurate information with them to set up fair remuneration for the authors or performers.

It is clear from the above that the EU has established a high bar on the protection and remuneration for data and text mining for public licences. Since companies offering services of a generative artificial intelligence model need data and text mining for extensive, global business needs, it can be expected that the same rules shall be applied to remunerating authors and performers for the provision of a commercial type of licence. The above-mentioned recent settlement agreed between Anthropic PBC on a payment of USD 3,000 per work to an author could be taken as a precedent for any future negotiations between copyright holders and companies operating generative artificial intelligence models. Thus, the current modus operandi of commercial companies shall stop unauthorized and uncompensated data and text mining for training their commercially driven generative artificial intelligence models. Collective management organizations can effectively help to take care of the rights of copyright holders.

4. RIGHTS OF AUTHORS TO OUTPUTS GENERATED BY ARTIFICIAL INTELLIGENCE

Regarding the question of who is the author of outputs generated by artificial intelligence models based on prompts instructed into the models by their users, in European member states, such outputs are not considered original under copyright law due to the lack of a human element. As such, they cannot be protected by copyright law.

A court decision no. 10C 13/2023-16, issued by the Regional Court in Prague on 11th October 2023,[23] falls within the above-mentioned hypothesis. Under Section 5 of the Czech Copyright Act, an author is

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[19] Section 24 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689& qid=1758827446632

[20] Ibid, Section 72.

[21] Ibid, Section 73.

[22] Ibid. Section 74.

[23] Court decision available at: https://msp.gov.cz/documents/14569/1865919/10C_13_2023_10/108cad3e-d9e8-454f-bfac-d58e1253c83a

a natural person who created the work. The artificial intelligence cannot be considered a natural person. Prompts instructing the generative artificial intelligence models are ideas or themes of the work. Those, however, are not the author's work under Section 2 (6) of the Czech Copyright Act.

Under the U.S. Copyright Act of 1976, an author's work becomes protected upon its creation in a physical form. The law allows a public registration of a copyright to the author's work at the United States Copyright Office, which is the official governmental entity with its seat in Washington.[24] Although "an author" is not defined in the U.S. copyright law the registration is not allowed to any other author than a human being. A certificate is issued by the Office to an applicant (author) upon registration. Based on the Policy issued on 16th March 2023, works made as a result of generative artificial intelligence models shall only be registered by the U.S. Copyright Office if the art expressive elements are the result of a mental creative activity of a human being.

From the above, it can be concluded that at present, a mental creative activity of a human being remains essential for any work to be protected by copyright law both in the European Union and U.S. law.

5. LIABILITY OF AI COMPANIES

Considering that a software company offering services with generative artificial intelligence models has been infringing copyrights of a Czech person (a natural person or a legal entity) by unauthorized data and text mining for training its artificial intelligence model, such a person is entitled to claim damages in line with the Czech Civil Code.[25] Under the law, the claimed damages can be material and immaterial.

For a successful claim, a plaintiff (a copyright holder) would have to prove to the court that the software company with offering services to its users (subscribers) through outputs from the generative artificial intelligence models (i) has breached law by training its models on the plaintiff's copyrighted data for a further commercial use illegally without having a licence agreement concluded with the plaintiff, (ii) the plaintiff has suffered harm in a form of a material and immaterial damage, and (iii) the suffered damaged was caused by breaching the law. The burden of evidence is with the plaintiff. This procedural requirement would be very challenging for a copyright holder to meet, as they lack the necessary tools to prove illegal conduct by the defendant in the context of highly sophisticated software and unpredictable generative artificial models. Upon presenting all facts and evidence to support the claim the plaintiff could demonstrate reasons for a request that the defendant is requested to disclose any and all evidence about data and text mining for the generative AI model per analogia to Article 9 (1) of the Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability of defective products which newly stipulates any software being a product.[26]

6. CONSIDERATIONS DE LEGE FERENDA

Copyrights are valuable intellectual property of their owners. Since the EU AI Office came up with the Copyright Chapter in the Code of Practice to support Act on Artificial Intelligence and the Chapter was already accepted by major software companies and taking into account an outlined direction of pending legal court cases against companies offering generative artificial intelligence models to their subscribers trained on (not only) pirated data, in my opinion, there is no need to consider any proposal to new law at this stage.

From a business perspective, it can be expected that software companies will have to implement filters to prevent the illegal copying of copyrighted data and stop training their generative artificial intelligence on such pirated data.

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24 Detail available at: https://www.copyright-registry-application-online.com/

25 Act no. 89/2012 Coll., Civil Code, as amended, Section 2894 and subs.

26 A draft Directive of EU on artificial intelligence liability has not been adopted by the European Parliament and the Council.

CONCLUSION

Following an analysis contained in this paper, it is possible to articulate its findings as follows: Legally, software companies operating commercial generative artificial intelligence models are not authorized to undertake text and data mining without prior permission (licence) granted to them by copyright holders. Data and text mining without permission of the authorized owners is only possible under public licences stipulated by European law and national laws of EU member states.

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Aplikácia DSA a jeho prienik do ochrany osobných údajov s ohľadom aj na etické princípy[3]

Application of the DSA and its intersection with personal data protection, Including Ethical Principles

Abstrakt

Digital Services Act (DSA) predstavuje nový regulačný rámec pre online prostredie, ktorého cieľom je zvýšiť transparentnosť, zodpovednosť a bezpečnosť digitálnych služieb v EÚ. Jeho aplikácia však zároveň prirodzene zasahuje do oblasti ochrany osobných údajov, ktorej právny základ tvorí nariadenie GDPR. Príspevok analyzuje kľúčové body prieniku medzi DSA a ochranou osobných údajov, najmä v kontexte povinností týkajúcich sa transparentnosti algoritmických systémov, moderovania obsahu a profilovania používateľov. Osobitná pozornosť sa venuje otázkam súladu medzi týmito dvoma reguláciami, ktoré často sledujú odlišné, no komplementárne ciele – ochranu základných práv na jednej strane a zabezpečenie spravodlivého a bezpečného digitálneho priestoru na strane druhej. Súčasťou analýzy je aj etický rozmer regulácie, najmä princípy proporcionality, minimalizácie zásahu do súkromia, algoritmickej zodpovednosti a posilnenia autonómie používateľa. Príspevok ukazuje, že úspešná implementácia DSA bude závisieť od schopnosti poskytovateľov služieb harmonizovať právne požiadavky s etickými zásadami tak, aby sa dosiahla rovnováha medzi inováciou a ochranou základných práv v digitálnom prostredí.
Kľúčové slová: *online prostredie, regulácia digitálne obsahu, ochrana osobných údajov, vzájomná korelácia nariadení.*

Abstract

The Digital Services Act (DSA) represents a new regulatory framework for the online environment, aiming to increase the transparency, accountability, and safety of digital services within the EU. Its application naturally intersects with the field of personal data protection, which is primarily governed by the GDPR regulation. This paper examines the key points of interaction between the DSA and personal data protection, particularly in the context of obligations related to algorithmic transparency, content moderation, and user profiling. Special attention is given to the question of compliance between these two regulations, which often pursue different yet complementary objectives—protecting fundamental rights on the one hand and ensuring a fair and secure digital space on the other. The analysis also incorporates the ethical dimension of the regulation, focusing on principles such as proportionality, data minimization, algorithmic accountability, and the strengthening of user autonomy. The paper argues that the successful implementation of the DSA will depend on the ability of service providers to harmonize legal requirements with ethical standards in a way that maintains a balance between innovation and the protection of fundamental rights in the digital environment.

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Keywords: *online enviroment, digital content regulation, personal data protection, mutual correlation of regulation.*

JEL Classification: K240, K420

ÚVOD

Dňa 19. októbra 2022 bolo prijaté Nariadenie (EÚ) 2022/2065 Európskeho parlamentu a Rady z 19. októbra 2022 o jednotnom trhu digitálnych služieb a o zmene smernice 2000/31/ES (Akt o digitálnych službách – DSA)**,** ktoré nadobudlo účinnosť 17. februára 2024.Existuje viacero dôvodov, prečo bolo potrebné prijať legislatívne opatrenia vo forme Aktu o digitálnych službách (DSA). V posledných rokoch došlo najmä k významnému nárastu rizík súvisiacich s uplatňovaním práv jednotlivých používateľov v súvislosti s využívaním digitálnych služieb. Tieto riziká zahŕňali šírenie nezákonného obsahu online až po porušenia ochrany osobných údajov a súkromia. Stalo sa nevyhnutným vytvoriť bezpečné a dôveryhodné online prostredie pre rôzne kategórie používateľov.[4]

Je treba uviesť, že DSA nie je ponímané ako lex specialis k GDPR, avšak bez akýchkoľvek pochybností sú vo vzájomnej interakcií a musí sa vykladať v súlade s ním. GDPR nám stanovuje prísne pravidlá ako nakladať s osobnými údajmi a DSA zase určuje pravidlá, ako sa máme správať keď jednotlivé online služby využívajú osobné dáta v online priestore, a to z pohľadu rôznych účelov spracúvania.

Interakcia medzi DSA a GDPR je mimoriadne významná, pretože nariadenie sa zaoberá aj otázkou profilovania používateľov, ktoré zahŕňa využívanie osobných údajov na posúdenie určitých osobných aspektov týkajúcich sa fyzickej osoby – najmä analýzu alebo predpovedanie aspektov, ako sú pracovný výkon, ekonomická situácia, zdravotný stav, osobné preferencie, záujmy a ďalšie charakteristiky. Táto časť DSA reaguje na obavy týkajúce sa netransparentných algoritmov a odporúčacích systémov, ktoré môžu posilňovať alebo zhoršovať existujúce spoločenské problémy, ako je diskriminácia, polarizácia alebo návykové správanie.[5]

Úlohou tohto príspevku bude poukázať na vzájomnú interakciu medzi DSA legislatívou na ochranu osobných údajov, a v súvislosti s tým, aj na etické princípy, ktoré sú v DSA vyjadrené a ktoré sa prejavujú aj do ochrany osobných údajov a súkromia. Úlohou bude aj poukázať na oblasti ochrany osobných údajov, ktoré majú najväčší prienik do oblastí, ktoré reguluje DSA.

Metodológia, ktorá bola zvolená za účelom naplnenia cieľa príspevku, reflektuje povahu skúmanej problematiky, ktorá si vyžaduje hlbšiu interpretačnú a kontextuálnu analýzu právnych textov súvisiacu s uplatňovaním etických princípov v digitálnom prostredí. Prepojenie právnej a etickej roviny v rámci DSA a GDPR nemožno uchopiť výlučne prostredníctvom deskriptívneho prístupu, ale vyžaduje si systematické a teleologické skúmanie ich ustanovení v širšom normatívnom a spoločenskom kontexte. Preto je využitie kombinácie právnej, komparatívnej a doktrinálnej metódy vhodné na odhalenie vzájomných väzieb medzi DSA a legislatívou o ochrane osobných údajov, ako aj na identifikáciu etických hodnôt, ktoré tieto predpisy implicitne presadzujú

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4 K tomu pozri TREŠČÁKOVÁ, D.: Freedom of expression on the internet vs. Digital Services Act: chosen aspects. In: ECLIC 9. Strong and secure Europe: Legal and Economic Aspects dostupné z https://ojs.srce.hr/index.php/eclic/issue/view/1476/478

5 Guide of the Council for Media Services dostupné z [https://rpms.sk/sites/default/files/2025-02/Prirucka_pre_sprostredkovatelske_sluzby.pdf)]

1. VYMEDZENIE VZÁJOMNEJ INTERAKCIE DSA A GDPR

Úlohou tejto kapitoly bude vymedziť vzájomný vzťah medzi dvoma nosnými nariadeniami na ochranu práv jednotlivcov v online prostredí.

Nariadenie Európskeho Parlamentu a rady (EÚ) 2016/679 bolo prijaté 27 apríla 2016. Na základe GDPR bol v slovenskom legislatívnom konaní prijatý zákon č. 18/2018 Z.z. o ochrane osobných údajov, ktorý zrušil dovtedy platný zákon o ochrane osobných údajov. Uvedený právny predpis je platný od 30.01.2018 s účinnosťou od 25.05.2018 spolu s GDPR.

Možno uviesť, že cieľom novej právnej úpravy ochrany osobných údajov bolo zabezpečiť jednotnú právnu reguláciu ochrany osobných údajov v európskom priestore a zaistiť tak výkon práv dotknutých osôb a kontrolu nad spracúvaním ich osobných údajov. Cieľom tejto právnej úpravy bolo nastoliť dôveru dotknutých osôb v právny rámec zabezpečujúci ich základné ľudské práva, najmä právo na súkromie a tiež upraviť práva a povinnosti prevádzkovateľov a sprostredkovateľov s dôrazom na materiálne plnenie stanovených povinností a zaistenie reálnej bezpečnosti spracúvania osobných údajov.

