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THE CONCEPT OF PUBLIC POLICY CLAUSE AND ITS APPLICATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS: THEORETICAL AND PRACTICAL ANALYSIS

Master thesis

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Vilnius, 2021

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LIST OF ABBREVIATIONS

Abbreviation	**Meaning**
Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
Charter	Charter of Fundamental Rights of the European Union
COMI	Center of main interests
Directive 2000/31/EC	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
Directive 2006/123/EC	Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market
Directive 64/221/EEC	Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
Directive 96/71/EC	Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EU	European Union
Insolvency Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
LAT	Supreme Court of Lithuania
Regulation No 1206/2001	Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
Regulation No 1215/2012	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial
Regulation No 1346/2000	Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
Regulation No 2201/2003	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,
Regulation No 593/2008	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Regulation No 864/2007	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
EEC Treaty	Treaty establishing the European Community

INTRODUCTION

Relevance of the final thesis.

The international spread of the coronavirus ("COVID-19") is not only generating dramatic consequences from a social perspective but it is also heavily affecting the global economy. For this reason, Governments, financial regulators and international organizations are responding with a package of legal, economic and financial measures.[1]

Such an environment has made the review of the insolvency law system particularly relevant. International law firms such as DLA Piper have begun to produce special reports[2] that regularly review changes in the EU Member States, and more precisely, in this area of law, as such shifts are important for business and policy-making. However, the insolvency law of EU members is strongly influenced not only by the national legal transformations themselves, but also by EU law and, more specifically, by the content of the Insolvency Regulation. It is the regulatory framework of this document that should also be reviewed, as its purpose is directly aimed at simplifying the resolution and administration of cross-border insolvency proceedings.

As will be shown in the next column on the level of analysis, most of the lawyers who comment on the Insolvency Regulation these days are devoting their investigation time to issues of COMI, jurisdiction and applicable law. However, one article, Article 33, should be borne in mind because of its special purpose and significance. This is because the foundations of the document are based on the idea of recognition and enforcement. States have looked for ways in which authorities in two or more countries can cooperate or facilitate the enforcement of decisions that are linked to another jurisdiction. The automatic recognition rule as early as 1933 has been integrated into The Nordic Convention[3]. Already in a 1996 report, commenting on the creation of a new European convention, the researchers formed that "to recognize foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down"[4]. In essence, its principle remained the same - a rule governing the automatic entry into force in other jurisdictions of decisions taken by the competent authorities (courts) of the Member States (in the context of an Insolvency Regulation) concerning the opening,

[1] Aurelio Gurrea-Martínez, "Insolvency Law in Times of COVID-19" *Working Paper 2/2020*, 27 March 2020, p. 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562685;
[2] DLA Piper, *An international guide to changes in insolvency law in response to COVID-19 (COVID-19 ALERTS)*, 2020, https://www.dlapiper.com/~/media/files/insights/publications/2020/12/covid_19_global-guide_km.pdf;
[3] Carl Hugo Parment, *The Nordic Bankruptcy Convention – an Introduction* (Frankfurt am Main: Germany, 2004), p. 3, https://www.iiiglobal.org/sites/default/files/Nordic_Bankruptcy.pdf;
[4] Miguel Virgos and Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (EU Council of the EU Document, 1996), p. 92;

execution and closure of insolvency proceedings and decisions directly or closely related to insolvency law, eliminating additional exequatur procedures. If the concept were not interpreted directly in relation to insolvency, since it is not merely an instrument in insolvency law, it would simply have the meaning of the direct application of the judgment without further proceedings in another jurisdiction. This means that a decision taken by a competent authority which is based essentially on the principle of *lex fori concursus* must not be called into question by other Member State and treated as national. This principle was explained by the ECJ in 2006, when it was commented on in Regulation No 1346/2000 that "[...] the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State"[5]. Geert Van Calster, an expert on Belgian law of origin, makes a rather practical and correct observation that the essential task of automatic recognition was to regulate the opening of the case, the moment of commencement, which constitutes the entry into force of the recognition rule and, secondly, the applicable law, thus gaining occupation[6].

Such regulation gives rise to a game of time between creditors and debtors, which may in part determine the venue of the dispute in the main proceedings since recognition is based on the principle of 'mutual trust'. This principle (formerly known as 'community trust') applies to both the Insolvency Regulation recognition and the provisions of the Regulation No 1215/2012. It is in the latter recital that the developers envisage that its aim is to reduce time wastage and additional economic burden[7]. It also commented on the substance of the case in the ECJ *Turner* (directing insights to the *Gasser*'s decision) case, stating that it aims to create respect for the courts of the Member States and to simplify their activities, facilitate work in international cases[8]. The basis is that states agree to trust each other's judicial decisions, and their adoption should not be further questioned. The relationship becomes based on the observance of uniform rules, partially progressively harmonized legal procedural standards and mutual cooperation. This is because the legal cultures of the Member States differ, which also determines the legal methods used. It is their partial harmonization, juxtaposition or at least prior acquaintance that is one of the EU's objectives

[5] "Judgement of the Court of Justice of the European Union (Grand Chamber) of 2 May 2006 in a reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings No. C-341/04," CURIA, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=A98DC45808C9B7F20114FD897E759462?text=&docid=56604&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9545700;

[6] Geert Van Calster, *European Private International law* (Oxford and Portland, Oregon: Hart Publishing, 2016), p. 322;

[7] "Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," recital para 26, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215;

[8] "Judgment Of The Court (Full Court) 27 April 2004 Case C-159/02 Gregory Paul Turner v. Felix Fareed Ismail Grovit and Others," para 24, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62002CJ0159&from=PL;

in order to establish the principle of mutual trust. Its promotion can be seen in relative terms in Article 25 of the Insolvency Regulation, which provides for the connection of insolvency registers by interconnecting members' electronic systems. The EU has described the rationale for promoting this principle, albeit in the field of criminal justice: "mutual trust developed through the shared values of the Member States concerning respect for human dignity, freedom, democracy, equality, the rule of law and human rights, so that each authority has confidence that the other authorities apply equivalent standards of protection of rights"[9]. However, the different nature of the cases should not eliminate this interpretation as irrelevant in interpreting the features of the element.

Enforcement, meanwhile, is a complement to the recognition instrument that follows each other. Automatic recognition often has to lead to enforcement, which would mean that the Member State undertakes to enforce all the consequences arising from the use of (usually) coercive territorial procedural tools. In practice, it should be divided into procedural enforcement and final enforcement, where the latter would relate to the implementation of the final results of court decisions, and procedural enforcement to the exercise of powers and cooperation in the course of proceedings. One of the practical examples is the actions of the insolvency administrator in the main proceedings, which concern the administration of assets in the jurisdiction of another Member State. Recognition alone does not confer on the administrator real powers within another State. In reality, it depends on communication between officials of national law and other institutions. Therefore, the new articles of the Insolency Regulation on inter-institutional cooperation and communication should be dedicated specifically to better enforcement.

Thus, these two principles are, in fact, the real foundations of the Insolvency Regulation and the cross-border insolvency proceedings, because without them, all previous decisions, such as the implementation of the COMI rule and the determination of jurisdiction, will not have multi-jurisdictional power. In other words, recognition and enforcement are an essential element in the document of universalism, allowing a decision taken by one state to be applied and enforced in another, extending the territorial dimension beyond it. It is a solution to the problem of more than 2,000 years of international insolvency, the need for which has been in the air since Roman times. It is a system that Jabez Henry really wanted in his 19th century work[10], which no one properly appreciated at the time. It is a system on which members of the committees, teams and legal investigation groups of previous international insolvency law projects relied in the end of the twentieth century.

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[9] "Council conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust' (2018/C 449/02)," https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018XG1213(02)&from=NL;

[10] Jabez Henry, *Outline of Plan of an International Bankrupt Code for the Different Commercial States of Europe*, 1825, p. 2-9;

While the importance of these elements is understandable, the question should be: is their application absolute? This is where Article 33 comes in, and more precisely, the public policy provision. It is no coincidence that the authors of both previous projects and the Insolvency Regulation have received this article, i.e. public policy has always been indicated at the end of a chapter (Chapter II in the case of an Insolvency Regulation). Article 33 is an exception or *ultima ratio* of the rules on recognition and enforcement:

> Any Member State may refuse *to recognise* insolvency proceedings opened in another Member State or *to enforce* a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.[11]

Article 33 is the only possible tool to refuse to recognize the validity and application of an insolvency decision of another EU Member State and the power of such an article reveals its importance - it may affect the viability of the case. However, the article and more precisely, its concept does not receive much and necessary attention. In its resolution of 22 February 2013, the LAT, commenting on the details of the recognition of the then old version of the Insolvency Regulation, stated that: "The possibility of refusing to recognize insolvency proceedings under Regulation No. 1346/2000 is very limited <...> moreover, the Regulation also does not provide for a special recognition (non-recognition) procedure during which it may be examined whether the judgment sought (non-recognition) is contrary to public policy in the recognizing State"[12] (translated from Lithuanian). In describing the old version of the Insolvency Regulation, the court uses the term 'very limited' several times. It also reiterates that the Regulation No 1346/2000 does not provide for a specific recognition procedure, the absence of which may prevent a court from reaching a firm ruling on a dispute concerning the enforcement of a judgment of another Member State. This is one of the possible examples of how official public authorities, by their vague and dubious type of reasoning, may have indirectly revealed a gap in the EU legal framework at the time due to the lack of application of the principles of legal certainty and efficiency in the Insolvency Regulation. True, as mentioned, the LAT commented on the Regulation No 1346/2000. This could lead to the conclusion that the court did not seem to have anything to rely on - neither in the academic literature nor in the case law substantive detailed legal comments.