Tak ako je úlohou nariadenia GDPR vo všeobecnosti chrániť osobné údaje dotknutých osôb, tak je úlohou DSA chrániť adresátov digitálnych služieb a digitálneho obsahu pred nezákonným obsahom na internete. Podľa dôvodovej správy k nariadeniu DSA predstavuje tento právny akt nový celoeurópsky rámec pre reguláciu online obsahu v rámci poskytovania sprostredkovateľských služieb. Na základe princípu „čo je nezákonné offline, je nezákonné aj online“ zavádza harmonizované pravidlá pre poskytovateľov sprostredkovateľských služieb, medzi ktoré patria sociálne siete, online trhoviská, internetové vyhľadávače, služby webhostingu a cloudu, platformy pre online cestovanie a ubytovanie, obchody s aplikáciami a ďalšie typy online platforiem. Nariadenie sa bude vzťahovať aj na poskytovateľov z tretích krajín, pokiaľ ponúkajú služby používateľom v rámci EÚ.[6]

Vzájomný vzťah medzi týmito nariadeniami je možné vymedziť prostredníctvom ich základnej filozofie a rámca, ktorý regulujú. Vo všeobecnosti nariadenie GDPR reguluje to, čo smieme robiť s osobnými údajmi a nariadenie DSA reguluje to, ako sa máme správať, keď naše osobné údaje sú využívané online platformami v digitálnom priestore a sú aj súčasťou digitálneho obsahu, nad ktorým DSA vykonáva dohľad.

Z uvedeného nám vyplýva, že DSA dopĺňa GDPR funkčne, nie právne z dôvodu, že DSA nepreberá kompetencie GDPR, ale vytvára kontext, v ktorom sa GDPR uplatňuje. Každé z týchto nariadení má tzv. vlastné bojové pole, avšak sú vo vzájomnom „rešpekte“ a interakcií. Uvedené potvrdzuje aj čl. 2 ods. 4 písm. g) DSA, ktoré stanovuje, že DSA sa uplatňuje bez toho, aby boli dotknuté pravidlá o ochrane osobných údajov.

DSA zavádza etické a procesné garancie pre spracúvanie dát, pričom rieši otázky ako platformy využívajú údaje. Úlohou DSA je v tomto prípade regulovať to, aby platformy využívali údaje transparente, spravodlivo, no najmä v súlade s pravidlami zavedenými v GDPR.

Oblasti, v ktorých sa DSA a GDPR prelínajú je viacero. Pre účely tohto príspevku sme sa však zamerali na niektoré oblasti, ktoré sa nám zdajú najviac markantné. Vymedzili sme nasledovné oblasti:

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6 K tomu pozri TREŠČÁKOVÁ, D.: Freedom of expression on the internet vs. Digital Services Act: chosen aspects. In: ECLIC 9. Strong and secure Europe: Legal and Economic Aspects dostupné z https://ojs.srce.hr/index.php/eclic/issue/view/1476/478

transparentnosť algoritmov a profilovanie používateľov a s tým súvisiaca cielená reklama a mikro-targeting, moderovanie obsahu a etické princípy správy digitálneho priestoru.

1.1. Transparentnosť algoritmov a profilovanie používateľov

Transparentnosť algoritmov a profilovanie používateľov sú dva odlišné, ale úzko prepojené pojmy, ktoré sa často riešia v kontexte digitálnych služieb, ochrany osobných údajov a regulácie online platforiem.

Nariadenie DSA zavádza povinnosť pre veľmi veľké online platformy (VLOP) a vyhľadávače zverejňovať informácie o fungovaní svojich algoritmických systémov – najmä o odporúčacích algoritmoch. Recitál 70 DSA sa zameriava na transparentnosť online platforiem, resp. spôsobu, akým sú informácie priorizované a prezentované na jej online rozhraní na uľahčenie a optimalizáciu prístupu k informáciám pre príjemcov služieb, čo je základnou črtou činnosti online platforiem. Ako uvádza recitál 70 DSA informácie sa napríklad odporúčajú, zoraďujú a priorizujú pomocou algoritmov, odlišujú sa prostredníctvom textu alebo iných vizuálnych znázornení alebo sa informácie poskytnuté príjemcami spracúvajú inak.

Takéto odporúčacie systémy môžu mať významný vplyv na schopnosť príjemcov získavať informácie a vstupovať s nimi do interakcie online, a to aj s cieľom uľahčiť vyhľadávanie relevantných informácií pre príjemcov služby a prispieť k lepšej používateľskej skúsenosti. Uvedené úzko súvisí s profilovaním užívateľov na základe získavania ich údajov a správania sa v online prostredí. V tomto momente sa DSA dostáva do prelínania s GDPR, ktoré upravuje profilovanie dotknutých osôb. Samotnú definíciu profilovania vieme nájsť v čl. 4 ods. 4 GDPR, ktorý profilovanie definuje ako *akúkoľvek formu automatizovaného spracúvania osobných údajov, ktoré pozostáva z použitia týchto osobných údajov na vyhodnotenie určitých osobných aspektov týkajúcich sa fyzickej osoby, predovšetkým analýzy alebo predvídania aspektov dotknutej fyzickej osoby súvisiacich s výkonnosťou v práci, majetkovými pomermi, zdravím, osobnými preferenciami, záujmami, spoľahlivosťou, správaním, polohou alebo pohybom.*

Zároveň v zmysle čl. 13 GDPR má dotknutá osoba právo byť informovaná o automatizovanom rozhodovaní a profilovaní. Čl. 22 GDPR ďalej uvádza, že *dotknutá osoba má právo na to, aby sa na ňu nevzťahovalo rozhodnutie, ktoré je založené výlučne na automatizovanom spracúvaní, vrátane profilovania, a ktoré má právne účinky, ktoré sa jej týkajú alebo ju podobne významne ovplyvňujú.*

Vychádzajúc z úpravy v GDPR je možné uviesť, že toto zakladá dôvod, prečo by online platformy mali sústavne zabezpečovať, aby boli príjemcovia ich služby primerane informovaní o tom, aký vplyv majú odporúčacie systémy na spôsob zobrazovania informácií, a aby mohli ovplyvňovať spôsob, akým sa im informácie prezentujú. Mali by jasne a ľahko zrozumiteľným spôsobom prezentovať parametre takýchto odporúčacích systémov, a tým zabezpečiť, aby príjemcovia služby chápali, ako sa pre nich informácie priorizujú. Uvedené parametre by mali zahŕňať aspoň najdôležitejšie kritériá pri určovaní informácií navrhnutých príjemcovi služby a dôvody ich príslušného významu vrátane prípadov, keď sa informácie priorizujú na základe profilovania a ich online správania.

Aj záväzný článok 26 ods. 3 DSA uvádza, že *poskytovatelia online platforiem nesmú prezentovať reklamy príjemcom služby na základe profilovania, ako sa vymedzuje v článku 4 bodu 4 nariadenia (EÚ) 2016/679 s použitím osobitných kategórií osobných údajov uvedených v článku 9 ods. 1 nariadenia (EÚ) 2016/679.*

Osobitnou otázkou je ochrana maloletých užívateľov, ktorí jednak v nariadení DSA a jednak v nariadení GDPR požívajú zvýšenú ochranu. Recitál 71, ako aj čl. 28 ods. 2 DSA sa zameriava na ochranu maloletých, ktorí využívajú služby, ktoré poskytuje online platforma. Nariadenie DSA v tomto recitály zavádza pre poskytovateľov online platforiem, ktoré používajú maloletí povinnosť prijať vhodné a primerané opatrenia na ochranu maloletých, napríklad navrhnutím svojich online rozhraní alebo ich častí s najvyššou štandardnou úrovňou ochrany súkromia, bezpečnosti a ochrany pre maloletých, ak je to vhodné, alebo prijatím noriem na ochranu maloletých alebo účasťou na kódexoch správania na ochranu maloletých.

Prienik uvedených zásad do ochrany osobných údajov je možné vidieť v otázke prezentovania reklám založených na profilovaní s použitím osobných údajov príjemcu služby, ak s primeranou istotou vedia, že príjemcom služby je maloletý. Tiež uvádza, že poskytovatelia online platforiem by nemali prezentovať reklamy založené na profilovaní s použitím osobných údajov príjemcu služby, ak s primeranou istotou vedia, že príjemcom služby je maloletý. Zároveň v súlade s nariadením GDPR, najmä so zásadou minimalizácie údajov stanovenou v článku 5 ods. 1 písm. c), by tento zákaz nemal viesť poskytovateľa online platformy k tomu, aby uchovával, získaval alebo spracúval viac osobných údajov, než už má, s cieľom posúdiť, či je príjemcom služby maloletý. Táto povinnosť by preto nemala motivovať poskytovateľov online platforiem, aby zbierali údaje o veku príjemcu služby pred jej využitím. Zároveň čo je dôležité pre vzájomný vzťah medzi oboma nariadeniami je to, že stanovuje, že týmto by nemalo byť dotknuté právo Únie o ochrane osobných údajov.

1.2. Moderovanie obsahu

Ďalšou oblasťou, kde je možné vidieť prienik medzi nariadením DSA a nariadením GDPR je moderovanie obsahu. Ako už bolo uvedené v úvode tohto článku, DSA predstavuje nový celoeurópsky rámec pre reguláciu online obsahu v rámci poskytovania sprostredkovateľských služieb. Na základe princípu „čo je nezákonné offline, je nezákonné aj online“ je jeho úlohou upraviť pravidlá pre obmedzenie rizík spočívajúcich v šírení nezákonného obsahu online, tak aby sa online prostredie stalo bezpečné a dôveryhodné pre rôzne kategórie používateľov. Za účelom moderovania obsahu DSA stanovuje procesy a informačné povinnosti pri odstraňovaní nezákonného obsahu. V rámci tejto úlohy DSA sa GDPR uplatní, ak sa pri tom spracúvajú osobné údaje (napr. meno autora, IP adresa a iné).

S moderovaním obsahu súvisí aj nahlasovanie resp. oznamovanie nezákonného obsahu. Toto je upravené v čl. 17 DSA, v zmysle ktorého *poskytovatelia hostingových služieb zavedú mechanizmy, ktoré každému jednotlivcovi alebo subjektu umožnia oznámiť im prítomnosť konkrétnych informácií, ktoré tento jednotlivec alebo subjekt považuje za nezákonný obsah, v ich službe. Tieto mechanizmy musia byť ľahko prístupné a používateľsky ústretové a musia umožňovať predkladanie oznámení výlučne elektronickým spôsobom.* DSA zároveň uvádza, čo všetko musí oznamovateľ uviesť, aby relevantne oznámil nezákonný obsah. Súčasťou informácií sú aj údaje ako meno a e-mailová adresa, ako aj tzv. lokalizačné údaje, čo spadá pod ochranu osobných údajov v zmysle GDPR.

Právnym základom pri nahlasovaní nezákonného obsahu je plnenie právnej povinnosti (čl. 6 ods. 1 písm. c) GDPR). Zároveň je potrebné aplikovať aj zásadu minimalizácie údajov, z ktorej vyplýva, že platforma môže požadovať len tie údaje, ktoré sú nevyhnutné na posúdenie oznámenia.

V zmysle čl. 17 DSA sa vyžaduje, aby platformy poskytli odôvodnenie, keď odstránia obsah alebo obmedzia účet. Aj v tejto oblasti je možné vnímať prienik DSA a GDPR, kedy platforma musí zabezpečiť, aby informácie uvedené v odôvodnení neobsahovali nadbytočné osobné údaje, ktoré by neboli potrebné na vysvetlenie rozhodnutia. Čiže opäť dochádza k aplikácii zásady minimalizácie údajov.