[11] "Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings," Articles 33, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848;
[12] "Order of the Supreme Court of Lithuania of 22 February 2013 in a civil case with international element No. 3K-3-39 / 2013," LITEKO, http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=1172958a-f46d-4006-9a37-4c182477de58;

Is it true? Has the procedural black hole in the Insolvency Regulation regarding the application of the public policy article and understanding been remedied? Or maybe it doesn't really even exist? Practical doubts, the lack of previous specific investigations of the article, the economic crisis caused by the pandemic creates an element of relevance to the topic. The new decade is a good time to review the concept / application of public policy in the EU, its practice, to analyze the current system, its potentially flawed standardization and to try to direct reasoned insights into the future improvement of the system. The law, its application and doctrine must not only follow, but be a step ahead of the ever-changing development of the market.

Level of analysis of researched problem. The issue of international insolvency law has been raised by authors such as Bankruptcy Judges Jabez Henry (1825), Samuel L. Bufford (2014), lawyers specializing in insolvency cases such as Miguel Virgos and Etienne Schmit (1996), Anne-Marie Mooney Cotter (2003), Paul J. Omar (2003), Jona Israel (2005), Gabriel Moss (2006), Ettore Consalvi (2006), Philip R. Wood (2007), Rosalind Mason (2008), Emilio Beltran (2010), Paolo Manganelli (2016), Tarek M. Hajjiri and Adrian Cohen (2016), Zoltan Fabok (2017), Professors: of International Insolvency law Bob Wessels (2015), of Comparative Law Elina Moustaira (2019), but in their research, the public policy clause was only a secondary issue that mentions the article more than reveals its potential problem. It is also worth mentioning the 2012 INSOL Europe Drafting Committee's proposal to amend the old version of the Regulation No 1346/2000, which did not pay any attention to the public policy clause or its concept. The latest study for improvements and missed opportunities by Vesna Lazić and Steven Stuij, published in 2020, in which the authors examine the latest version of the Insolvency Regulation, Article 33 or public policy is not even mentioned. The only closer commentary on the article can be found in Radvilė Čiricaitė's doctoral dissertation (2012), however, the old version of the Insolvency Regulation is commented on, and it only describes the general features of the article but does not raise any issues or describes the perception.

Novelty. The chosen topic is a step forward and corresponds to this element, because, as mentioned, the article / concept has not received enough attention so far, therefore the topic is considered insufficiently researched and new. Also, a new approach is presented, such as the introduction of new concepts of hard-core public policy and doctrine of sufficiency (sufficiency criteria).

Significance of the final thesis. This research is based on an attempt to systematize the work already done by authors from different countries, their positions on the topic and to provide a general analysis of public policy not only in terms of insolvency, bankruptcy, but also the forms of expression of this principle in other branches of law, as well as constitutional and international law, while highlighting historical assumptions and content. Also, to create and present a proposed

modern legal framework, which can be used in the development of future legal norms and in the refinement of their terms. This type of thesis is a kind of synthesis of the created legal science, historical facts and possible ways to improve it, which allows to be a convenient source of information for those interested in EU private and public law (national legislators, lawyers, officials of the EU institutions concerned).

Aim of research. Evaluate the existing theoretical and legal concept of a public policy in EU law and its application in the context of enforcement and recognition court decisions with an international element in the field of insolvency law.

Objectives of research. In order to achieve the set goal, it was necessary:

1. To examine the concept of public policy, its existing origins, and the latest current understanding and procedure;
2. To analyse theories and doctrines related to private (insolvency, bankruptcy) and public (constitutional, human rights) law, material from other significant disciplines (politics, philosophy) which are relevant to the perception in question, that is, public policy;
3. To compare the defining elements of the application and use of the public policy clause in different legal areas, as well as in ECJ practice;
4. To present the complementary and modern methodologies, such as the sufficiency criteria or the process of unionization, in view to create an optimal understanding and formulation of the concept of public order and its procedural regulation.

Research methodology. The following were used in the study:

1. Systematic analysis - existing research and sources of law have been analyzed, attempts have been made to draw conclusions concerning the concept of public policy being developed and its theoretical / practical aspect in the context of the Insolvency Regulation and other spheres;
2. Comparitive - an attempt was made to compare the legal regulation of the EU Member States and other countries, the doctrinal academic literature, and the developed legal case law in the context of cases with a transnational recognition and enforcement element;
3. Historical chronological - theories formed over time related to the understanding and design of public order, the evaluation of which is presented in chronological historical order, are studied.
4. Logical methodology (induction, deduction, generalization).

The structure of the thesis. A two-part separation system was chosen for this study. This means that the problematic aspect is divided into two separate fields of analysis. The first stage is

designed to explore the exclusively theoretical meaning of the thesis, based on the performed philosophical, political, legal studies. The main elements and definition of public order are sought, the factors that shape its content. Existing divisions and stages of the development process are also distinguished. After examining the theoretical meaning of public policy, the research moves to the second stage - the practical examination of the application of the norm. Attention is drawn to the case law developed by the ECJ, which is not limited to insolvency law. Elements of provisions that explain or limit the use of the norm are sought. The results obtained during the study from both fields are crossed, thus finding references to the answers to the questions raised.

Defence statements. This master's thesis defends 1 essential statement: the application of the public policy exception to the national element alone is no longer adequate, as the synthesis of theory and case law distinguishes the doctrine of sufficiency to help the Member States apply the concept of public policy to cross-border insolvency matters and beyond.

1. PUBLIC POLICY – THE *ULTIMUM* CORNERSTONE OF LEGAL MORALITY

1.1. The essence of public policy

1.1.1. General concept

Before embarking on a substantive study, it must be acknowledged that the terms 'public order' and 'public policy' used in the context of this work are to be understood as synonyms. Public policy can be described from the point of view of different branches - philosophical theoretical, social, economic, practical political, administrative, legal, managerial (Annex No. 1). However, there are two essential groups - the theoretical one, which is examined by philosophical science, and the practical one, which reflects more the attitude of the representatives of politicians. Theoretical is more related to the real origin of the phenomenon and its composition, when the practical political expression describes the real processes that shape the phenomenon and especially the dependence on its real implementers, that is, the government.

The philosophical expression of the phenomenon comes from the fact that the authors view the procedural as too narrow an expression, as it considers it as a specific state of power manifested in legislation, but from a philosophical point of view it should be seen as a set of ideas[13]. From a philosophical prism, public policy should be understood as a phenomenon of intellectual result, not an element arising from itself. This is because, under the influence of various factors, its establishment and expression ultimately depends on the human criterion - the results of its activities, which are manifested through its intellectual understanding. For a social life based on community, policy is a factor (or agreement) that sets the guidelines for it to function. If the law provides for the rights and obligations of society, then the policy sets out the bases according to which the law must fulfill its purpose[14]. Meanwhile, the principle differs little from public policy, but from the moment a person has to explain why a particular principle works, his arguments and assumptions are not based on the principle itself, but on public policy and its objectives. Like the rule of law, the principle should be a tool to achieve public policy. It should be understood as a symbol of a community, reflecting its priority base against the struggle of certain problems in various fields or the fostering of a system of values. True, this is often based on substantial constraints on the actions of individuals, as everyday dilemmas stem from people's willingness to act in their own interests, which is not always recognized as a norm that has a

[13] Lee E. Preston and James E. Post, *Private Management and Public Policy. The Principle of Public Responsibility* (Stanford: California, Stanford Business Classics, 1975), p. 11;
[14] Eric Thomas Weber, *Morality, Leadership and Public Policy. On Experimentalism in Ethics* (London: Continuum International Publishing Group, 2011), p. 100;

positive impact on the community. Fostering different characters creates different communities, various imaginations of good and bad ideas. This vision makes it possible to construct provisions in force on the basis of a framework agreement, setting limits on both individual and public interests. Boundaries are universally recognized and are of interest to most individuals who take active steps together to create it. This is where both policy making and the principle of group action emerge. The synthesis of these two elements leads to an active discussion of public policy on definitions, descriptions, categorizations, classifications, meanings, validations, problematic aspects and etc. Therefore, public policy can be understood as the result of these struggles, manifested in the accumulation and filtering of ideas, depending on a set of arguments that determine one or another result. These ideas should become the starting point for further instruments that provide the beginning and direction for the nature and objectives of the implementation of these tools. In other words, it becomes the personification of the perception of reality, the conceptual construction. True, such a structure can have not only the state, but also corporations or other business entities, as they "have policies on accounting, safety, and harassment that conform to government policies"[15]. Finally, from a philosophical point of view, public order could be expressed as a specific community's desire to enshrine a utopian order in its interrelationships through instrumental guidelines, as this phenomenon is clearly directed towards a particular goal that could be interpreted creating satisfaction for the whole.

From a practical political point of view, public policy is more closely linked to the implementation of guidelines published by a government entity. This aspect is partly reflected in Thomas R. Dye's statement that public order means "what governments choose to do or not to do"[16]. It is true that this concept is not specific enough and is therefore open to criticism, as it constitutes a phenomenon in which government is the entity that has the power to choose its course of action arbitrarily. This is not true in Western democracies. Most Western countries (including the EU) have adopted a form of representative democracy, but the essence of a modern democracy is that power comes not from the state apparatus, but from the people, the nation. This means that the government chooses what to do or not to do based on certain guidelines / plan approved by the group of people the government represents. It is society that often raises problematic bogeys on the issue of state policy, leading to investigative journalism, and dissatisfaction can be clearly reflected in the format of strikes or protests, which can ultimately have a direct impact on government action, decisions and politics. A good example is the mass protests in Belarus in August 2020 following the presidential election, which called into question the certainty of the

[15] Charles Crawford, "Public Policy and Personal Decisions: The Evolutionary Context," *Evolutionary Psychology, Public Policy and Personal Decisions* (London: Lawrence Erlbaum Associates, Publishers, 2004), p. 3;
[16] Thomas R. Dye, *Understanding Public Policy (Fourteenth edition)* (Pearson Education Inc., 2013), p. 3;

results due to state policies against corruption and the impermissible restriction of free speech. Therefore, a relatively slightly more precise concept due to its less direct absolute exaltation of power, which would reflect the political definition, could be: "the broad framework of ideas and values within which decisions are taken and action, or inaction, is pursued by governments in relation to some issue or problem"[17]. However, it is the main aspect of the political approach that is power and its interaction with the development of public policy (as if it were its two main elements), so its significance cannot be underestimated by the theoretical basis that is being developed to substantiate this phenomenon. This is evidenced by other formulations of this type: "A public policy is the product of the activity of an authority invested with public power and governmental legitimacy"[18], "A public policy is the product of activities aimed at the resolution of public problems in the environment by political actors whose relationships are structured. The entire process evolves over time"[19]. The government aspect is also important in that it reveals the criterion of bindingness - the system created by government instruments is binding in the community in which it acquires legal force, so University Panthéon-Assas Paris II Professor Catherine Kessedjian uses the expression: "from which parties have no freedom to derogate"[20]. However, the above-mentioned guidelines implemented by the institutions reflect specific priority, legal principles, the aim of which is to solve public problems of the society or only of a certain specific group. For this reason, the political approach also directs its research aspect to political, administrative cooperation between the involved actors, as their dialogue determines the effectiveness of the development of provisions and their content. These guidelines must have a specific interpretation or form of expression that could reflect the ideal being developed, otherwise it would not meet its requirements and purpose, as its implementers (government or other subordinate executive departments, courts) could not implement it properly without knowing its structure, substance or the desired behavior of the authorities. Thus, it usually acquired the forms of statute, edict, regulation, constitution, order, warrant, law, ordinance, permit, rule, agreement of political parties[21]. It can also be certain un-legislated or un-codified actions that create rules of conduct or customs that link the specific, exclusively targeted action of public policy[22]. However, it cannot be equated with 'public opinion', from which the practical political concept differs.

[17] Stephen Brooks, *Public Policy in Canada: An Introduction* (Toronto: McClelland and Stewart Inc., 1989), p. 16;
[18] Yves Meny and Jean-Claude Thoenig, *Politiques publiques* (Paris: Presses De La Fondation Nationale Des Sciences Politiques, 1990), p. 130;
[19] Vincent Lemieux, *L'étude des politiques publiques: Les acteurs et leur pouvoir* (Sainte-Foy: Les Presses de l'Université Laval, 1995), p. 7;
[20] Catherine Kessedjian, "Public Order in European Law," *Erasmus Law Review* (Vol. 1, Is. 1), 2007, p. 26;
[21] Frank Fischer, *Reframing Public Policy – Discursive Politics and Deliberative Practices* (New York: Oxford University Press, 2003), p. 2; Peter Knoepfel et al., *Public Policy Analysis* (Bristol: Policy Press, 2007), p. 24;
[22] Satyajit Mohanty and Rabindra K. Mohanty, *Community Policing as a Public Policy. Challanges and Recommendations* (Newcastle: Cambridge Scholars Publishing, 2014), p. 39;

Public policy contrasts from public opinion in that the latter has not acquired the legal form of the state apparatus in the instruments given to it, but public opinion can turn into it. This seems to prove that without the intervention of a public authority, public policy does not become hismelf. It is true that since politics is associated with government, and it is usually changing, as are the phenomena that need to be addressed, the norms of public policy are constantly transforming, modifying, evolving, which depends (according to the theory of this direction) on the government apparatus. Therefore, public policy should be understood as a time-sensitive phenomenon. The practical examples to which the subject of the study relates are given by Martin Potucek: "transportation, health care, education, sports, housing, monument preservation, protection of nature, and a myriad other concerns"[23]. However, it can be said in part that the Western procedure of developing national public policy is constant (Annex No. 2). 'Public' also means that it is an area accessible to everyone that can be influenced by public opinion, in other words, especially 'politics' is 'public' at present, as it is open to debate in social spaces, media, television and on other platforms. However, it must be acknowledged that part of the public is not as focused on this debate as deeply as it should be. In other words, either part of the society is not sufficiently qualified or their attitude is not fully formed. David Boonin describes this situation, commenting on the public policy from the perspective of the principle of equality: "Most people also have a general sense that equality matters in many public policy contexts, but they may not have thought clearly about just what equality amounts to or about what exactly it is that should be equalized"[24]. This is why the policy is developed by delegates and professionals in those fields (and at the same time its application is decided only by the competent courts) (parallel to the Rationality Project, which will be explained in the course of this study). It allows the field to be recognized as the most relevant for politicians and public administration.

Thus, although both concepts, both philosophical and practical political, are partly different, they can complement each other due to the already stated thesis that philosophical defines the essence, and political prescribes its practical manifestation. A rather good attempt to synthesize the meanings of the two has been made by legal and political scientists from Switzerland, Peter Knoepfel, Corinne Larrue, Frederic Varone and Michael Hill, who have formulated that public policy should be defined as:

> a series of intentionally coherent decisions or activities taken or carried out by different public – and sometimes – private actors, whose resources, institutional links and interests vary, with a view to resolving in a targeted manner a problem that is politically defined

[23] Martin Potucek et al, *Public Policy. A Comprehensive Introduction* (Prague: Karolinium Press, 2017), p. 16;
[24] David Boonin, "Introduction: Philosophers and Public Policy," *The Palgrave Handbook of Philosophy and Public Policy* (Springer International Publishing AG, 2018), p. 1;

> as collective in nature. This group of decisions and activities gives rise to formalised actions of a more or less restrictive nature that are often aimed at modifying the behaviour of social groups presumed to be at the root of, or able to solve, the collective problem to be resolved (target groups) in the interest of the social groups who suffer the negative effects of the problem in question (final beneficiaries). [25]

Together with this concept and the previous analysis, it can be definitively distinguished that public policy has 4 essential elements: (i) Symbolism - it sets guidelines in the form of objectives on the issues of the system of public life; (ii) Communality - the guidelines are known to the public and reflect its expectations; (iii) Legal enforceability - guidelines are expressed through established legal instruments specific to society; (iv) Representativeness - legal instruments are enforced by competent institutions legally representing the public interest. These ingredients are influenced by a large number of different factors that determine their content. Which institutions are represented, through which legal instruments are occured, to what extent the aspect of communality is implemented, what content guidelines are raised, where do the state moral regulations and a specific position come from, and so on. Therefore, we cannot understand public policy as a separate element, dividing it from philosophical, political, legal theories, ideas and other paradigms[26]. It is their totality that shapes the content of a particular state policy. But about that in the next subsection.

1.1.2. Factors influencing the structure of the concept

When examining elements relevant to specific public policies, it should first be acknowledged that the essential focus must be on the descent of personal decisions, as it has a direct link to the origins of public order and, more precisely, is a direct factor in shaping the phenomenon[27]. If it is not an intellectual result that depends on a person's positive will to create it, then otherwise the negative side of the will is triggered, which creates policy through the prism of misconduct, flashing a niche for public debate through inappropriate action.

It would not be a mistake to say that every person who is currently born finds himself in a particular social environment where specific norms already apply, the principles by which society conducts its activities. The person takes over most of the values from the environment, but at the same time matures within themselves their priority aspects, thus creating a different positional state, which may lead to a subsequent change in the attitudes of public policy.

[25] Knoepfel, *supra note*, 21: p. 24;
[26] Giandomenico Majone, *Evidence, Argument and Persuasion in the Policy Process* (New Haven: Yale University Press, 1989), p. 147;
[27] Crawford, *supra note*, 15: p. 4;

Researchers therefore wondered what determines the positional framework that explains the content of public policy? What content should be available? What is right and what is wrong? This led to the emergence of various doctrines interpreting the environment, opposing, presupposing, or complementing each other. They could be divided into two major groups - the empirical and the moral. The first explains the natural result of human intellectual abilities, which manifests itself through scientific research - to analyze, understand, perceive, research, form, discover. Science creates experiences whose content can influence the attitudes of future generations towards public life, a rule of conduct, or another worldview phenomenon. Moral values, meanwhile, bring the field of research back into a person's inner perception, occured through an inner feeling that evokes an external emotional response. In other words, it is like a field of a person's inner beliefs. This is exactly what this type is aimed at - understanding the system of an individual's personal values and reaction to external factors. Theologians, philosophers of moral values and politicians work more with this type[28]. The relationship between these two types could be illustrated by the thesis that empiricism is designed to scientifically enrich social, political, economic, or other community desires (by creating public policy), but by choosing the methods by which empiricism and its process work, it may be determined not only by previous research, but the final word has the moral inner basis of the individual ('that's a good rule because I feel that way'). A practical example of the thesis is Galileo Galilei, who discovered heliocentrism through empiricism, but had to renounce these discoveries because of the pressure of the religious community and others from moral inner values.