Ako už bolo uvedené, mechanizmy oznámenia a konania („notice and action“) a systémy vnútorného vybavovania sťažností, ktoré vyžaduje DSA, môžu taktiež vyžadovať spracúvanie osobných údajov, najmä preto, že poskytovatelia služieb musia zaviesť mechanizmy na nahlasovanie nezákonného obsahu. Poskytovatelia hostingových služieb by mali zhromažďovať iba nevyhnutné osobné údaje a mechanizmus nahlasovania by mal umožňovať, ale nie vyžadovať, identifikáciu oznamovateľa – pokiaľ to nie je nevyhnutné na určenie, či oznámené informácie predstavujú nezákonný obsah. Ak je potrebné oznámiť identitu oznamovateľa dotknutým príjemcom služby, oznamovateľ musí byť o tom riadne informovaný.[7]

2. ETICKÉ PRINCÍPY ZAKOTVENÉ V DSA A VPLYV NA OCHRANU OSOBNÝCH ÚDAJOV A SÚKROMIA

Významnou oblasťou, ktorá sa týka uplatňovania digitálnych práv a celkového pôsobenia v online prostredí sú etické princípy, ktoré by mali byť zachovávané rovnako ako digitálne práva. Etické princípy zavádzania a využívania digitálnych technológií možno zaradiť pod oblasť digitálnej etiky. Digitálnu etiku je možné vymedziť ako prepojenie hodnôt informácií so zložkami digitálnych informácií, digitálneho prostredia a digitálnych služieb, ktoré sú podmienené emóciami (etickou senzitivitou a etickými intuíciami), etickým uvažovaním a rozhodovaním, morálnou gramotnosť v informačnom správaní a budovaním dôvery.[8]

Ako uvádza Steinerová, konkrétne problémy digitálnej informačnej etiky obsahujú nielen aspekty súkromia, práce s dátami (ochrany osobných dát), ale aj informačnú bezpečnosť. Problémy vznikajú aj ako súčasť antisociálneho informačného správania človeka, ako napríklad depersonalizácia, „hackerstvo", šírenie dezinformácií a pod. Príkladom je aj etika inteligentných systémov (algoritmov) významných technologických gigantov, ktoré často využívajú etické skreslenie pri hodnotení dát a informácií.[9] Tieto systémy využívajú inteligentné softvérové nástroje, ktoré umožňujú analyzovať veľké dáta, využiť dolovanie v dátach a textoch a odkryť aj skryté súvislosti či tendencie. Dátová analýza súvisí s etickými problémami ochrany dát. Digitálne nástroje môžu podporiť procesy zoskupovania, agregácie, klasifikácie a kategorizácie dát a vyvolať etické problémy.[10]

Z uvedeného vznikajú nielen výzvy v oblasti zachovávania základných ľudských práv a slobôd v online prostredí, ale aj zachovávanie etických princípov. Medzi problematické oblasti, ktoré súvisia s vyššie uvedeným je otázka „sledovania" používateľov pri ich konaní, rozhodovaní v digitálnom prostredí cez vytváranie profilov, ako aj zásahy do ich súkromia, o to viac, ak ide o maloletých používateľov. DSA zakazuje cielenú reklamu založenú na osobných údajoch maloletých a vyžaduje jasné onačenie personalizovaných reklám. Tieto opatrenia sú zamerané na ochranu súkromia a zabezpečenie, aby používateľom bola poskytnutá jasná informácia o tom, ako sú ich údaje používané. Osobitnou otázkou je aj zverejňovanie osobných údajov, ktoré predstavujú osobitnú kategóriu osobných údajov podľa čl. 9 ods. 1 GDPR. Príkladom slúži rozsudok Súdneho Dvora zo dňa 04.07.2023, vo veci C-252/21 Meta Platforms Inc., predtým Facebook Inc.,Meta Platforms Ireland Ltd, predtým Facebook Ireland Ltd,Facebook Deutschland GmbH proti Bundeskartellamt, ktorý v rámci druhej prejudiciálnej otázke riešil spracúvanie osobitných kategórií osobných údajov, ktoré dotknutá osoba preukázateľne

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7 Guidelines 3/2025 on the interplay between the DSA and the GDPR. Version 1.1. Adopted at 11 September 2025 dostupné z https://www.edpb.europa.eu/system/files/2025-09/edpb_guidelines_202503_interplay-dsa-gdpr_v1_en.pdf

8 STEINEROVÁ, J. FÁZIK, J. a NOVÁKOVÁ, F.> Prínos fenomenografických výskumov pre informačnú vedu. In: ProInFlow [online]. (2020). Vol.12, No.1. Dostupné z: [http://www.phil.muni.cz/journals/index.php/proinflow/article/view/2020-1-2/2102]

9 STEINEROVA, J.: Etika tvorby informačných produktov v digitálnej revolúcii. ProInflow: časopis pro informační vědy Vol. 13, No. 1, 2021, pp. 64–86. Dostupné z [https://doi.org/10.5817/ProIn2021-1-4.]

10 STAHL, Bernd C. (2021). Artificial Intelligence for a Better Future. An Ecosystem Perspective on the Ethics of AI and Emerging Digital Technologies. London: Springer 2021. ISBN 978-3-030-69977-2. In: Steinerova, J.: Etika tvorby informačných produktov v digitálnej revolúcii. ProInflow: časopis pro informační vědy Vol. 13, No. 1, 2021, pp. 64–86. Dostupné z [https://doi.org/10.5817/ProIn2021-1-4.]

zverejnila v zmysle čl. 9 ods. 2 písm. e) GDPR.[11] V zmysle tohto rozhodnutia možno vyvodiť, že obchodné modely technologických gigantov je založený na zbere a zhromažďovaní dát a vytváraní profilov ich používateľov za účelom reklám, pričom uvedené praktiky výrazné zasahujú do etických princípov, ktoré by sa mali dodržiavať.

Ďalším aspektom, ktorý súvisí s uplatňovaním etických princípov v digitálnom prostredí je zodpovednosť za digitálne rozhodnutia, napr. algoritmické predsudky najmä pri posudzovaní nezákonného obsahu v zmysle DSA. Algoritmické systémy môžu byť nápomocné v identifikácii a odstraňovaní nezákonného obsahu. Ak sú však tieto systémy predpojaté, môže negatívne ovplyvniť používateľov, jednak v tom čo umožnia zverejniť, a aj v tom čo neumožnia, resp zablokujú. Uvedenej problematike sme sa už venovali v predchádzajúcej kapitole, ktorá sa týka slobody prejavu v online prostredí a nezákonného obsahu práve z pohľadu automatizovaného vyhodnocovania obsahu zverejneného online. Podporne možno uviesť, že v digitálnom prostredí je šírenie nepravdivých alebo neoverených informácií jednoduché. Etické digitálne služby by mali podporovať overovanie informácií, bojovať proti dezinformáciám a zabezpečovať integritu obsahu.[12]

ZÁVER

Analýza vzájomného prieniku medzi Digital Services Act a ochranou osobných údajov, ktorá je regulovaná nariadením GDPR ukazuje, že tieto dva regulačné rámce nemožno vnímať izolovane. Naopak, predstavujú vzájomne prepojené súčasti širšieho systému ochrany základných práv a riadenia digitálneho priestoru. DSA prináša nové mechanizmy transparentnosti, zodpovednosti a riadenia rizík, ktoré síce presahujú tradičné hranice ochrany súkromia, no zároveň vytvárajú priestor na ich posilnenie. GDPR ostáva základným pilierom ochrany osobných údajov, pričom jeho normy poskytujú nevyhnutný korektív pri implementácii povinností podľa DSA.

Z pohľadu poskytovateľov služieb tak vzniká potreba vytvoriť komplexné interné procesy, ktoré zabezpečia nielen právnu kompatibilitu oboch nariadení, ale aj ich praktickú koherenciu. Kľúčovú úlohu pritom zohrávajú etické princípy, ako sú proporcionalita, minimalizácia zásahov, férovosť a algoritmická zodpovednosť, ktoré umožňujú premeniť právne požiadavky na zmysluplnú prax rešpektujúcu ľudskú dôstojnosť.

Záverom možno konštatovať, že úspešné fungovanie DSA bude závisieť od schopnosti technologických aktérov i verejných inštitúcií implementovať opatrenia, ktoré reflektujú nielen právne povinnosti, ale aj etický imperatív ochrany používateľov. Iba tak možno dosiahnuť vyvážený a dôveryhodný digitálny ekosystém, ktorý podporuje inovácie, no zároveň zachováva vysokú úroveň ochrany základných práv v online prostredí.

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Nicotné rozhodčí nálezy a jejich postavení v insolvenčním řízení - ochrana majetkové podstaty versus autonomie vůle

Nugatory Arbitral Awards and Their Role in Insolvency Proceedings: Protection of the Insolvency Estate versus the Autonomy of Will

Abstrakt

Rozhodčí řízení představuje v obchodní praxi rychlý a flexibilní způsob řešení sporů. V insolvenčním řízení však vyvstávají otázky, jak naložit s rozhodčími nálezy, které nejsou platnými exekučními tituly. Nejvyšší soud ČR dovodil, že rozhodčí nález vydaný na základě neplatné rozhodčí doložky je nicotným aktem, tedy právně neexistujícím rozhodnutím. Tato judikatura má zásadní dopady i na insolvenční praxi: co se stane, pokud věřitel přihlásí do insolvenčního řízení pohledávku založenou na nicotném rozhodčím nálezu? Má insolvenční správce a insolvenční soud povinnost přezkoumat platnost a povahu rozhodčího nálezu, nebo je otázka nicotnosti ponechána na zvláštních řízeních mimo insolvenci? Příspěvek analyzuje vztah mezi rozhodčím a insolvenčním řízením, soustředí se na důsledky nicotnosti rozhodčích nálezů a ukazuje, jak tato problematika ovlivňuje zásadu rovného uspokojení věřitelů. Zároveň přináší komparativní pohled a nabízí návrhy de lege ferenda, které by mohly přispět k větší právní jistotě v insolvenční praxi.
Klíčová slova: *rozhodčí řízení, rozhodčí nálezy, nicotnost, insolvenční řízení, rovnost věřitelů.*

Abstract

Arbitration represents a fast and flexible method of dispute resolution in commercial practice. In insolvency proceedings, however, questions arise as to how to deal with arbitral awards that do not constitute valid enforceable titles. The Supreme Court of the Czech Republic has held that an arbitral award rendered on the basis of an invalid arbitration clause is a nullity, i.e. a legally non-existent decision. This case law has fundamental implications for insolvency practice: what happens if a creditor files a claim in insolvency proceedings based on a null arbitral award? Are the insolvency administrator and the insolvency court obliged to review the validity and nature of the arbitral award, or is the issue of nullity left to special proceedings outside insolvency? The paper analyzes the relationship between arbitration and insolvency proceedings, focusing on the consequences of null arbitral awards and demonstrating how this issue affects the principle of equal treatment of creditors. At the same time, it offers a comparative perspective and proposes de lege ferenda solutions that could contribute to greater legal certainty in insolvency practice.
Keywords: *arbitration proceedings, arbitral awards, nullity, insolvency proceedings, equality of creditors.*

JEL Classification: K22, K35, K41

ÚVOD

Rozhodčí řízení představuje institut s významnou rolí v oblasti soukromého práva, jehož základním smyslem je nabídnout stranám sporu rychlejší, flexibilnější a často také odbornější alternativu k soudnímu řízení. V českém právním prostředí bylo rozhodčí řízení pevně zakotveno přijetím zákona č.

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216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů, který vycházel z principu autonomie vůle stran a důrazu na efektivitu obchodního styku. Postupem času se však začaly objevovat problémy, zejména v oblasti ochrany slabší strany a platnosti rozhodčích doložek, což vyústilo v rozsáhlou judikaturu Nejvyššího i Ústavního soudu.

K zásadnímu posunu v právní praxi došlo po vydání rozhodnutí Nejvyššího soudu ČR ze dne 11. května 2011, sp. zn. 31 Cdo 1945/2010, v němž soud dovodil, že rozhodčí nález vydaný na základě neplatné rozhodčí doložky je tzv. nicotným aktem, tedy právně neexistujícím rozhodnutím, které nemůže být podkladem pro exekuční řízení ani pro jiné formy vymáhání pohledávky. Tento závěr vyvolal rozsáhlou odbornou diskusi o povaze nicotnosti rozhodčích nálezů a jejích důsledcích nejen v exekučním řízení, ale i v řízeních dalších – zejména v insolvenčním řízení. Právě otázka, jak mají insolvenční soud a insolvenční správce postupovat při přezkumu pohledávky založené na takovém rozhodčím nálezu, zůstává sporná a právní praxe zde dlouhodobě postrádá jednotný přístup.

Z uvedeného lze formulovat základní hypotézu tohoto příspěvku, která bude dále ověřována: *Pokud je rozhodčí nález vydán na základě neplatné rozhodčí doložky, má být při přezkumu v insolvenčním řízení s takovým nálezem nakládáno jako s právně neexistujícím aktem, a insolvenční soud má povinnost přezkoumat jeho povahu z úřední povinnosti, i bez návrhu účastníků řízení.* Tato hypotéza vychází z aktuální judikatury Nejvyššího soudu (např. rozhodnutí sp. zn. 31 Cdo 958/2012, 29 ICdo 7/2013) a z doktrinálních stanovisek, která zdůrazňují význam zásady rovného uspokojení věřitelů (srov. Richter, Insolvenční právo, 2. vyd., Wolters Kluwer, 2017, s. 54–56) a princip legality výkonu rozhodnutí (Bělohlávek, Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář, C. H. Beck, 2012, s. 41–45).

Současný stav odborné literatury se této problematiky dotýká spíše okrajově. Otázkou nicotnosti rozhodčích nálezů se v širším kontextu zabývá především A. J. Bělohlávek, který upozorňuje na rozpor mezi koncepcí nicotnosti a tradiční zásadou závaznosti rozhodčích nálezů. N. Rozehnalová se v rámci mezinárodního obchodního rozhodčího řízení věnuje zejména hranici mezi autonomií vůle stran a ochranou veřejného pořádku (Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku, Wolters Kluwer, 2013, s. 235–240). Naopak T. Richter analyzuje dopady vadných titulů (včetně rozhodčích nálezů) na průběh insolvenčního řízení a zdůrazňuje, že jejich přezkum je nezbytný pro zachování zásady rovnosti věřitelů. Ze zahraniční literatury lze zmínit především práce Garyho B. Borna (International Commercial Arbitration, 3rd ed., Kluwer Law International, 2021) a Janet Walkerové (Commercial Arbitration in International Perspective, Oxford University Press, 2019), které analyzují vztah arbitráže a insolvenčních procesů v komparativním kontextu, včetně výjimek připuštěných švýcarským a britským právem.