The first intelligent civilizations chose to live in communities. It should be mentioned here that a 'reciprocal system' has emerged, whereby family A and family B choose to 'run a farm' together for the possible common good - the failures of one family can be covered by the right jobs of the other. The emergence of such a principle, together with the possibility of fraud (for example, by refusing to do certain jobs (in ancient times, hunting, nowadays, by analogy, paying taxes)), meant that rules were needed to establish a specific relationship between its members under which everyone would have specific obligations. This gave rise to 'rights', which were originally based on the principle of 'the nature of law'. These rights (more precisely, their greatest advantages) were acquired by those who were powerful, above all, miraculous, servants of God, forming a patrimonialism regime[29] that ultimately established a certain basis of power that shaped the future policies of the community – the goals and rules were shaped by leaders. In this way, the principle of existing rights was an essential basis for maintaining the stability of the community,

[28] Crawford, *supra note*, 15: p. 5;
[29] It is worth noting that the system of internal values of the family and wider communities was mostly based on a patriarchal system;

its existence, on which the first and subsequent states were based. It has become so inseparable that the principle of 'order' has survived to this day, and more precisely, every country in the world has its own guidelines on which it is based, which is now called public order.

> The history of American, British, French, German, medieval, Graeco-Roman, and every civilization could be written for the sake of showing how the carriers of public power figured in the eyes of the various groups within and without the culture.[30]

The only difference was always what / who shaped them and how they formed them. Initially, the rule directly influenced and conditioned the content of the policy. Therefore, it all depended on what values a person holds the position of rule or what his mental mechanism was. If a person is selfish, arrogant, racist, such qualities would turn into policies that reflected the entire community. This model of order-building was later partially explained and sought to change the provisions of utilitarianism that argued that "a typical individual seeks to maximize pleasure and minimize pain to the greatest extent possible"[31]. In other words, order building depends on what a person or group of individuals with the power to influence it recognizes as a benefit, the greatest happiness. It is the inner instinctive understanding of man that determines the totality of moral values, which turns into a policy that is dominated by the aspect of the pursuit of benefit. This is where the question arises - what are the values of the leader - selfish or directed towards the public good? This also explains the established order in which the rulers are economically stable and in a better position than the rest of the community, as public policy has raised the issue of upholding their rights as respect for order and advantages for the system. The dependence of politics on selfish morality led to an authoritarian regime that created rules through which the pursuit of benefit was directed not only to the regulation of community relations, but especially to the economic and social gain of the ruler.

The doctrine mentioned here, utilitarianism, disagreed, because the desires of one person or a small group may not reflect the majority, which is the wrong form. It is from the roots of this doctrine that a provision may have emerged, according to which society will understand that its representative and governing bodies must reflect the general values and goals of the majority of the community, not personal ones. Therefore, utilitarianism because of such a position is realistically difficult to separate from democracy.

However, utilitarianism can be criticized for its straightforwardness to the view that the will of the majority is absolute in pursuing its desire for a policy based on the mathematical

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[30] Harold D. Lasswell, *The Political Writings. Psychopathology and Politics. Politics: Who Gets What, When, How? Democratic Character* (Illinois: The Free Press, 1951), p. 38;
[31] J. Michael Martinez, *American Environmentalism. Philosophy, History and Public Policy* (New York: CRC Press, 2014), p. 11;

calculation of benefits and losses. Is the selfish obscurity of minorities for the majority a truly modern approach to society? At the same time, is the pursuit of well-being created by ultilitarianism always right and legal, as there are opinions that disproportionate majority opinion can lead not only to indifference and selfishness, but also to the seek of the short-sighted good, even by non-legal means. Thus, social, qualifying, legal criteria have also been raised, because according to a study by John Stuart Mill, sometimes the tyranny of the majority can lead to an oppressive public policy[32].

Another problematic aspect influencing the policy element is that utilitarianism, due to the predominant selfish moral traits of the people, has been directed only to the welfare of the present, thus not thinking about the situation of the future community e.g. the decision made for massive deforestation for wood reduces the number of forests for future generations, reducing the number of plants performing photosynthesis changes the rhythm of nature. Or another persofinification of this example is King Louis XIV of France (King Sun), who would describe this element in his 'motto' - *après nous, le déluge* (translated from French: after us, the flood). This thesis returns to the general understanding that politics depends on the values of the community - its moral sophistication. It can be argued that in this place in the twentieth century, group institutionalism was one of the means aimed at integrating it into morality by accumulating good practice, complementing and developing the attitude of the community. It can also be said that utilitarianism explains that the perception of different communities in their desires and the use of different means to achieve them have led to different policies in the countries of the European continent.

There is some opposition to this philosophy by Immanuel Kant, who believes that society has certain internal absolute norms that it must abide by because they apply equally to everyone[33]. In acting, a person must follow the provisions of the 'categorical imperative' created by the author, the essential premise of which was that before carrying out his actions, each person must consider whether his action is what he would like to see for himself. In the negative, he must refuse to pursue his whim, which would run counter to the standard moral base. This golden rule, which is one of the beginnings of Kantianism, also has some connection with the principles of mutual trust and automatic recognition, more precisely, it partly explains where these principles come from. Interpreted through Kantianism, each Member State undertakes to recognize judgments of other Member States automatically (which determines speed, procedural efficiency), as it would like its own judgments to be recognized just as quickly and automatically on the same principle of

[32] John Stuart Mill, *On Liberty* (Batoche Books, Kitchener, 2001 (1859)), p. 9, https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf;
[33] This is like the distant origin of transnational public policy theory, which is described in the next subsection;

potential benefit. This means that Member States create a level playing field in which everyone thinks they (norms / principles) are right and that compliance is the right thing to do, not only because they are such, but also because they want other countries to do the same treatment of the relationship between them - the right system is born of a common desire to be treated equally by all, and the desire depends on a separate perception of reality that ultimately coincides. Also, Immanuel Kant disagreed with a quantitative approach to the individual, as each member of the community is a goal rather than a tool to achieve a goal when utilitarianism was based on a quantitative system of counting and actually collecting the majority[34].

It would be expedient to mention two opposite paradigms related to the psychological features of man – egoism and altruism - which try to explain the reasons for the formation of morality. Egoism (like socio-darwinism) is based on the fact that man arises from an animal, which determines his desire to survive in all possible ways in the world, which he sees as a certain arena of survival (this doctrine could be more closely linked to ancient times and the Middle Ages). In order for a person to survive or push himself forward, he can choose measures that are aimed at violating the interests of other persons. This means that the person concentrates on himself, which determines the natural base of the principle of selfishness. Altruism, meanwhile, tries to show that man, through evolutionary human evolution, has changed certain qualities that have led to an inner desire to help not only oneself but others as well – "philanthropists donate money anonymously or soldiers sacrifice their lives to save their peers"[35]. But egoism may oppose that the hunger of a man who was previously an altruist still leads him to steal for survival. Here comes another paradigm: ethical egoism, which tries to address the negative features of simple egoism by stating that person should be encouraged to take an interest in oneself, but this interest eventually benefits the environment as well. Selfishness should be directed more towards autonomy (self-support), which can contribute to the values of the community through its public spirit. In this case, the policy becomes focused on the individual's personal development, which ultimately serves society, as he learns to understand the meaning of the system, can contribute to its development and can perform various civic duties (paying taxes, voting).

Another concept is social-darwinism (especially close to egoism), whose essential statement is that only the strongest survive. According to this theory, it does not really matter what the policy will be - its leaders will only be able to survive if they have the inner instinct to adapt or if they have established their power to be strong in the community. If they are able to survive - they are creating good practices, if they are not able to do so - their ability to create bad practices

[34] Immanuel Kant, *Groundwork for the Metaphysic of Morals*, (1785), p. 29, https://www.earlymoderntexts.com/assets/pdfs/kant1785.pdf;
[35] Martinez, *supra* note, 31: p. 19;

is useless and bad, which means that nature is actually creating its own inviolable public order. It should be emphasized, however, that proponents of this paradigm rely more on the biological origin of man and the laws of nature, which cannot be directly accepted in the 21st century, as the essential characteristic of man is the intellect, which transcends instinctive animal behavioral remnants. It is the emergence of morals, rules, and policies that has led society to limit these instincts by creating certain acceptable norms of behavior. Slavery, the power of the strong in Europe, is abolished. Also, orphanages are being set up to look after and try to provide equal opportunities for children without families, charities and other special funds to help people living in poverty or illness, and a simple state pension helps to care for the elderly. Policies based on social-darwinism are no longer appropriate to equate man with the development of his intellect. However, it explains why the principle 'rule means policy' has long prevailed. Those in power were at the top of the pyramid, leading to their superior position and ability to influence order. Socio-Darwinism could better explain man's relationship with other animal species, as man can control the animal world (such as the number of insects in his yard) through the development and application of technology, yet man keeps animals at home, equating them to full-fledged family members or creates special gardens to look after them.

This is where the paradigm of environmental justice comes in, which states that even weaker individuals must have rights, so it is important how society distributes those rights, that is, what policies it formulates not only to satisfy the interests of the majority or the powerful, but also other minorities. It encourages a move away from a simple cost-benefit calculation, but points out that the benefits must be comprehensive and forward-looking. The policy that is being developed should focus on a set of rules designed to align the system of community action by anticipating a real rather than a mathematical economic situation. Politics must be real, fair to its community.