Předmětem tohoto příspěvku je tedy analýza vztahu mezi rozhodčím a insolvenčním řízením, se zaměřením na důsledky nicotnosti rozhodčích nálezů pro přihlašování a přezkum pohledávek v insolvenčním řízení. Cílem je vyhodnotit, zda současná judikatura a aplikační praxe zajišťují dostatečnou právní jistotu a ochranu věřitelů, a nabídnout úvahy de lege ferenda, které by mohly přispět k systémovější úpravě tohoto vztahu v českém právním řádu.

Nedávno publikované práce autora ve zkoumané oblasti:
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Neplatnost právních jednání dle NOZ a odporovatelné úkony s podmínkami pro odpůrčí žaloby v §§ 235 až 242 InsZ (2023)
Neplatnost a neúčinnost právních jednání v insolvenčním řízení se zřetelem k soudobým judikaturním trendům (2022)
Konkurzní řízení v období první ČSR na pozadí příslušné judikatury (2022)
Neplatnost právních jednání v insolvenčním řízení ve světle současné judikatury (2021)

1. ROZHODČÍ ŘÍZENÍ

Rozhodčí řízení je vnímáno jako alternativa k soudnímu řízení, která stranám umožňuje řešit jejich spory mimo rámec státní justice. Jeho jádro spočívá v principu autonomie vůle – strany se samy rozhodují, zda chtějí svůj případ svěřit rozhodcům, jaká pravidla řízení budou použita a v některých případech také, kdo bude rozhodcem. Autonomie vůle se tak stává jedním z klíčových kamenů rozhodčího řízení.[2]

Tento princip ovšem není neomezený. Rozhodčí řízení vždy existuje v určitém rámci stanoveném právním řádem, který mu poskytuje legitimitu a zároveň nastavuje hranice. Na jedné straně stojí snaha umožnit stranám co největší flexibilitu a rychlost při řešení sporů, na druhé straně nutnost zajistit ochranu základních práv účastníků a předcházet zneužívání. Česká právní úprava proto vyžaduje, aby rozhodčí doložka byla sjednána určitým způsobem, aby rozhodci splňovali podmínky nestrannosti a aby rozhodčí řízení respektovalo základní zásady spravedlivého procesu.

Významnou roli hraje rovněž pojetí rozhodčího nálezu. Ten má obdobné účinky jako pravomocné soudní rozhodnutí a zpravidla slouží jako exekuční titul. V tom spočívá jeho praktická hodnota – strana sporu, která v rozhodčím řízení uspěje, získává titul, na jehož základě může vymáhat své právo, a to bez nutnosti opakovaného dokazování či vedení soudního řízení. Právě tento účinek však činí rozhodčí řízení citlivým institutem: pokud je rozhodčí doložka neplatná nebo rozhodčí řízení proběhne v rozporu se zákonem, vyvstává otázka, zda lze výsledný nález považovat za legitimní akt způsobilý zasáhnout do právní sféry účastníků.

Z hlediska teorie procesního práva je proto rozhodčí řízení vnímáno jako zvláštní druh civilního procesu, který stojí „vedle“ řízení soudního. Nejedná se o proces zcela soukromý – rozhodci sice nejsou soudci v pravém slova smyslu, avšak jejich rozhodnutí má veřejnoprávní účinky, které jsou vykonatelné prostřednictvím státní moci. To znamená, že stát fakticky propůjčuje rozhodčím nálezům svou autoritu, ale zároveň si ponechává právo kontrolovat, zda byly dodrženy základní právní požadavky (zejména prostřednictvím řízení o zrušení rozhodčího nálezu soudem).[3]

Tento rámec je nezbytný pro porozumění problematice nicotnosti rozhodčích nálezů. Pokud totiž rozhodčí nález vznikne bez platného právního základu – například na základě neplatné rozhodčí doložky – vyvstává otázka, zda lze vůbec hovořit o existenci aktu, který by měl jakýkoli účinek. Z teoretického hlediska tak vzniká napětí mezi autonomií vůle stran, které chtěly řešit svůj spor mimosoudně, a požadavkem na legitimitu a právní jistotu, které chrání nejen účastníky řízení, ale i třetí osoby, jež mohou být důsledky rozhodčího nálezu dotčeny.

2. INSOLVENČNÍ ŘÍZENÍ

Insolvenční řízení představuje zvláštní druh civilního procesu, jehož cílem je řešení úpadku dlužníka. Na rozdíl od individuálních sporů, kde jde primárně o ochranu subjektivního práva jedné strany, insolvenční řízení sleduje širší, kolektivní účel – uspořádání majetkových poměrů dlužníka a dosažení co nejrovnějšího uspokojení věřitelů. Česká právní úprava je obsažena v zákoně č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon), který vstoupil v účinnost dne 1. 1. 2008.

2.1. Účel insolvenčního řízení

Primárním účelem insolvenčního řízení je:

- uspořádání majetkových vztahů dlužníka, který se ocitl v úpadku (tj. není schopen plnit své splatné závazky, nebo je předlužen),

2 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím řízení a výkonu rozhodčích nálezů: komentář*. 2. vyd. Praha: C. H. Beck, 2012, s. 180.

3 nález Ústavního soudu ze dne 8.3.2011 sp. zn. I. ÚS 3227/07.

- kolektivní uspokojení věřitelů, a to zásadně poměrně[4],
- vytvoření transparentního rámce, který omezuje chaos spojený s mnohostí věřitelů a individuálními exekucemi,
- ochrana práv třetích osob a veřejného zájmu na stabilitě hospodářských vztahů.

Úpadek není chápán jen jako soukromý problém mezi dlužníkem a věřitelem, ale i jako stav, který má širší hospodářské dopady. Proto insolvenční řízení obsahuje řadu veřejnoprávních prvků (dozor soudu, zákonné zásady, povinnosti insolvenčního správce).

2.2. Zásady insolvenčního řízení

Insolvenční zákon (zejména v § 5 a násl.) zakotvuje základní principy, které tvoří páteř celého řízení:

1. Zásada rovného postavení věřitelů – žádný věřitel nesmí být v řízení neodůvodněně zvýhodněn ani znevýhodněn. To se projevuje např. v přezkumném jednání, v pravidlech pro uspokojování zajištěných a nezajištěných pohledávek či v ochraně před neúčinnými právními úkony dlužníka (§ 235 a násl. IZ).[5]
2. Zásada rychlosti a hospodárnosti řízení – cílem je co nejefektivnější průběh, minimalizace nákladů a rychlé dosažení výsledku (srov. např. § 5 písm. a) IZ). Insolvenční soud má povinnost dbát, aby řízení nebylo zbytečně prodlužováno.
3. Zásada ochrany práv věřitelů i dlužníka – insolvenční řízení není jednostranně zaměřeno jen na věřitele, ale chrání i dlužníka před excesy (např. zákaz individuálních výkonů rozhodnutí a exekucí po zahájení insolvenčního řízení – § 109 IZ).
4. Zásada koncentrace – všechny pohledávky a spory mají být řešeny v rámci jediného insolvenčního řízení, nikoli rozptýleně v individuálních řízeních. To je podstatou kolektivní povahy insolvence.
5. Zásada publicity – transparentnost řízení je zajištěna prostřednictvím insolvenčního rejstříku, který umožňuje každému sledovat průběh řízení v reálném čase (§ 419 a násl. IZ).
6. Zásada přiměřeného uspokojení věřitelů – žádný věřitel nemá garanci plného uspokojení, ale má právo na uspokojení podle pravidel stanovených zákonem (viz § 165 a násl. IZ).

2.3. Postavení insolvenčního správce

Insolvenční správce je klíčovým orgánem řízení – funguje jako zvláštní procesní subjekt, který stojí mezi soudem a účastníky. Jeho úkolem je:

- zjišťovat a zpeněžovat majetek dlužníka,
- přezkoumávat přihlášené pohledávky,
- zastupovat dlužníka, pokud je zbaven dispozičního oprávnění,
- jednat v zájmu věřitelů jako celku, nikoliv jednotlivých osob.

Správce má zákonnou povinnost jednat odborně, nestranně a s péčí řádného hospodáře. Je pod dohledem insolvenčního soudu, ale v praxi disponuje značnou autonomií a odpovědností.

2.4. Role insolvenčního soudu

Insolvenční soud plní kontrolní a rozhodovací funkci. Rozhoduje zejména o:

[4] RICHTER, T. *Insolvenční právo.* 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s. 120.
[5] k rovnému postavení věřitelů např. usnesení NS ze dne 28.3.2013 sp. zn. 29 NSČR 14/2012.

- zjištění úpadku a způsobu jeho řešení,
- incidenčních sporech (např. popření pohledávky, neúčinnost právních úkonů),
- dohledu nad činností insolvenčního správce,
- schvalování reorganizačních plánů či rozvrhů.

Soud tedy nese odpovědnost za zákonnost a spravedlivý průběh řízení, zatímco jeho samotný "provoz" stojí na insolvenčním správci.

2.5. Praktické dopady

Insolvenční řízení je procesně a materiálně komplexní institut, který zasahuje nejen do vztahů mezi dlužníkem a věřiteli, ale i do širšího ekonomického prostředí. Klíčovým principem je zásada rovného uspokojení věřitelů, podle které musí být věřitelé stejné třídy uspokojeni proporcionálně. Tento princip vytváří rámec pro posuzování pohledávek a chrání kolektivní zájmy věřitelů před neoprávněným zvýhodněním jednotlivých účastníků řízení.

V praktické rovině se tento princip uplatňuje zejména při přihlašování pohledávek založených na rozhodčích nálezech. Pokud věřitel zakládá svou pohledávku na rozhodčím nálezu vydaném na základě neplatné rozhodčí doložky, jedná se o tzv. nicotný akt, který nemůže sloužit jako způsobilý právní titul pro uspokojení pohledávky (srov. rozhodnutí NS ČR, sp. zn. 31 Cdo 1945/2010; 31 Cdo 958/2012; 29 ICdo 7/2013). Automatické přijetí takového titulu by mohlo vést k narušení zásady rovného uspokojení, protože by jeden věřitel získal výhodu oproti ostatním.

Z toho vyplývají konkrétní praktické důsledky:

1. Pro insolvenční správce: musí při přezkumu přihlášených pohledávek ověřit jejich právní základ, především platnost a vykonatelnost rozhodčího nálezu. Tato povinnost zajišťuje, že kolektivní charakter řízení není narušen.
2. Pro insolvenční soud: má aktivní roli při schvalování pohledávek; může pohledávku zamítnout, pokud zjistí, že je založena na nicotném rozhodčím nálezu. To zahrnuje nejen formální kontrolu, ale i materiální přezkum titulu.
3. Pro věřitele: pohledávky musí být podloženy platným a vykonatelným rozhodčím nálezem; v opačném případě hrozí zamítnutí pohledávky a prodloužení procesu uspokojení, včetně možných nákladů spojených s doplněním nebo opravou právního titulu.

Zahraniční zkušenosti ukazují alternativní přístupy, které mohou být inspirativní pro českou praxi. Například švýcarské právo připouští omezené pokračování rozhodčích řízení zahájených před zahájením insolvence, pokud tím není ohrožena kolektivní zásada uspokojení věřitelů. Tento model demonstruje, že harmonizace mezi autonomií rozhodčího řízení a kolektivní povahou insolvence je možná a může být vzorem pro systematičtější legislativní úpravu.

Shrnutí praktických dopadů:

- Insolvenční správce a soud mají povinnost přezkoumat právní platnost a vykonatelnost rozhodčího nálezu, pokud na něm věřitel zakládá pohledávku.
- Pohledávky založené na nicotných rozhodčích nálezech nelze automaticky akceptovat, aby nebyla porušena zásada rovného uspokojení věřitelů.
- Věřitelé musí být připraveni doložit právní existenci a vykonatelnost rozhodčího nálezu.
- Komparativní zkušenosti ukazují, že je možné zavést výjimky a systematicky upravit hranice arbitráže a insolvence, aniž by byla ohrožena kolektivní povaha řízení.

3. KOLIZE ROZHODČÍHO A INSOLVENČNÍHO ŘÍZENÍ

Rozhodčí a insolvenční řízení jsou instituty, které sledují odlišné cíle a vycházejí z rozdílných principů. Zatímco rozhodčí řízení je založeno především na autonomii vůle stran, jehož účelem je poskytnout rychlé a flexibilní řešení sporu, insolvenční řízení je procesem kolektivním, řízeným veřejným zájmem na uspořádání majetkových poměrů dlužníka a rovném uspokojení věřitelů.

Právě odlišnost jejich účelů se stává zdrojem konfliktů, zejména v okamžiku, kdy do insolvenčního řízení vstupuje rozhodčí nález. Problém nastává především tehdy, když tento nález není vydán na základě platné rozhodčí doložky nebo je jinak stižen vadou, která jej činí nevykonatelným či dokonce nicotným.

3.1. Rozhodčí nález jako exekuční titul

Rozhodčí nález má v českém právním řádu obdobné účinky jako pravomocné soudní rozhodnutí (§ 28 zákona č. 216/1994 Sb., o rozhodčím řízení). V praxi to znamená, že věřitel, který uspěl v rozhodčím řízení, disponuje exekučním titulem a může se na jeho základě domáhat výkonu rozhodnutí nebo exekuce.

V insolvenčním řízení však takový nález nepůsobí bez dalšího. Přihlášená pohledávka, byť opřená o rozhodčí nález, musí projít přezkumem insolvenčního správce a insolvenčního soudu. Samotná existence exekučního titulu nezbavuje insolvenční soud povinnosti přezkoumat, zda je pohledávka řádně doložena a zda neodporuje základním zásadám insolvenčního řízení.[6]

3.2. Neplatnost rozhodčích doložek a nicotnost nálezu

Nejvyšší soud i Ústavní soud opakovaně konstatovaly, že rozhodčí nález vydaný na základě neplatné rozhodčí doložky je nutno považovat za nicotný akt – tedy právně neexistující rozhodnutí.[7] Rozhodčí nález, který nemá právní základ v platné rozhodčí smlouvě, nelze považovat za rozhodnutí způsobilé zasáhnout do právní sféry účastníků. V takovém případě nejde o vadný právní akt, nýbrž o akt vůbec neexistující.[8] V kontextu insolvenčního řízení je nutné zdůraznit, že správce přezkoumává všechny přihlášené pohledávky, bez ohledu na jejich právní titul. Rozdíl u pohledávek založených na rozhodčím nálezu spočívá v riziku jeho nicotnosti – pokud byl vydán na základě neplatné rozhodčí doložky, pohledávka může být zamítnuta, aby nedošlo k porušení zásady rovného uspokojení věřitelů. U pohledávek podložených platnými soudními rozhodnutími či jinými exekučními tituly je materiální přezkum zpravidla méně složitý, protože titul je právně vykonatelný, i když přezkum stále probíhá.

3.3. Povinnost přezkumu insolvenčním soudem

Otázkou je, zda insolvenční správce a insolvenční soud mají povinnost zkoumat platnost rozhodčí doložky a povahu rozhodčího nálezu. Judikatura se přiklání k závěru, že ano: insolvenční soud není povinen ani oprávněn vycházet z toho, že rozhodčí nález je exekučním titulem, pokud byl vydán na základě neplatné rozhodčí doložky. V takovém případě musí k námitce účastníků posoudit, zda jde o nález nicotný.[9] Tento závěr souvisí se zásadou koncentrace insolvenčního řízení (§ 159 IZ), která vyžaduje, aby všechny spory související s přihlášenými pohledávkami byly řešeny v rámci insolvenčního řízení, nikoli v řízení paralelním.

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6 RICHTER, T. *Insolvenční právo.* 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s. 243.

7 usnesení NS ze dne 11.5.2011 sp. zn. 31 Cdo 1945/2010 a usnesení NS ze dne 10.7.2013 sp. zn. 31 Cdo 958/2012.

8 ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3. aktualizované vydání. Praha: Wolters Kluwer, 2013, s. 152.

9 RICHTER, T. *Insolvenční právo*. 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s .245.

3.4. Praktické důsledky kolize

Kolize rozhodčího a insolvenčního řízení má několik praktických dopadů:

- Věřitelé, kteří se spoléhali na rozhodčí doložku, mohou zjistit, že jejich rozhodčí nález nemá v insolvenčním řízení žádnou váhu.
- Insolvenční správci se ocitají v situaci, kdy musí posuzovat platnost právního aktu, který má na první pohled povahu vykonatelného titulu.
- Insolvenční soudy musí balancovat mezi zásadou právní jistoty (ochrana exekučních titulů) a zásadou rovného uspokojení věřitelů.

Střet rozhodčího a insolvenčního řízení je nevyhnutelný, neboť rozhodčí řízení akcentuje vůli stran a rychlost, zatímco insolvenční řízení sleduje spravedlivé uspořádání kolektivních zájmů. Je proto nezbytné, aby zákonodárce i soudní praxe hledali rovnováhu mezi oběma přístupy.[10]

Kolize rozhodčího a insolvenčního řízení není pouze procesní otázkou, ale dotýká se samotné podstaty dvou odlišných právních principů – autonomie vůle a ochrany kolektivu věřitelů. Judikatura Nejvyššího soudu i odborná literatura potvrzují, že v případě nicotného rozhodčího nálezu nemůže insolvenční soud takový titul respektovat a je povinen zkoumat jeho platnost.

4. DŮSLEDKY NICOTNOSTI ROZHODČÍCH NÁLEZŮ V INSOLVENČNÍM ŘÍZENÍ

4.1. Ztráta povahy exekučního titulu

Pokud je rozhodčí nález vydán na základě neplatné rozhodčí doložky, jde o nicotný akt – právně neexistující rozhodnutí. Takový nález proto nemůže sloužit jako exekuční titul ani jako podklad pro přihlášení pohledávky do insolvenčního řízení.

4.2. Povinnost insolvenčního soudu a správce

Insolvenční správce i insolvenční soud musí aktivně zkoumat, zda rozhodčí nález, na němž je přihlášená pohledávka založena, není nicotný. Nelze se spoléhat pouze na formální existenci nálezu. Insolvenční soud není vázán tím, že věřitel předloží rozhodčí nález. Je povinen přihlédnout k tomu, zda jde o rozhodnutí vůbec existující v právním smyslu. V opačném případě by došlo k obcházení zásady rovného uspokojení věřitelů.[11]

4.3. Dopad na věřitele

Pro věřitele to znamená, že přihlášená pohledávka, která stojí na nicotném rozhodčím nálezu, nebude považována za vykonatelnou. Tento věřitel se tak ocitá ve stejné situaci, jako kdyby žádný exekuční titul neměl, a jeho pohledávka musí být přezkoumána v celém rozsahu. Nicotnost rozhodčího nálezu má za následek, že věřitel ztrácí procesní výhodu vykonatelného titulu a jeho pohledávka se v insolvenčním řízení posuzuje znovu, bez ohledu na proběhlé rozhodčí řízení.

4.4. Vztah k zásadě rovného uspokojení věřitelů

Pokud by insolvenční soud nicotný nález respektoval bez přezkumu, mohlo by to potenciálně vést k nespravedlivému zvýhodnění věřitele, protože jeho pohledávka by byla uspokojena, aniž by byla

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[10] ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3. aktualizované vydání. Praha: Wolters Kluwer, 2013, s. 210.

[11] RICHTER, T. *Insolvenční právo*. 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s. 245.

podložena platným právním titulem. Ten by byl postaven nad ostatní, přestože jeho titul nemá právní účinky.[12] V insolvenčním řízení nelze připustit účinky rozhodčího nálezu, který nemá právní základ. Přijetí takového titulu by znamenalo porušení principu kolektivního uspokojení a zvýhodnění jednoho věřitele na úkor jiných.[13] V každém případě je nezbytné důkladné přezkoumání, aby byla zachována zásada rovného uspokojení všech věřitelů.

4.5. Praktické důsledky

- Pro věřitele: ztráta výhody „vykonatelnosti“, nutnost doložit pohledávku jinak.
- Pro insolvenční správce: povinnost aktivně přezkoumávat platnost rozhodčích doložek a povahu rozhodčích nálezů.
- Pro insolvenční soudy: nutnost rozhodovat o nicotnosti i v rámci incidenčních sporů, aby byla zachována integrita řízení.
- Pro celý systém: zajištění toho, aby insolvenční řízení plnilo svůj účel – spravedlivé, poměrné a rovné uspokojení všech věřitelů.

Nicotný rozhodčí nález v insolvenčním řízení nemá žádné účinky. Pohledávka založená na takovém nálezu se musí přezkoumat, jako by žádný titul neexistoval. Tento přístup je nutný, aby byla zachována zásada rovného postavení věřitelů a aby insolvenční řízení nebylo zneužíváno.

5. KOMPARATIVNÍ POHLED

Střet mezi rozhodčím a insolvenčním řízením je obecný problém, který řeší více evropských i mimoevropských právních řádů. Všude se objevuje napětí mezi autonomií vůle (a rychlostí rozhodčího řízení) a kolektivním charakterem insolvenčního řízení.

5.1. Německo

Německý insolvenční zákon klade důraz na princip rovného uspokojení věřitelů. Rozhodčí nálezy jsou respektovány pouze tehdy, pokud mají účinky srovnatelné s pravomocným soudním rozhodnutím.

- Insolvenční správce může popřít účinnost rozhodčího nálezu, pokud byl vydán na základě neplatné doložky nebo rozhodcem bez pravomoci.
- BGH (Spolkový soudní dvůr) judikoval, že insolvenční soud není vázán rozhodčím nálezem, pokud by jeho uznání narušilo rovnost věřitelů.[14]

5.2. Rakousko

Rakouská úprava je českému právu velmi blízká. Rozhodčí nález má účinky pravomocného soudního rozhodnutí, ale insolvenční soud přezkoumává jeho existenci i platnost.

- Pokud rozhodce neměl pravomoc, nález je pro insolvenci irelevantní.
- Rakouský Nejvyšší soud (OGH) potvrzuje, že princip rovného uspokojení věřitelů má přednost před autonomií rozhodčího řízení.[15]

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[12] Usnesení NS ze dne 28.3.2013 sp. zn. 29 NSČR 14/2012.

[13] ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3. aktualizované vydání. Praha: Wolters Kluwer, 2013, s. 210.

[14] rozhodčí řízení upraveno v Zivilprozessordnung (ZPO), arcticles 1025-1066, insolvenční řízení upraveno v Insolvenzordnung (InsO).

[15] rozhodčí řízení upraveno v Schiedsgerichtsgesetz 2006, insolvenční řízení upraveno v Insolvenzordnung (IO).

5.3. Švýcarsko

Švýcarské právo zaujímá specifický a odlišný přístup. Obecně platí, že insolvenční řízení má přednost a arbitrážní řízení nelze proti dlužníkovi po prohlášení úpadku dále vést. Zde platí výjimka: pokud byla arbitráž zahájena před prohlášením insolvence, může v určitých případech pokračovat (viz § 171 SchKG). Podmínkou je, že se jedná o určení pohledávky vůči dlužníkovi a že pokračování neohrozí rovné uspokojení ostatních věřitelů. Pokud je arbitráž zahájena až po úpadku, je její vedení zásadně nepřípustné – všechny pohledávky musí být uplatněny v insolvenčním řízení. Švýcarský právní řád připouští pokračování arbitráže zahájené před úpadkem, avšak jen v omezeném rozsahu. Ostatní věřitelé se nesmějí dostat do nevýhodného postavení; princip kolektivního uspokojení má přednost.[16]

5.4. Evropský kontext

Nařízení Evropského parlamentu a Rady (EU) 2015/848 ze dne 20. května 2015 o insolvenčním řízení problematiku vztahu mezi arbitráží a insolvencí výslovně neřeší. Unijní právo přenechává tuto oblast národním právním řádům. Absence unifikace v rámci EU znamená, že otázka účinků rozhodčích nálezů v insolvenci zůstává na vnitrostátním právu. Přesto je zřejmý trend preferovat kolektivní uspokojení věřitelů před autonomií rozhodčího řízení.[17]

5.5. Komparativní závěry

- Česká republika, Německo a Rakousko: rozhodčí nálezy lze v insolvenci akceptovat, ale soudy musí zkoumat platnost rozhodčí doložky a pravomoc rozhodce.
- Švýcarsko: obecná priorita insolvenčního řízení, ale omezená výjimka pro arbitráže zahájené před úpadkem.
- EU: bez harmonizace; každý stát řeší sám, obecný trend však upřednostňuje princip rovného uspokojení věřitelů.

Komparativní analýza ukazuje, že většina evropských zemí podřizuje rozhodčí řízení principu rovného uspokojení věřitelů. Švýcarsko je výjimečné, protože připouští pokračování arbitráží zahájených před úpadkem, ovšem jen v úzkém rozsahu a s důrazem na ochranu ostatních věřitelů.

6. ÚVAHY DE LEGE FERENDA

Střet rozhodčího a insolvenčního řízení ukazuje, že současná právní úprava v ČR zanechává některé otázky otevřené. Existuje prostor pro legislativní zlepšení, které by zajistilo právní jistotu, efektivní insolvenční proces a ochranu věřitelů.

6.1. Jasnější pravidla pro nicotné rozhodčí nálezy

- Problém: dnes soudy musí individuálně zkoumat platnost rozhodčí doložky a nicotnost nálezu, což může vést k nejistotě a zbytečné zátěži insolvenčního správce i soudu.
- Návrh: explicitně upravit zákon o insolvenčním řízení, aby bylo jasné, že rozhodčí nález vydaný na základě neplatné doložky nemůže být přihlášen jako pohledávka. Zákonodárce by měl vymezit jasné parametry pro přezkum rozhodčích nálezů v insolvenčním řízení, zejména kritéria nicotnosti a vyloučení jejich automatické exekuční síly.[18]

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[16] rozhodčí řízení upraveno v Zivilprozessordnung (ZPO), arcticles 353-393, insolvenční řízení upraveno v Schuldbetreibungs- und Konkursegesetz (SchKG).

[17] ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3. aktualizované vydání. Praha: Wolters Kluwer, 2013, s. 219.

[18] RICHTER, T. *Insolvenční právo*. 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s. 247.

- Důvod: zabránilo by se nejednotnému přístupu soudů a zjednodušilo přezkum pohledávek.