Territorialism and universalism must also be borne in mind. Although they focus on legislative frameworks, they can also explain the perception of the extent to which the policy being developed must be valid. Territorialism argues and for a very long time it is essential that the 'rule' should cover only a certain part of the territory, be closed, because other groups in other territories have adopted different cultures and paradigms in policy making. Universalism, meanwhile, promotes international cooperation, the development of common policies based on the systematization and application of good practice to communities. The achievements of certain communities can contribute to the development of another if there is sufficient willingness and understanding to see the benefits of such cooperation. It is the development of this doctrine that has been advocated by the already quoted Harold Lasswell, who is identified as the person with

whom "the origins of the policy focus are usually identified with"[36]. One of his theses was related to the need to develop organizations that would be able to help shape policy[37]. Here he is also presupposed by Deborah Stone, whose proposed the Rationality Project seeks to link policy-making to a synthesis of research that would increase aspects of validity and professionalism. In this way, the previously criticized utilitarianism for its purely economic approach should be conditionally addressed, as the paradigm proposed by the researcher is based on some more detailed decision-making process[38]. This means that:

> Decision-makers first identify empirically the existence of a problem, then formulate the goals and objectives that would lead to an optimal solution. After determining the relevant consequences and probabilities of alternative means to the solution, they assign a numerical value to each cost and benefit associated with the consequences. Combining the information about consequences, probabilities, and costs and benefits, they select the most effective and efficient alternative.[39]

The Rationality Project indirectly, but by its very nature, promotes the integration of researchers 'activities, which is more effective in gathering their views from a wider circle of individuals, and their performance can be seen through the international organizational model proposed by Harold Lasswell. One of the practical manifestations of the implementation of the Rationality Project is the Age of Enlightenment, during which monarchies with titular powers began to integrate philosophical, legal and political sciences into its creation, thus enriching the state model that is also linked to public policy.

However, not everything that is organization-based is fine. Neo-institutionalism researchers reveal when studying the negative activities of organizations that, indeed, it is not only based on the generation of good ideas and its proposed application, but real play with the given powers not only makes it easier to influence politics, but even block certain dissemination of other group ideas. Their internal and external mass influences the ways in which society tries to achieve its goals, even the very concept of dialogue. They affect how the environment is understood and how it should work. This is why there are proponents of territorialism who are the promoters of overseeing the activities of such organizations due to possible excessive political intervention. In interpreting and finding reasons for such phenomena, neo-institutionalism distinguishes two directions: rationalism and constructivism. Rationalism defines the personal desire of the members

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[36] Fischer, *supra note*, 21: p. 2;
[37] Doug Torgerson, "Contextual Orientation in Policy Analysis: The Contribution of Harold D. Lasswell," *Policy Sciences,* 18 (Elsevier Science Publishers B.V., Amsterdam, 1985);
[38] Before quoting, it should be emphasized that the calculation of the benefit is not based solely on the economic aspect, as a reading of the quotation could give the impression;
[39] Fischer, *op. cit.,* p. 4;

of the institutions to focus on the maximum pursuit of individual benefit by accurately calculating the set personal goals, while constructivism expresses the common will of the members, which, by common views, imposes them on other actors in the environment[40]. True, neo-institutionalism should not be understood here as a negative version of institutionalism. It is only an analysis of the studies by which this science seeks to draw attention to the systemic impact on the creation of organizations. Its one of the purposes is to study and analyze their activities.

In part, a different but fundamental breakthrough has been provided by interventionism, which restores the position of universalism under a magnifying glass, as it encourages territorial state institutions to take more active oversight, which can also be supported by the integration of the same territorial Rationality Project. This is also where the feature of the current element of public policy (its promotion) - state representation - appears in part. On the basis of interventionism, state apparatus must be more involved in the creation of the general welfare of the state, without separating it into a majority or a minority. The essence of this paradigm is that community representatives, politicians and other active persons must have a direct interest in the efficiency and effectiveness of the state, helping its members to solve economic, social and other problems with specific solutions. In this way, the state apparatus becomes directly responsible for the implementation of public policy, ensuring that it does not deviate from the norms it develops. Interventionism seems to seek to protect the community from its own flaws, which could again be traced back to the aforementioned statements of egoism and social-darwinism. Interventionism also interacts with pluralism, which argues that the state must reflect the social desires of the community, the implementation of which is the responsibility of the bureaucracy. Such relationships show how paradigms can interact with each other to this day.

There are also many more different factors and aspects that lead to different perceptions of public policy. Religious studies, the rise of experimentalism (which led to the development of reasoned and forward-looking policies), Marxism (one of the main advocates of the interests of the dominant class), neo-Marxism, globalism and rationalism, utility theory, consequentialism, egalitarianism, contractualism, social choice and other phenomena can also be mentioned[41]. They could have their own species classification - legal, economic, biological, religious[42]. All have their own basis, their own separate positions, but in reality, paradigms are oriented towards the formation of internal and external human behavior (or their group), the causes and content of its moral perception or their results. If science focuses on the principles of personal action, decision-

[40] Andrea Lenschow, "Europeanisation off public policy," *European Union. Power and Policy-making (3rd edition)* (Oxon, Routledge, 2006), p. 62;
[41] Daniel M. Hausman and Michael S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy* (New York: Cambridge University Press, 2006);
[42] Crawford, *supra note*, 17: p. 4;

making theories, and areas of policy or legal development, they will be related to the analysis of public policy. This is why public policy is a direct reflection of legal morality, as it reveals the value content of a community that establishes a distinctive but binding symbolism that can be judged through the moral attitude of each individual. Public policy is a monument to the moral attitudes of the community, the form of which is directly dependent on the values that emerge over time.

1.1.3. 'New' hierarchical classification?

A very careful examination of the concept should focus not only on law research related to the state public order, but also on the theory developed by the arbitration system, and more precisely, the division. According to the developed study, the concept is divided into three parts - national, international and transnational, assigning their own features, and position in the system, linking it to arbitration procedures, but if properly tilted, this division can be extended to a theoretical broader classification. It can effectively explain the manifestation of public policy in the legal web by creating a kind of pyramid system.

1.1.3.1. National public policy

> Is it a good idea to build nuclear power stations? We are not sure how to deposit nuclear waste in a safe and permanent way. Are we better off building more kindergardens, or supporting industrial innovations? Should we devote our limited public resources to providing better pensions to seniors, or better salaries to civil servants? Or should we rather increase welfare benefits for children?[43]

On such theorical questions, Martin Potucek concludes his book, *Public Policy. The first part (A1) of A Comprehensive Introduction*, forming practical phenomena that seek to reveal value otherness through moral / political / philosophical aspects. One or another response to them would form a national public policy or at least a public opinion influencing its composition. There are many more such phenomena. Frank Fischer, for example, illustrates the difference between public policy and, in particular, its internal values by raising a practical question: "Is, for example, the death penalty a means to a necessary end, or it is an evil end unto itself? It depends on whom you ask"[44]. The imposition of the death penalty is an instrument (also one of the elements related to the composition of public order) that has been used to administer the system of punishment, justice

[43] Potucek, *supra* note, 23: p. 16;
[44] Fischer, *supra note*, 21: p. 61;

and the prevention of criminal offenses. Only in 1998 did the Republic of Lithuania renounce it, declaring it unconstitutional[45], meanwhile France did so in 1981, 1949 in West Germany, and 1948 in Italy. This example reveals that, at different times, states seem to have developed a common legal practice, which was the result of equal treatment on this issue of public policy relating to the right to enforce sentences. This is becoming an example of uniform practice being adopted by more and more communities. However, takeover is not consistent, so these phenomena together show the practical situations in which states can form a different approach to public order, manifested through a territorial element that indirectly leads to the differentiation of elements between states. Thus, a rather clear and initial type of classification emerges here - national public policy.

In part, it is the broadest and most widely applied, as the internal order of nation-states has been in shape for a very long time. Its exclusively territorial nature means that it confines itself to laying down the essential internal rules and regulations of society, which have a binding element in it. As Andrey Ryabinin points out, this is best reflected in the case where exclusively internal rules are applied to regulate closed internal proceedings, thus providing for the determination of the essential applicable law and other rules that determine the course and outcome of the proceedings[46]. Such exceptional rules of one state are based on its personal internal public policy, thus portraying this type in practice. In converting this type of division into a general perception, it should reveal the totality of the public order of each state through exclusively internal embedded symbols, which at their level are in fact all equally important and, for a given legal action, the whole of such a policy is essential. Due to its purely internal nature, this type in practice poses the greatest distinction between states when comparing their public orders. Therefore, their use in practice to deal with cross-border issues should be the least flexible, as (for example) a judgment of one state court that will subsequently affect another should take into account the totality of national public policy, thus posing the greatest risk of discrepancies.

1.1.3.2. Internantional (hard-core) public policy

Meanwhile, the international can be considered narrower than the national because “only the most fundamental norms of the national public policy form part of each State’s international

[45] “On the Compliance of the Death Penalty provided for in the Sanction of Article 105 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania, (Vilnius, 9 December 1998), Constitutional Court of the Republic of Lithuania, Nr. 2/98,” LRKT, https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta385/content;

[46] Andrey Ryabinin, *Procedural Public Policy in Regard To The Enforcement and Recognition of Foreign Arbitral Awards* (Central European University, 2009), p. 4;

public policy"[47]. As Dr. Marie Louise Seelig rightly points out, the judgment of the German Federal Court of Justice in 2008 is relevant here, which ruled that not all violations of mandatory German rules are infringements of the country's national public policy. At the same time, not all violations of mandatory German rules are infringements of international public policy, as only violations directed at the most fundamental principles of the state lead to a violation of international 'public policy'[48]. In other words, not all breaches are equivalent to national public order and, at the same time, not all national infringements are equivalent to international. Such a court interpretation creates a classification and distinction between the two concepts by stating that only substantial deviations are contrary to international public policy. Such a division creates a value criterion for assessing the degree of the situation, stating that not all situations must be based on the direct fact that they have infringed public policy with a view to contravene a specific order. In other words, such a fact is sufficient in not all infringements. Thus, it is a climb up the pyramid, highlighting the specific relevance of national public policy provisions compared to other norms. Each state may differently distinguish the principles of a particular content from the rest of the others, so it is not a fully unifying universal paradigm of value moral attitudes. However, in this way the scope of the public policy provisions is narrowed, making it more specific, but the assessment of the situation is not sufficiently predictable precisely because of the assessment of the attitude - whether it is enough to equate the situation with a breach of fundamental guidelines. At this point, it can be pointed out in advance that the introduction of the words 'manifestly contrary' in the Insolvency Regulation will in particular provide for a system whereby only international public policy can be used in the context of an article, as national public policy is too general and does not exclude direct supremacy between its system as its interpretation itself has limitations in practice. Expressions such as fundamental principles or constitutional rights in themselves create a justification for the existence of differences in the values of norms. Thus, this type creates a hierarchy of national values, which makes it possible to raise the value criterion of moral provisions, which still really depends on the national self-determination of the state. This may lead to a contradiction between the use of such a term 'international' for this type, since 'international' is, in its view, more concerned with the establishment of generally valid international values, which is much more closely linked to the type described in the next subsection. In order to make the distinction more obvious and not have room for mixing types, another term, 'hard-core