6.2. Stanovení lhůt a pravidel pro přihlášení arbitrážních pohledávek

- Problém: v současnosti není jasně stanoveno, jak zacházet s pohledávkami založenými na rozhodčím nálezu vydaném před vs. po zahájení insolvenčního řízení.
- Návrh: zavést pravidlo obdobné Švýcarsku – arbitráže zahájené před úpadkem mohou být pokračovány, ale jejich pohledávky musí být přezkoumány soudem a přihlášeny do insolvence s podmínkou, že nezvýhodní jednoho věřitele.
- Důvod: přináší právní jistotu stranám a chrání kolektivní uspokojení věřitelů. Úprava, která rozlišuje arbitráže zahájené před a po úpadku, může snížit konflikty mezi autonomií rozhodčího řízení a principem kolektivního uspokojení.[19]

6.3. Přesnější definice účinků rozhodčího nálezu

- Problém: není jasné, zda insolvenční soud má přezkoumávat exekuční účinnost rozhodčího nálezu vždy, nebo pouze při námitce některého účastníka.
- Návrh: explicitně zakotvit, že každý rozhodčí nález je předmětem přezkumu insolvenčním soudem z hlediska pravomoci rozhodce a platnosti doložky.
- Výhoda: minimalizuje riziko, že některý věřitel bude zvýhodněn mechanickým převzetím exekučního titulu. Insolvenční soud je povinen zkoumat, zda byl vydán rozhodcem oprávněným a zda doložka nebyla neplatná. Jen tak lze ochránit rovnost věřitelů a právní jistotu v insolvenčním řízení.[20]

6.4. Možnost sjednocení s evropskou praxí

- Problém: EU zatím explicitně problematiku arbitráží a insolvence neupravuje, ale členské státy jako Německo a Rakousko mají osvědčené modely přezkumu rozhodčích nálezů.
- Návrh: Česká republika by mohla zavést jednotné pravidlo o přezkumu rozhodčích nálezů v insolvenci, které by reflektovalo osvědčené zahraniční praxe, a zároveň umožnilo omezenou pokračující arbitráž (podobně jako ve Švýcarsku) pro nálezy před insolvenčním řízením.

6.5. Praktické přínosy návrhů de lege ferenda

1. Právní jistota: soudy a správci vědí, kdy nález může být akceptován a kdy ne.
2. Efektivita insolvenčního řízení: méně sporů o vykonatelnost rozhodčích nálezů.
3. Ochrana rovnosti věřitelů: žádný věřitel nemůže získat nezaslouženou výhodu.
4. Harmonizace s komparativními systémy: inspirace Německem, Rakouskem a Švýcarskem.

De lege ferenda by bylo vhodné:
- explicitně vymezit nicotnost rozhodčích nálezů v insolvenčním řízení;
- zavést pravidla pro arbitráže zahájené před insolvenčním řízením;
- stanovit povinnost insolvenčního soudu přezkoumat každý nález;
- reflektovat osvědčené modely z Německa, Rakouska a Švýcarska.

Takové úpravy by posílily právní jistotu, ochránily kolektivní uspokojení věřitelů a zároveň zachovaly flexibilitu rozhodčího řízení.

[19] ROZEHNALOVÁ, N. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. 3. aktualizované vydání. Praha: Wolters Kluwer, 2013, s. 220.

[20] RICHTER, T. *Insolvenční právo*. 2 doplněné a upravené vydání. Praha: Wolters Kluwer, 2017. s. 245-247.

ZÁVĚR

Cílem příspěvku bylo analyzovat vztah mezi rozhodčím a insolvenčním řízením, zejména z pohledu důsledků nicotnosti rozhodčích nálezů vydaných na základě neplatné rozhodčí doložky, a posoudit, zda současná právní úprava a judikatura dostatečně zajišťují ochranu zásady rovného uspokojení věřitelů. Na základě provedené analýzy právní úpravy, judikatury Nejvyššího soudu ČR a doktrinálních stanovisek lze dospět k několika závěrům.

Předně bylo potvrzeno, že rozhodčí řízení a insolvenční řízení sledují odlišné cíle a vycházejí z rozdílné právní logiky – zatímco rozhodčí řízení je nástrojem individuálního řešení sporů mezi stranami, insolvenční řízení má kolektivní povahu a jeho smyslem je dosažení rovného a poměrného uspokojení všech věřitelů dlužníka. Tento rozdíl musí být zohledněn i při posuzování účinků rozhodčích nálezů v rámci insolvence.

Judikatura Nejvyššího soudu (zejm. rozhodnutí sp. zn. 31 Cdo 1945/2010, 31 Cdo 958/2012 a 29 ICdo 7/2013) potvrdila, že rozhodčí nález vydaný na základě neplatné rozhodčí doložky je právně neexistujícím aktem (nicotným nálezem), který nemůže být způsobilým titulem pro výkon rozhodnutí ani pro přihlášku pohledávky v insolvenčním řízení. Z toho plyne, že insolvenční soud i insolvenční správce mají povinnost z úřední povinnosti zkoumat nejen formální, ale i materiální platnost rozhodčího nálezu, pokud na něm věřitel svou pohledávku zakládá.

Analýza současné právní úpravy ukazuje, že české insolvenční právo sice obsahuje základní mechanismy přezkumu přihlášených pohledávek, nicméně explicitně neupravuje postup při zjištění nicotnosti rozhodčího nálezu. Tato mezera v právní úpravě může vést k rozdílné praxi soudů a k právní nejistotě věřitelů. Proto lze podpořit návrhy de lege ferenda, které by výslovně stanovily povinnost insolvenčního soudu přezkoumat platnost rozhodčího nálezu, pokud na něj věřitel odkazuje jako na právní titul své pohledávky.

Z komparativního pohledu lze ocenit například švýcarskou právní úpravu, která výjimečně připouští pokračování rozhodčího řízení i po zahájení insolvenčního řízení, avšak jen tehdy, pokud bylo řízení zahájeno před prohlášením insolvence a pokud se nejedná o otázku, která by mohla narušit kolektivní zásadu uspokojení věřitelů. Tento přístup představuje inspirativní model, který dokazuje, že harmonizace mezi autonomií rozhodčího řízení a ochranou insolvenční masy je možná.

Z provedené analýzy tak vyplývá, že hypotéza formulovaná v úvodu byla potvrzena – rozhodčí nález vydaný na základě neplatné rozhodčí doložky musí být v insolvenčním řízení posuzován jako právně neexistující akt, a to i bez návrhu účastníků. Pro zajištění právní jistoty, efektivity a rovnosti věřitelů je žádoucí, aby byla tato zásada výslovně zakotvena v právní úpravě, případně dále rozpracována v judikatuře Nejvyššího soudu.

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Spôsoby reštrukturalizácie záväzkov dlžníka v rámci reštrukturalizačných konaní v poľskom práve

Methods of Restructuring a Debtor's Liabilities in Restructuring Proceedings under Polish Law

Abstrakt

Od 1. 1. 2016 je súčasťou poľského právneho poriadku Zákon o reštrukturalizácii (Prawo restrukturyzacyjne)[1]*, medzi ktorého hlavné ciele patrí reforma dovtedajších mechanizmov umožňujúcich reštrukturalizáciu podniku dlžníka. Osobitný dôraz bol v ustanoveniach zákona kladený na problematiku uzatvárania dohody o urovnaní s veriteľmi (poľ. układ). Tento mechanizmus má za cieľ predísť začatiu likvidačného konania voči dlžníkovi. Zámerom uvedeného zákona je na jednej strane zabezpečiť čo najvyššie uspokojenie pohľadávok veriteľov a na strane druhej snaha o poskytnutie maximálnej ekonomickej ochrany podniku dlžníka. Podľa ustanovenia čl. 155 ods. 3 poľského Zákona o reštrukturalizácii, návrhy reštrukturalizácie záväzkov dlžníka v rámci dohody o urovnaní s veriteľmi (poľ. propozycje układowe) určujú spôsob, akým majú byť reštrukturalizované dlhy dlžníka. Vzhľadom na absenciu legálnej definície návrhov reštrukturalizácie záväzkov v rámci dohody sa pod týmto pojmom zásadne rozumejú návrhy na reštrukturalizáciu existujúcich záväzkov dlžníka, adresované jeho veriteľom. Aktuálna právna úprava preberá koncepciu otvoreného katalógu spôsobov reštrukturalizácie záväzkov dlžníka, ktoré boli ustálené ešte na základe predchádzajúcej právnej úpravy obsiahnutej v zákone o konkurze pred novelou z roku 2016. Cieľom príspevku je priblížiť najčastejšie spôsoby reštrukturalizácie záväzkov dlžníka v poľskom práve v rámci reštrukturalizačných konaní.*
Kľúčové slová: *reštrukturalizácia záväzkov dlžníka, poľská úprava, dohoda o urovnaní s veriteľmi, návrhy dohody o urovnaní s veriteľmi.*

Abstract

As of January 1, 2016, the Polish legal system has included the Restructuring Law (Prawo restrukturyzacyjne), one of the main objectives of which was to reform the existing mechanisms allowing for the restructuring of a debtor's enterprise. Particular emphasis in the provisions of the Act was placed on the issue of concluding an arrangement (Pol. układ) with creditors. This mechanism is intended to prevent the need to initiate liquidation proceedings against the debtor. The purpose of the said law is, on the one hand, to ensure the fullest possible satisfaction of creditors' claims, and on the other hand, to provide maximum economic protection for the debtor's enterprise.

According to Article 155 sec. 3 of the Polish Restructuring Law, arrangement proposals (Pol. propozycje układowe) define the manner in which the debtor's liabilities are to be restructured. In the absence of a legal definition of arrangement proposals, the term is generally understood to refer to proposals aimed at restructuring the debtor's existing obligations, submitted to their creditors. The current legal framework adopts the concept of an open catalogue of methods for restructuring the debtor's liabilities, which had already been established under the previous legal regulation contained in the Bankruptcy Law prior to the 2016 amendment.

The aim of this paper is to present the most common methods of restructuring a debtor's liabilities under Polish law within the framework of restructuring proceedings.
Keywords: *restructuring of the debtor's liabilities, Polish regulation, arrangement with creditors, proposals of the arrangement with creditors.*

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[1] Zákon zo dňa 15.5.2015 – „Prawo restrukturyzacyjne" – Dz. U. z 2015 r. poz. 978 ze zm., ďalej ako: ReštZák.

JEL Classification: K22; G33

ÚVOD

Dňa 1. januára 2016 nadobudol účinnosť zákon o reštrukturalizácii[2], medzi hlavné ciele ktorého patrí reforma doterajších mechanizmov umožňujúcich vykonanie reštrukturalizácie podniku dlžníka na základe dohody o urovnaní s veriteľmi, t. j. bez nutnosti vykonania likvidačného konania dlžníka. Cieľom zákona je na jednej strane zabezpečiť čo najvyššie uspokojenie veriteľov, na druhej strane však aj ochranu ekonomickej stability podniku dlžníka[3].. Nevyhnutným predpokladom pre správnu realizáciu uvedených cieľov je určenie adekvátneho spôsobu reštrukturalizácie záväzkov dlžníka prostredníctvom návrhu reštrukturalizačnej dohody o urovnaní s veriteľmi. Podľa článku 155 ods. 3 poľského Zákona o reštrukturalizácii sa týmto návrhom rozumejú špecifické návrhy týkajúce sa spôsobu reštrukturalizácie dlhov dlžníka. Tieto návrhy (poľ. propozycje układowe) sú adresované veriteľom a určujú spôsob, akým sa majú upraviť existujúce záväzky dlžníka, pričom zákon neobsahuje konkrétnu legálnu definíciu tohto pojmu. Ide však o návrh reštrukturalizácie záväzkov, ktorý bude určený v dohode[4]. Jedným z hlavných cieľov návrhov je dohodnutie takých podmienok, ktoré budú akceptovateľné pre všetky zúčastnené strany, pričom výsledkom bude plnenie záväzkov v takej forme, ktorá umožní dlžníkovi zachovať svoju ekonomickú aktivitu a veriteľom zabezpečiť čo najvyššie uspokojenie ich pohľadávok.

Cieľom tohto príspevku je priblížiť najčastejšie spôsoby reštrukturalizácie záväzkov dlžníka v poľskom práve v prípade reštrukturalizačných konaní. V rámci článku sa podrobne rozoberá otázka katalógu spôsobov reštrukturalizácie záväzkov dlžníka a osobitná pozornosť je venovaná predmetným obmedzeniam reštrukturalizácií záväzkov dlžníka a podmienkam ich úpravy v rámci poľskej úpravy.

1. KATALÓG SPÔSOBOV REŠTRUKTURALIZÁCIE ZÁVÄZKOV DLŽNÍKA

V súlade s ustanovením čl. 155 ods. 3 Zákona o reštrukturalizácii návrhy reštrukturalizácie záväzkov dlžníka v rámci dohody o urovnaní s veriteľmi určujú spôsob takejto reštrukturalizácie v priebehu reštrukturalizačného konania. V dôsledku toho je potrebné prijať záver, že pod pojmom „návrhy reštrukturalizácie záväzkov dlžníka“ sa zásadne rozumie návrh reštrukturalizácie doterajších záväzkov dlžníka, ktoré sú adresované jeho veriteľom[5]. Ustanovenia poľského Zákona o reštrukturalizácii preberajú osvedčenú konštrukciu otvoreného katalógu návrhov reštrukturalizačných dohôd, ktorá bola zavedená ešte v rámci právnych predpisov o konkurze a sanácii[6]. Poľský zákonodarca totiž uvádza, že reštrukturalizácia záväzkov dlžníka môže zahŕňať najmä sedem možných spôsobov: odloženie termínu splnenia záväzku; rozloženie záväzkov na splátky; zníženie výšky záväzku; konverziu pohľadávky na podiely alebo akcie; zmenu práva zabezpečujúceho určitú pohľadávku; výmenu práva zabezpečujúceho určitú pohľadávku a zrušenie práva zabezpečujúceho určitú pohľadávku. Okrem toho je v rámci návrhov reštrukturalizačných dohôd možné súčasne uviesť viacero spôsobov reštrukturalizácie záväzkov dlžníka (čl. 156 ods. 2 Zákona o reštrukturalizácii).

Formula otvoreného katalógu návrhov reštrukturalizačných dohôd, ktorá bola zachovaná zákonodarcom v ustanoveniach Zákona o reštrukturalizácii, sa výrazne líši od koncepcie prijatej

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[2] Zákon zo dňa 15.5.2015 – „Prawo restrukturyzacyjne” – Dz. U. z 2015 r. poz. 978 ze zm., ďalej ako: ReštZák

[3] Poz. Dôvodová správa zo dňa 9.10.2014 k návrhu zákona (poľ. Uzasadnienie do projektu ustawy)– Prawo restrukturyzacyjne, s. 12. Zdroj: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2824 [Prístup: 21.10.2025].

[4] Ďalej v príspevku tiež ako: „reštrukturalizačné návrhy“.

[5] Por. Dôvodová správa zo dňa 9.10.2014 k návrhu zákona (poľ. Uzasadnienie do projektu ustawy) – Prawo restrukturyzacyjne, s. 34; GURGUL, S., Komentár k čl. 156 ReštZák, Rdn 1 In Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz. C.H. Beck: Warszawa 2020. Prístup: Legalis PL.

[6] Ide o ustanovenia Zákona o konkurze a sanácii, ktorý bol dôležite zmenený novelou, ktorou bol zavedený do poľského právneho poriadku zákon o reštrukturalizácii.

predvojnovým zákonodarcom v ustanovení čl. 20 § 1 Zákona o reštrukturalizačnom poriadku z roku 1934[7]. Podľa tohto ustanovenia mohli návrhy reštrukturalizačných dohôd zahŕňať iba spôsoby reštrukturalizácie záväzkov uvedené vo vyššie uvedenom zákone, a to len odloženie termínu splnenia záväzkov, rozdelenie záväzkov dlžníka na splátky, zníženie sumy záväzkov dlžníka s možným rozložením tejto sumy na splátky, vykonanie zabezpečenia splnenia záväzkov zahrnutých v reštrukturalizačnom pláne[8].

Vzhľadom na súčasnú podnikateľskú prax je potrebné konštatovať, že otvorený katalóg návrhov reštrukturalizačných dohôd plní svoju úlohu. Možnosť uzavretia iných návrhov reštrukturalizačných dohôd, než sú uvedené v zákone, môže prispieť k efektívnejšiemu plneniu záväzkov dlžníka. Prijatie takejto konštrukcie umožňuje určitú flexibilitu pri výbere vhodného spôsobu reštrukturalizácie záväzkov. Pri tom sa však vynára otázka, či zákonodarca ponecháva úplnú slobodu pri tvorbe návrhov reštrukturalizačných dohôd. Je potrebné prijať záver, že hlavné rámce pre formulovanie návrhov reštrukturalizačných dohôd určujú ich súlad s platnými právnymi predpismi a nemožnosť predkladať návrhy reštrukturalizačných dohôd, ktoré by mohli prehĺbiť stav zadlženia dlžníka[9].

Výnimočne, návrhy reštrukturalizácie záväzkov dlžníka v rámci dohody o urovnaní môžu tiež predpokladať uspokojenie veriteľov prostredníctvom likvidácie majetku dlžníka. V doktríne sa uvádza, že ustanovenie čl. 159 Zákona o reštrukturalizácii umožňuje uzavretie likvidačnej dohody z dôvodu potenciálne ekonomicky odôvodnenej potreby odstúpenia od zákonom predpokladaného spôsobu likvidácie, najmä pokiaľ ide o jej termíny. Tento spôsob reštrukturalizácie záväzkov sa najčastejšie zúži na výber medzi dvoma základnými spôsobmi likvidácie majetku dlžníka:

1. predajom uskutočneným určenou osobou a rozdelením získaných prostriedkov medzi veriteľov;
2. prevzatím majetku veriteľmi alebo veriteľom a rozdelením získaných prostriedkov medzi ostatných veriteľov.

Ak má dohoda predpokladať predaj majetku dlžníka za účelom uspokojenia veriteľov, je nevyhnutné určiť osobu, ktorá vykoná takúto likvidáciu. Veritelia musia teda zvoliť „správcu reštrukturalizačného plánu“ (poľ. nadzorca układu), pričom ho vyberú ako konkrétnu fyzickú alebo právnickú osobu. Na prevod majetku v rámci vykonania plánu, ktorý predpokladá likvidáciu majetku, sa neaplikuje čl. 313 poľského Zákona o konkurze z 28.2.2003[10] – ktorý predaj majetku v úpadkovom konaní spája s účinkami exekučného predaja. Dôsledkom je teda to, že na predávaných predmetoch zostávajú v platnosti existujúce zabezpečovacie práva. Samozrejme, plán môže predpokladať primerané zohľadnenie možnej predajnej ceny, ktorá umožní odstránenie alebo zmenu týchto zabezpečovacích práv.

Odloženie termínu splnenia záväzkov znamená určenie nového termínu na splatenie záväzkov dlžníkom. Pri určovaní nového termínu splatnosti je potrebné predpokladať, že takýto termín by mal byť stanovený v súvislosti s termínom nadobudnutia právoplatnosti rozhodnutia o schválení reštrukturalizačného plánu. Pri predkladaní návrhov reštrukturalizačných dohôd totiž nie je možné predvídať, kedy sa uskutoční zhromaždenie veriteľov, a ani to, či rozhodnutie o schválení plánu nadobudne právoplatnosť okamžite, alebo až po prejednaní prípadného odvolania.

Rozdelenie záväzkov dlžníka na splátky spočíva v odložení vykonania jednotlivých častí záväzkov na rôzne, po sebe nasledujúce termíny. Je to jeden z najbežnejších spôsobov reštrukturalizácie záväzkov. Tento nástroj umožňuje dlžníkovi postupne splácať svoje záväzky v stanovených termínoch. Výhodou

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[7] Nariadenie Prezidenta Poľskej republiky (poľ. Rozporządzenie Prezydenta Rzeczypospolitej) z 24.10.1934 r. - Prawo o postępowaniu układowem (Dz. U. Nr 93, poz. 836 ze zm.).

[8] Viac o spôsoboch reštrukturalizácie záväzkov dlžníka na základe predvojnového Nariadenia Prezidenta Poľskej republiky zavádzajúceho Zákon o reštrukturalizačnom poriadku – pozri: M. Allerhand, Prawo upadłościowe. Prawo o postępowaniu układowem. Komentarz, Warszawa 1937, s. 966 – 969.

[9] Porov. GROELE B., Komentár k čl. 156 ReštZák, Rdn 2 In FILIPIAK P., HRYCAJ A. (eds), Prawo restrukturyzacyjne. Komentarz, Warszawa 2021, Prístup: LEX/el.

[10] Zákon zo dňa 28.2.2003 – „Prawo upadłościowe” - Dz. U. z 2003, Nr 60, poz. 535 ze zm., ďalej ako: KonkZák.

splátkového kalendára je predovšetkým predvídateľnosť: dlžník môže plánovať svoje finančné toky a zabezpečiť stabilitu podniku počas obdobia splácania. Tento spôsob reštrukturalizácie môže byť prispôsobený sezónnosti podnikania alebo konkrétnym výkonnostným cieľom, ktoré podnik dosahuje. Napríklad, ak je podnikanie sezónne, splátky môžu byť nastavené tak, aby sa zohľadnila výška príjmov počas roka, čím sa zabezpečí, že v menej výkonných obdobiach podnik nebude zaťažený nadmerným finančným bremenom. Veritelia sú chránení pred úplným zlyhaním dlžníka, čo môže byť lepšia alternatíva, než ak by dlžník išiel do likvidácie a rozdelili by sa len zostávajúce aktíva.

Zníženie sumy záväzkov je jedným z najdôležitejších a najsilnejších nástrojov reštrukturalizácie. Tento mechanizmus umožňuje odpustenie časti dlhov, čo môže byť vyjadrené v percentách alebo konkrétnym pomerom k celkovým pohľadávkam. Tento spôsob je výhodný v situáciách, keď je jasné, že dlžník nie je schopný splniť všetky svoje záväzky v plnej výške, ale zároveň existuje šanca, že určité zníženie dlhu umožní jeho pokračovanie v podnikaní.

Zníženie záväzkov musí byť vyvážené, aby neohrozilo schopnosť podniku pokračovať v činnosti. Aby bolo možné zníženie schváliť, musí byť návrh reálny a spravodlivý, čo znamená, že veritelia by mali dostať viac, než by dostali v prípade konkurzu alebo likvidácie podnikateľa. Tento proces je často založený na teste uspokojenia, ktorý porovnáva to, čo veritelia získajú z reštrukturalizácie, s tým, čo by získali, ak by podnik skrachoval.

V doktríne sa zdôrazňuje, že najnáročnejším spôsobom reštrukturalizácie záväzkov je tzv. konverzia pohľadávok na obchodné podiely alebo akcie. V súlade s ustanovením čl. 155 ods. 5 ReštZák by mal tento spôsob upravovať nasledujúce údaje:

1. sumu, o ktorú má byť zvýšený základný kapitál a, v prípade jednoduchej akciovej spoločnosti, počet akcií, ktoré majú byť vydané;
2. počet a nominálnu hodnotu novovytvorených obchodných podielov alebo akcií, alebo aj hodnotu, o ktorú sa zvyšuje nominálna hodnota už existujúcich obchodných podielov alebo akcií a, v prípade akcií bez nominálnej hodnoty, ich počet a emisnú cenu;
3. určenie, že prevzatie obchodných podielov alebo akcií sa uskutočňuje s vylúčením práva prednostného odkupu alebo upisovania, pričom vylúčenie práva prednostného odkupu alebo upisovania nastáva aj vtedy, ak takúto možnosť nepredpokladá spoločenská zmluva alebo stanovy;
4. určenie, či sú akcie novej emisie na doručiteľa alebo na meno;
5. emisný kurz nových akcií;
6. dátum, od ktorého majú nové akcie alebo nové obchodné podiely právo na dividendu.

Obsah návrhov reštrukturalizačných dohôd v tomto rozsahu musí spĺňať všetky požiadavky, ktoré sú stanovené pre uznesenie valného zhromaždenia spoločníkov (akcionárov) a pre návrh na zápis do Národného súdneho registra, pretože reštrukturalizačný plán nahrádza určité kroky stanovené v Zákonníku obchodných spoločností[11] týkajúce sa zvýšenia kapitálu a upisovania podielov (akcií). Konverzia nastáva na základe samotnej dohody, a preto nie sú potrebné žiadne ďalšie kroky vyžadované predpismi KSH. Základom registrácie zvýšeného kapitálu je kópia právoplatného rozhodnutia o schválení reštrukturalizačného plánu.

Zákon nevyžaduje, aby ktorýkoľvek z návrhov reštrukturalizačných dohôd bol priložený k predbežnému plánu reštrukturalizácie (nie sú povinnou súčasťou). Avšak, vzhľadom na elektronizáciu reštrukturalizačných konaní, žiadosť obsahujúca návrhy reštrukturalizačných dohôd by mala byť zaslaná príslušnému reštrukturalizačnému súdu a musí byť podaná prostredníctvom teleinformatického systému Národného registra zadlžených.

[11] Zákonník obchodných spoločností zo dňa 15.9.2000 – „Kodeks spółek handlowych" - Dz. U. z 2000 Nr 94 poz. 1037 ze zm., ďalej ako: KSH

2. LEGITIMÁCIA NA PODANIE NÁVRHU REŠTRUKTURALIZÁCIE ZÁVÄZKOV DLŽNÍKA V RÁMCI DOHODY O UROVNANÍ S VERITEĽMI

Podľa poľského práva má v súčasnosti aktívnu legitimáciu na predloženie návrhu na reštrukturalizáciu záväzkov dlžníka v rámci reštrukturalizačných konaní: dlžník, veriteľský výbor (poľ. rada wierzycieli), súdny dozorca alebo správca, veriteľ alebo veritelia, ktorí majú spolu viac ako 30 % sumy pohľadávok, a v prípade reštrukturalizačného konania voči developerom - kupujúci tvoriaci aspoň 20 % počtu kupujúcich v rámci developerského projektu realizovaného dlžníkom[12].