[47] Dr. Marie Louise Seelig, "The Notion of Transnational Public Policy and Its Impact on Jurisdiction, Arbitrability and Admissibility," *Annals FLB – Belgrade Law Review*, Year LVII, 2009, No. 3, p. 121;
[48] "BGH, Beschluss vom 30.10.2008 - III ZB 17/08," OPEN-Jur, https://openjur.de/u/74750.html;

public policy', could be suggested, borrowed from the description used by Dr. Pierre Lalive[49], thus expressing the distinctive element of importance / fundamentality of national principles.

1.1.3.3. Transnational public policy

However, as mentioned, hard-core policy does not create an overall ultimate universality, as there is a possible real distinction between the established guidelines. The fact that one recognizes a particular symbol as a constitutional, fundamental or other higher-powered expression does not, in theory, mean that the other views it with the same eyes. This is why transnational public policy emerges. This type is like an even bigger step up, where the fundamental difference is that it is a guideline that is actually recognized by most states and is therefore understood as logically universally valid in the wider arena, regardless of national jurisdiction. Identical mass perception and common recognition determine their existence as an intellectual and moral outcome of a civilized community. It becomes like universal minimum standards on which a system of a large number of states is built. This group is like the result of the idea of Immanuel Kant's absolute norms that apply to everyone. For example, in the arbitration case *World Duty Free Company v. The Republic of Kenya* has ruled that bribery in the legal system is a violation of transnational public policy[50]. This means that such a violation is as commonly perceived as substantial or destructive (in the case of bribery) that it does not require proof of any additional understanding of the principle. In other words, transnational public policy is such that it stems from a general universal perception, the entrenchment of a mass principle in the national systems of states, established over time and practice. An even more specific concept is provided by Catherine Kessedjian:

> Transnational public policy is composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world. These norms aim at being universal. They are the sign of the maturity of the international communities (that of the merchants and that of the civil societies) who know very well that there are limits to their activities.[51]

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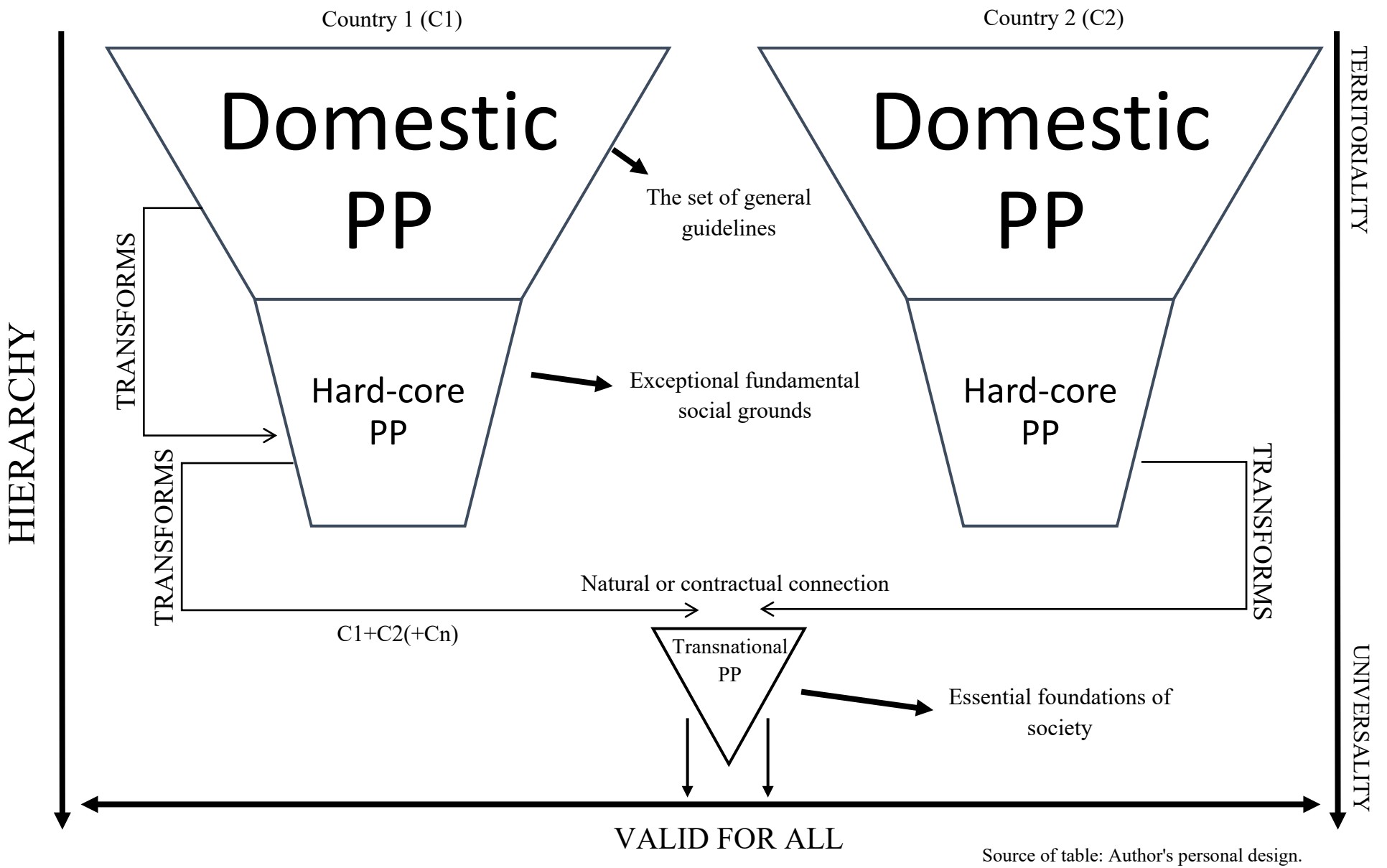
[49] Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," *ICCA Congress series 3/1986*, p. 258, 262;
[50] "World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award of 4 October 2006," TRANS-Lex, para 157, https://www.trans-lex.org/241400/_/world-duty-free-co-ltd-v-the-republic-of-kenya-icsid-case-no-arb-00-7/;
[51] Catherine Kessdjian, "Transnational Public Policy," *ICCA Congress Series 13/2007*, p. 857, 861–862;

This type of perception makes it possible to assume, and more precisely to refine, the latter thesis that it is precisely the establishment of hard-core public policy norms in the context of a large number of member states that should be perceived as a transnational 'public policy'. This qualification not only explains the hierarchy, but also the possible conversion of the guidelines to a higher level concept:



Source of table: Author's personal design.

As shown in this summary table, hard-core public policy transforms into transnational public policy naturally or by agreement. The natural should theoretically be able to emerge through a juxtaposition analysis of existing conventions, references or other substantive legislation, emphasizing that a particular principle is fundamental to the parties to the dispute and that national courts would not be properly served if they did not rely on this guideline (this can be seen precisely in arbitration practice). However, a slightly different path, which could be seen as more specific and legally clear, is a type of agreement that would result in a specific framework arrangement of large number of countries establishing the highest legal force of specific common rules, creating a transnational public policy binding on members. It is at this type that the main and research-relevant example emerges: the EU.

1.1.4. Internal guideline distinction – substantive and procedural

Before reviewing the theoretical framework of public policy being developed by the EU, another distinction should be made, which appears in both arbitration and judicial cases concerning the application of the concept of public order. This can be divided into procedural and substantive. Such a classification arose precisely through practice, as it began to follow the basis on which the exception was used and, more specifically, the origin of the exception, from the procedural or substantive breach of the specific guidelines.

Procedural ones should be understood as those that arise from violations of the dispute (case) procedure, e.g. during the procedures that have occurred due to the incorrect application of procedural legal norms or the inadequacy of their wording. In this way, it is as if the quality of the application of the norms, which ensures the above-mentioned principles, is assessed[52]. It is true that the concept of procedural is more universal, as procedural order is often based on the same principles, making it easier to predict and more often applied. Practical examples of this type are bias, equality of arms, proper notification, the right to be heard, non-compliance with the principles of a fair trial or their improper implementation during the proceedings.

Meanwhile, the substantive one is based on the subject-matter of the dispute and its unjustified, incompatible result, which manifests itself precisely in the final content of foreign decisions, the implementation of which in another may have negative consequences from the perspective of its society - the host state. As identified by the research group on EU practice, this type is manifested through the principle of proportionality[53], whereas it is as if the relationship

[52] Such an assessment, as will be observed later - is severely limited by the ECJ;
[53] Directorate-General for Internal Policies, *Interpretation of the Public Policy, Exception as refferred to in EU Instruments of Private International and Procedural Law* (Brussels: European Parliament, 2011), p. 13;

between the application of the judgment and the legal moral basis of another State is being assessed. Although this type is in fact more dependent on the political and cultural features of the state (their differences), it is precisely because the EU promotes the legal integration of states that "the legal divergences between the Member States are rarely strong enough to bring a contradiction with public policy"[54]. And for this reason the issue was raised by the EU Commission and Parliament, which sought to abolish substantive public policy due to its difficult practical application, leaving only procedural public order directly addressed, more concretely through Article 47 of the Charter, a fair trial provision and according to its basics[55]. Although supported by a special commission of inquiry, this idea was unsuccessful due to its particular radicality (more precisely, the innovations for which the members were not prepared) and the lack of support within the community itself[56]. Practical examples of substantive public policy could be singled out, such as misapplication of principles such as *pacta sunt servanda*, *res judicata*, good faith, equality of creditors, non-discrimination, as well as establishing facts such as illegal contracts, bribery, corruption.

In a study carried out in 2011, a team of researchers analyzed the case law of the EU Member States on the basis of which the public policy clause was used in the application of Regulation No 1346/2000. According to them, an examination of 23 Member States revealed only 3 successful decisions (and all only through a procedural factor) acknowleding a breach of the exemption and refusing to recognize the judgment of the court of origin[57]. Examining the basis of these and other failed attempts, it was observed that procedural public order manifestations revealed themselves in attempts to state the right to be heard, lack of jurisdiction or verification, insolvency administrator independence, procedural fraud, lack of reasoning, excessive use of procedural means. Substantive examples, meanwhile, were so meager that it was for this reason that this study group confirmed the possibility of changing the substantive basis. However, the initiative was unsuccessful.

1.1.5. Negative and positive functions

Another difference can be seen in the theory of public order. Positive is displayed in the ability of a Member State to form its legal moral backbone, compliance with which may be a

[54] Ulrich Magnus and Peter Mankowski, *Brussels I Regulation* (Munich: Sellier. European Law Publisher, 2007), p. 568;
[55] "Proposal for a Regulation Of The European Parliament And Of The Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/2010/0748 final - COD 2010/0383)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010PC0748&from=EN;
[56] Peter Arnt Nielsen, "The Recast Brussles I Regulation," *Nordic Journal of International Law 83* (2014), p. 65;
[57] Directorate-General for Internal Policies, *supra note,* 53: p. 119-120;

sufficient reason to defend the internal beliefs of the public from external influences, that is, against the parties initiating foreign court decisions. With this instrument, the state can seem to publicly say that it may be able to resolve the dispute by better means or achieve a fairer result. It must not be forgotten that one of the cornerstones of many countries in the world, and of the EU in particular, is the rule of law. However, the negative show itself on the other side of this relationship - it is like an instrument to deprive another state of a lawfully made decision on the host state's attitude towards it[58]. Thus, the positive defends the host, while the negative manifests itself from the perspective of the party initiating the decision.

It is worth noting that this terminology is used to describe a conditional and different type of distinction on the part of the political sciences. According to it, the principles of representativeness and legal consolidation are discussed, looked back more peculiarly, where the positive one explains the active actions of state institutions to address specific public issues. In other words, it is the action of the government to use its legal instruments to regulate the objectives set. Negative, meanwhile, occurs when the government decides not to voluntarily take action to address the problem, or more precisely, decides to address the problem through inaction, as its active action can provoke community dissatisfaction or other damaging reactions.

1.2. Exceptional norm in the context of the European Union

1.2.1. Ordre public européen

Thus, knowing that national public policy is transforming into a hard-core one on its value scale, and that the partly common mass identity of hard-core public policies creates a transnational public policy, one can look for practical ways to display the latter. And it is the basis of the EU's activities, due to its exceptional organizational nature. However, why and how does this type manifest itself precisely through the prism of the EU? It is expedient to begin the search for the answer from the roots of its formation.

If before its founding the politics of some states were developed by the strong, religious, nobility and those with power, then today the union has a political and legal methodology of rules based on the implementation of the ideas of the majority of citizens, combining the interests of minorities and other cultural groups which occurs through the competent delegated and other bodies. The potentially tyrannical and destructive significance of public policy has also been demonstrated by the dangers of World War I and World War II, when different idealistic policies

[58] Alexandra Shtromberg, *Substantive Public Policy in Enforcement of Foreign Arbitral Awards in Russia* (Master‘s thesis, University of Helsinki, 2017), p. 14;

or, more critically, abuse based on trespass, discrimination, genocide, terror, chauvinism, propaganda, militarism and other radical ideas costs not only the lives of the country itself, but also the lives of millions of people in other states, creating such artistic formulations as Gertruid Stein and Ernest Hemingway's *lost generation*. Describing the beginnings of EU formation, August Reinisch argued that "Europe has been a history of war and peace, where rival political entities, predominantly in the form of nation-states, have tried to dominate each other"[59]. First of all, such conflicts show once again that not all states have the same policies and approaches to fundamental rights. Secondly, the subsequent management of the conflicts gradually revealed symbols that were unacceptable to the interests of the parties, they became generally understood as harmful. Public policy aimed at the expansive demonstration of power in Western-minded states has become intolerable because of the atrocities it has caused, and the resulting erroneous forms of values that have been such as a result of mass moral condemnation have had to be deconstructed. And the collective desire to achieve common goals is already a path that raises the importance of certain values above the national sphere. Economic growth required concentration and the sharing of resources. There was a need for a catalyst that would lead to a common unified approach to key international issues to be developed together rather than individually. There was a need for a mediator who would resolve idealistic disputes and reconcile a broader unified direction to modern international public good. Evolution and improvement had to become shared, not territorial. At the same time, science itself spread the ideas of Richard Nikolaus Coudenhove-Kalergi, Aristide Briand, and even Winston Churchill for a united Europe. The benefits lay in unity and politics understood that. Modernist approaches were clearly at hand and it was precisely the current EU that, over time, has grown into an entity that has no analogues in the world. Until then, the concept of public order, which positioned territorial values, has acquired transnationality.

The EU, and more specifically its predecessors, was created to address these dilemmas. The theory of European integration began to spread in the 1950s and 60s[60], when there was a public debate among the: (i) federalists who came up with a more radical concept - the United States of Europe with its constitution based on the ideas of a federal super-state, which it saw as a continuing further modern form of intergovernmental cooperation; and (ii) functionalists, who wanted to change the form of state governance, but not in such a radical way, as their ideas were directed towards the idealology of progressively step by step integrating sectors, which should eventually lead to ever closer cooperation in expanding the number of them over time. However, the two were inseparable from the common thesis that the necessity of integration theory is

[59] August Reinisch, *Essentials of EU law (2nd edition)* (New York: Cambridge University Press, 2012), p. 1;
[60] Robert Geyer and Samir Rihani, *Complexity and Public Policy, A new approach to 21st century politics, policy and society* (London: Routledge, Taylor and Francis Group, 2010), p. 112;

indisputable, thus reviving the Pan-European Movement, born in 1923, which spread the ideas of unification in Europe. As a first result, the Paris Treaty entered into force in 1952, which "set up the first truly supranational organisation with a 'High Authority', its main organ, having far reaching powers"[61]. This fact meant that a structure had emerged which took precedence over national rules as regards the powers conferred on it by the states to act in the activities specifically assigned to it, and the implementation of such an innovative system had to acquire its own internal political functioning, which is applicable for both parties. Thus, gradually the *ordre public*[62] which was valid for the nation states, took on a new meaning - *ordre public européen*, which was developed with the introduction of new forms of integration, such as the European Economic Community, the European Atomic Energy Community. It is worth noting that the emergence of fundamental principles was caused not only by the desire to regulate these cross-border institutions (the fact of their establishment), but also by the violations of the Member States during their further operation, which partly gave rise to economic but also legal integration.

The latter led to the creation of a separate legal protection system, which would correspond to the exceptional mass composition of the EU. Alix R. Green provides a very good example here, arguing that "The term 'public' can usefully be recognised as a code or shorthand for complex questions about the nature and use of power"[63]. The 'public' in the EU context seems to imply that this is the result of a general public dialogue, and the larger the public's share of the quantitative criterion, the more difficult the practical procedure for implementing this element of co-decision. It is this that the EU is particularly confronted with: its activities at supranational level create an environment in which 'public' manifests itself through the harmonization of the views and cultures of all the Member States. However, 'public' at the same time means cooperation, communication, which would not have such a positive meaning in states of a totalitarian or authoritarian nature. It is historical experience and its analysis that has led humanity to good practice, transforming the power of several individuals or groups into a majority that involves discussion and reconciling differences of opinion for the common good. While fostering this element creates a complex framework, the EU is trying to take the view that tackling difficult issues together is worthwhile. The EU has been publishing the Journal of European Public Policy since 1994, which reviews various studies on the debate on community development, Member States' views and arguments on certain issues, and so on. Thus, in creating and regulating the given areas, which form a common framework and its activities, the EU has created its own separate

[61] Reinisch, *supra note,* 59: p. 4;
[62] A concept derived from a French term which means public order that was extremely popular in organizations formed as a result of French leadership. For this reason, public policy is also called public order and this term is used in other current EU legislation. However, there is no evidence that their scope has a different meaning;
[63] Alix R. Green, *History, Policy and Public Purpose. Historians and Historical Thinking in Government* (London: The Palgrave Macmillan, 2016), p. 4;

legal system, based on the development of primary and secondary legislation, with the principle of direct effect presupposing the supremacy of Union law over national law whereas the principle legitimizes the purposefulness / directionality of the application of that legislation. Primary (treaties) are those that describe the principles on which the EU operates, and secondary (e.g. directives, regulations (including Insolvency Regulation), ECJ decisions, implementing acts, delegated acts, opinions, recommendations) are those that seek to comply with the primary legal tools and their guidelines. In regulations and other key documents, the EU provides, following procedural negotiations, for specific legislation that applies to all or part of the states, usually of a binding nature.