Na druhej strane, legitimáciu na predloženie návrhov ohľadne reštrukturalizácie záväzkov nemajú veritelia uvedení v:

- čl. 80 ods. 3 ZákReštr, t.j. spoludlžník, ručiteľ, garančný subjekt alebo banka, ktorá neuspokojila veriteľa,
- čl. 109 ods. 1 ZákReštr - veriteľ, ktorý nadobudol pohľadávku prostredníctvom postúpenia alebo rubopisom po začatí reštrukturalizačného konania a
- čl. 116 ZákReštr, t.j. veriteľ, ktorý je manželom dlžníka, jeho príbuzným alebo blízkou osobou v priamom rade, príbuzným alebo blízkou osobou v pobočnom rade do druhého stupňa vrátane, osvojiteľom dlžníka alebo osobou, ktorú si dlžník osvojil, ak je dlžníkom obchodná spoločnosť ide tiež o osobu oprávnenú zastupovať spoločnosť, a ak je dlžníkom osobná obchodná spoločnosť - spoločník zodpovedajúci za záväzky spoločnosti celým svojím majetkom.

V prípade, že návrhy reštrukturalizácie záväzkov predloží viac ako jeden oprávnený subjekt, zhromaždenie veriteľov sa nimi bude zaoberať a hlasovať o nich v poradí určenom súdom[13]. Na hlasovanie sa predkladajú všetky návrhy reštrukturalizačných dohôd. Za prijaté sa považujú tie návrhy reštrukturalizácie záväzkov dlžníka v rámci dohody o urovnaní s veriteľmi, ktoré získali najväčšiu podporu veriteľov, počítanú v súvislosti s celkovou sumou pohľadávok (čl. 117 ods. 1 ZákReštr).

3. VECNÉ OBMEDZENIA REŠTRUKTURALIZÁCIE ZÁVÄZKOV DLŽNÍKA

V prvom rade je potrebné zdôrazniť, že návrhy reštrukturalizácie záväzkov v rámci dohody o vyrovnaní nemôžu predpokladať pre žiadneho veriteľa uspokojenie vyššie, než je výška jeho pohľadávky (čl. 155 ods. 4 ZákReštr). Toto riešenie vyplýva z rovnakého zaobchádzania so všetkými veriteľmi, bez možnosti preferovania niektorých veriteľov (napr. veriteľov financujúcich). Skutočným problémom zostáva porovnanie dvoch rôznych spôsobov reštrukturalizácie záväzkov (uspokojenia veriteľov), napríklad konverzie na obchodne podiely alebo akcie a hotovostnej platby veriteľovi. Základom pre tieto výpočty bude tzv. test uspokojenia, ktorý by mal obsahovať výpočet hodnoty podniku dlžníka v prípade úspechu reštrukturalizácie.

Poľský zákonodarca pri zavádzaní Zákona o reštrukturalizácie akceptoval, že osobitný charakter záväzkov dlžníka voči poľskej Sociálnej poisťovne (poľ. Zakład Ubezpieczeń Społecznych) neumožňuje zaobchádzať s týmito záväzkami rovnako, ako s ostatnými záväzkami dlžníka. V dôsledku toho reštrukturalizácia záväzkov z titulu príspevkov na sociálne poistenie, ktoré platí platca príspevkov, a iných záväzkov dlžníka voči poľskej Sociálnej poisťovni, môže zahŕňať iba rozloženie platby na

[12] Viac o vecnej legitimácii na predloženie návrhov reštrukturalizácie záväzkov dlžníka pozri: ZIMMERMAN, P., Komentár k čl. 155 ReštZák, Rdn 2-5 In Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz. C.H. Beck: Warszawa 2025. Prístup: Legalis PL; ADAMUS, R., Komentár k čl. 155 ReštZák, Rdn 12-16 In Prawo restrukturyzacyjne. Komentarz, Warszawa 2019, Prístup: Legalis. GROELE B. In MACHOWSKA A. (ed.), Prawo restrukturyzacyjne i upadłościowe. Warszawa 2021, s. 452-456; GROELE B., Komentár k čl. 155 ReštZák, Rdn 2-8 In FILIPIAK P., HRYCAJ A. (eds), Prawo restrukturyzacyjne. Komentarz, Warszawa 2021, Prístup: LEX/el.

[13] Porov. GURGUL, S., Komentár k čl. 155 ReštZák, Rdn 1 In Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz. C.H. Beck: Warszawa 2020. Prístup: Legalis PL.

splátky alebo odloženie platby, pokiaľ ZUS nevyjadrí súhlas s iným spôsobom reštrukturalizácie. Reštrukturalizácia, ktorá by viedla k zníženiu výšky záväzkov voči poľskej Sociálnej poisťovne, nie je prípustná (čl. 160 ods. 1 ZákReštr). Ak dohoda predpokladá konverziu pohľadávky na obchodné podiely alebo akcie, prevzatie celého majetku treťou osobou alebo veriteľom, ako aj doplatky medzi veriteľmi, v dohode musí byť určený veriteľ alebo tretia osoba, ktorá preberie povinnosť splniť záväzky voči poľskej Sociálnej poisťovne. Prebratie tejto povinnosti nezmení povahu pohľadávok Sociálnej poisťovne a možnosti ich núteného vymáhania. Podobná úprava je stanovená aj pre príspevky a iné záväzky dlžníka voči Fondu zamestnanosti (poľ. Fundusz Pracy), Fondu zaručených pracovných dávok (poľ. Fundusz Gwarantowanych Świadczeń Pracowniczych) a Fondu predčasných starobných dôchodkov (poľ. Fundusz Emerytur Pomostowych). Každý z týchto fondov je štátnym účelovým fondom.

Ďalším obmedzením predmetnej reštrukturalizácie je reštrukturalizácia záväzkov z pracovného pomeru (čl. 163 ZákReštr). Podmienky reštrukturalizácie záväzkov z pracovného pomeru nemôžu odoprieť zamestnancom minimálnu mzdu za prácu. Nezáleží ani na prípadnom súhlase zamestnanca. Prepočet by mal prebiehať v súvislosti s mesiacom a vzťahuje sa aj na nároky za dovolenku a z dôvodu dočasnej pracovnej neschopnosti.

4. MOŽNOSŤ ROZDELENIA VERITEĽOV DO SKUPÍN PODĽA KATEGÓRIÍ ZÁUJMOV

Účinná poľská úprava anticipuje v čl. 161 ods. 1 Zákona o reštrukturalizácii, že návrhy reštrukturalizácie záväzkov dlžníka v rámci dohody o urovnaní s veriteľmi môžu predvídať rozdelenie veriteľov do skupín, ktoré zahŕňajú jednotlivé kategórie záujmov. Rozdelenie veriteľov do týchto skupín sa uskutočňuje na základe objektívnych, jednoznačných a ekonomicky alebo právne odôvodnených kritérií týkajúcich sa právnych vzťahov, ktoré viažu veriteľov na dlžníka, a z ktorých vyplývajú záväzky zahrnuté v návrhoch reštrukturalizačných dohôd.

V súlade s ustanovením čl. 86 ods. 2 písm. 11 ZákReštr možno v zozname pohľadávok „zohľadniť rozdelenie veriteľov do skupín", pričom v tomto prípade sa určuje „suma pohľadávok pre každú skupinu". Poľský zákonodarca určil, že pre veriteľov: (1) ktorým patria pohľadávky zo vzťahu k pracovnej zmluve a ktorí vyjadrili súhlas s ich zahrnutím do reštrukturalizačného plánu, (2) ktorým patria pohľadávky na základe zmlúv o dodaní produktov z vlastného poľnohospodárskeho podniku, (3) ktorých pohľadávky sú zabezpečené na majetku dlžníka hypotékou, záložným právom, registračným záložným právom alebo daňovým záložným právom, možno predpokladať rozdelenie do skupín. Zásadou je, že podmienky reštrukturalizácie záväzkov dlžníka sú rovnaké pre všetkých veriteľov, a ak sa hlasovanie o dohode o urovnaní s veriteľmi v rámci reštrukturalizačného konania uskutočňuje v skupinách veriteľov, rovnaké pre veriteľov zaradených do tej istej skupiny, pokiaľ veriteľ výslovne nesúhlasí s menej výhodnými podmienkami. Okrem toho, so súhlasom takéhoto veriteľa môže dojednanie ustanoviť zmenu predmetu zabezpečenia pohľadávky alebo jej predaj. Je potrebné zdôrazniť, že návrh na urovnanie nemôže ustanoviť iný spôsob uspokojenia veriteľa než je uvedený v dohode, ibaže s novým spôsobom veriteľ súhlasil. Ak navrhnuté rozdelenie do skupín nebolo urobené v zozname pohľadávok alebo uskutočnené rozdelenie nie je v súlade s aktuálnymi návrhmi na urovnanie zoznam zaraďujúci jednotlivých veriteľov do skupín pripravuje správca po schválení zoznamu pohľadávok. Správca má možnosť rozdeliť veriteľov na ďalšie skupiny podľa druhu ich konkrétneho záujmu, ktorý je možné jasne odlíšiť. Zákon neustanovuje konkrétne kritériá na toto rozdelenie, avšak rozdelenie môže byť vykonané na základe faktorov, ako sú výška pohľadávok, splatnosť záväzkov alebo ich charakter[14]. Správca si zachováva túto slobodu, no je potrebné súhlasiť s tým, že samotné rozdelenie veriteľov do jednotlivých skupín závisí od obsahu „návrhov na urovnanie (usporiadanie)" [15].

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14 ZIMMERMAN, P., Komentár k čl. 161 ReštZák, Rdn 7 In Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz. C.H. Beck: Warszawa 2025. Prístup: Legalis PL

15 GURGUL, S., Komentár k čl. 161 ReštZák, Rdn 1 In Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz. C.H. Beck: Warszawa 2020. Prístup: Legalis PL

Zákonodarca predpokladá výnimku z rovnakého zaobchádzania s veriteľmi vo vzťahu k veriteľom, (a) ktorí poskytli financovanie nevyhnutné na vykonanie reštrukturalizačného plánu, (b) ktorých spolupráca je nevyhnutná na vykonanie reštrukturalizačného plánu a (c) mikro-podnikateľom. Každá z týchto skupín v oblasti uspokojenia v rámci reštrukturalizačného plánu má charakter výnimky od zásady a môže byť uplatnená iba v prípade, že je to nevyhnutné na dosiahnutie cieľov reštrukturalizačného plánu a nespôsobí to nespravodlivé zaobchádzanie s právami alebo záujmami iných účastníkov konania. Požiadavka navrhnutia rovnakých podmienok reštrukturalizácie v rámci skupiny zahŕňajúcej danú kategóriu záujmov veriteľov znamená, že sa nepredkladajú návrhy spôsobov reštrukturalizácie záväzkov dlžníka pre jednotlivých veriteľov alebo pre všetkých veriteľov, ale len pre konkrétnu skupinu veriteľov, vyčlenenú na základe presne stanovených objektívnych kritérií v návrhoch. Pojem rovnakých návrhov pre danú kategóriu záujmu veriteľov treba chápať doslovne - rovnaké znamená „také isté“ či „rovnaké“.

ZÁVER

Zákon o reštrukturalizácii, ktorý nadobudol účinnosť 1. januára 2016, bol zásadnou reformou, ktorá zjednodušila a upravila mechanizmy umožňujúce vykonanie reštrukturalizácie podnikov, majitelia ktorých sa nachádzajú v finančných ťažkostiach, bez nutnosti ich likvidácie. Tento zákon mal za cieľ zabezpečiť vyvážený prístup medzi ochranou ekonomickej stability podniku dlžníka a uspokojením práv veriteľov, pričom jedným z kľúčových nástrojov na dosiahnutie tohto cieľa je právny rámec pre reštrukturalizačné dohody s veriteľmi.

V rámci článku boli podrobne rozobrané rôzne spôsoby reštrukturalizácie záväzkov dlžníka podľa poľského práva, pričom osobitná pozornosť bola venovaná najčastejším mechanizmom a obmedzeniam týchto procesov, ktoré vyplývajú z konkrétnych ustanovení Zákona o reštrukturalizácii. Katalóg spôsobov reštrukturalizácie, ktorý bol uvedený v tomto zákone, reflektuje potrebu flexibility pri reštrukturalizácii, pričom ponecháva priestor na konkrétne prispôsobenie riešení podľa špecifických potrieb dlžníka a veriteľov. Napriek tomu existujú jasné pravidlá a obmedzenia, ktoré sa týkajú napríklad rovnakého zaobchádzania so všetkými veriteľmi, ako aj podmienok, za ktorých môže dôjsť k výnimkám z tejto zásady.

Zámerom príspevku bolo poukázať, ako poľská právna úprava reaguje na potrebu flexibilných riešení v rámci reštrukturalizačných konaní, ktoré umožnia podnikom v ťažkostiach pokračovať v činnosti a zároveň zabezpečiť čo najvyššie uspokojenie veriteľov. Pri hľadaní rovnováhy medzi týmito dvoma cieľmi sa právna úprava zameriava na určenie efektívnych spôsobov reštrukturalizácie a rozdelenia veriteľov do skupín, ktoré zohľadňujú konkrétne ekonomické a právne záujmy.

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