A supranational term could be used to describe the modern EU as an organization, which has its own elements: "majority voting in the decision-making institutions with the power to bind outvoted Members, a system of obligatory dispute settlement, the direct effect and supremacy of EU law in/over national law, and the existence of 'own resources"[64]. This means that the principle of functioning of the EU is based on the conferral of sovereignty of the Member States to the competent EU institutions, which consist of Member States, exclusively their nationals, delegates and other professionals. It would also be appropriate to mention the first ECJ practices here. The key is the legendary 1963 *Van Gend en Loos* case, in which the court ruled that "The European Economic Community constitutes a new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights"[65]. It is supported by the *Costa v. ENEL* 'decision stating that unilateral action by a Member State cannot take precedence over Community law[66]. 1978 *Stato v. Simmenthal SpA* has introduced an obligation to repeal legislation that is hostile and potentially in conflict with European Union legislation[67]. Twelve years later, the ECJ reiterated this system in the *Marleasing* case, exclusively that national legal norms must not only not be hostile, but must also be interpreted in the light of European Union law (in this case, the directive)[68]. Finally, the Treaty of Lisbon, concluded in 2007, one part of which, namely Declaration 17, provided that:

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[64] Reinisch, *supra note,* 59: p. 6;
[65] "Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026&from=GA;
[66] "Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006;
[67] "Judgment of the Court of 9 March 1978. - Amministrazione delle Finanze dello Stato v Simmenthal SpA. - Reference for a preliminary ruling: Pretura di Susa - Italy. - Discarding by the national court of a law contrary to Community law. - Case 106/77," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0106;
[68] "Judgment of the Court (Sixth Chamber) of 13 November 1990. - Marleasing SA v La Comercial Internacional de Alimentacion SA. - Reference for a preliminary ruling: Juzgado de Primera Instancia e Instruccion no 1 de Oviedo -

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. [...] It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law.[69]

The current niches in which the community operates are competition, the single market, energy, public health, the environment, employment, food safety, cross-border taxation and others. These include judicial cooperation in civil and criminal matters, which is where the content of the Insolvency Regulation comes from with the concept of cross-border insolvency proceedings. Over time, the list of these areas has been expanded due to the growing awareness that centralization and unity of state bring more productive benefits to members. Economic, social, cultural, personal good is the goal of the members, which has become an integral part of the EU. These frameworks required roadmap symbols that allowed Member States to work together to create a common set of values into a common EU public policy for peace, freedom, security, economic cooperation and other provisions[70]. It was these general provisions that were actually understood by the Member States as hard-core public policy provisions, and their endorsement led to their integration into the Union's content. It is worth mentioning that the creation of this path also serves the fact that the Member States know the direction of the Union, which can help to decide the satisfaction and approval / disapproval of the member society, as each raises expectations, non-compliance (e.g. the United Kingdom and its 2020 BREXIT movement).

Finding examples of EU public policy guidelines is the easiest way to use the legal instruments and key provisions that are of paramount importance to the community. It is like fundamental particles or directions of the Union analogous to constitutional rights. There are 3 relevant documents here. The first is the Charter, the application of which is recognized in TEU 6 (1), thus enshrining it as a primary act with direct effect, but Article 51 (1) provides that this instrument is valid for the EU institutions and Member States where they apply EU law, thus ultimately limiting its application. However, in an article in December 2019, the European Parliament announced on its official page that it was returning to the initiative to repeal Article 51

Spain. - Directive 68/151/CEE - Article 11 - Consistent interpretation of national law. - Case C-106/89," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0106;

[69] "Consolidated version of the Treaty on the Functioning of the European Union - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - A. Declarations Concerning Provisions of the Treaties - 17. Declaration concerning primacy", EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FAFI%2FDCL%2F17;

[70] Official website of the European Union: Europa.eu, *The EU in brief*, https://europa.eu/european-union/about-eu/eu-in-brief_en#:~:text=promote%20scientific%20and%20technological%20progress,whose%20currency%20is%20the%20euro.;

(1) from the Charter and convert it into a Union Bill of Rights, which would change the scope of this document[71]. Yet, its current scope means that where a Member State has recourse to EU legal instruments, it has an obligation to enforce its decisions in compliance with the fundamental principles of the Charter, such as dignity, freedom, equality, solidarity, civil rights, justice[72]. Two points should be emphasized here: (i) the necessary application and interpretation of fundamental principles arising from both primary and secondary legislation in the application of EU law has already been interpreted by the ECJ in its practice[73]; and (ii) that the Insolvency Regulation is a regulation, a secondary source of EU law, and the application of that act to a national court 'activates' the Charter and other fundamental principles or case-law. This way "EU fundamental rights are indirectly imported into the growing areas of Member States private law"[74]. The Charter positions the essential general individual, civil, economic, political, social rights (which are protected by the ECJ), such as dignity, freedoms, equality, solidarity, citizens' rights, data protection, transparent administration, guarantees on bioethics and justice. The application of these principles becomes like a policy instrument, according to which the internal activities of the community and decision-making in its context must be carried out. It is also presumed by another piece of legislation distinguished by the aforementioned TEU 6 (2), the ECHR (although not an EU document). This act is conditionally aimed at a similar type of content - the fundamental rights of the individual, such as the rights to life, a fair trial, freedom, expression, family. It would also be wrong not to include the TEU itself, Article 2 of which sets out essential guidelines for the functioning of the EU as a whole and its members:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

[71] Ottavio Marzocchi, "The protection of fundamental rights in the EU," (2019-12), Europarl.europa.eu, https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu;
[72] "Charter Of Fundamental Rights Of The European Union (2012/C 326/02,)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT;
[73] "Judgment of the Court (Sixth Chamber) of 13 April 2000. - Kjell Karlsson and Others. - Reference for a preliminary ruling: Regeringsrätten - Sweden. - Additional levy on milk - Milk quota scheme in Sweden - Initial allocation of milk quotas - National rules - Interpretation of Regulation (EEC) No 3950/92 - Principle of equal treatment. - Case C-292/97," para. 37, CURIA, https://curia.europa.eu/juris/liste.jsf?num=C-292/97; "Judgment of the Court (Grand Chamber) of 29 January 2008. Productores de Música de España (Promusicae) v Telefónica de España SAU. Reference for a preliminary ruling: Juzgado de lo Mercantil nº 5 de Madrid - Spain. Information society -Obligations of providers of services - Retention and disclosure of certain traffic data - Obligation of disclosure - Limits - Protection of the confidentiality of electronic communications - Compatibility with the protection of copyright and related rights - Right to effective protection of intellectual property. Case C-275/06," CURIA, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-275/06;
[74] Viviane Reding and Andrezej Zoll, *EU Compendium. Fundamental Rights and Private Law* (Munich: Sellier, European Law Publisher, 2011), p. 5;

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[75]

Subsequent articles set out more specific principles and areas of activity, and their broader meaning can actually be found in the various interpretations of the ECJ, which in practice were intended to explain the application or meaning of the norms[76]. Mention should be made here of its 1970 *Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle für Getreide und Futtermittel* case, which sets out the roots of the fundamental principles: "The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[77]. This position of the court could be interpreted through the prism of the formation of public order. The ECJ forms the fact that it is the values of the Member States that shape the EU's sphere of activity, thus transforming them into the public policy of the EU. It seems as if there is a justification that national law cannot rely on its constitutional laws to overturn the law of the EU if its content is formed on the basis of common basic national norms, which would mean that the state cannot violate its own corncerstone values. More specific examples of european public policy can also be found in initiatives such as the Common Agricultural Policy, the Environmental Action Program, the Social Policy and Social Action Program, the Common Fisheries Policy, the Police and Judicial Cooperation in Criminal Matters, the Judicial Cooperation in Civil Matters and other programs which are all carried out as a result of specific visions at the EU level, which are linked to the issues of the lives of the members and the principles according to which these visions have been implemented and addressed in practice in ECJ cases[78].

However, the final observation is that EU is in line with all 4 essential elements of public policy: (i) representativeness is implemented through an institutional framework established by the EU, based on a coherent framework of the Council of Europe, the European Parliament, the European Commission and other bodies, the decisions of which are later enforced by national public bodies; (ii) the representative bodies have the legal instruments and power to lay down both the essential guidelines and the instruments for their implementation, some of which are binding on all EU members; (iii) community spirit is reflected in the scale of the direction being developed

[75] "Consolidated version of the Treaty on European Union (2012/C 326/01)," Article 2, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT;
[76] Here, it is worth highlighting August Reinisch's generalized case study of practice, which includes rights such as the right to expression, personal data, life, property the right to be heard, legal protection, equal treatment, principles of proportionality, legal certainty and legitimate expectations and more (Reinisch, *supra note,* 59: p. 105-106);
[77] "Judgment of the Court of 17 December 1970. - Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. - Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. - Case 11-70," para 2, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0011&from=DE;
[78] Reinisch, *op. cit.,* p. 209-221, 231-232;

by the EU, which touches on the totality of the values raised by all the Member States, the content of which has been influenced by various factors, including the historical experience of the countries mentioned above; (iv) Symbolism enshrines specific forms of values that are directed at and arise from society - their application and implementation have an impact on its daily life. At the same time, the essence and uniqueness of these principles, which shape the EU's public policy, are within their scope. The Member States undertake (with exceptions) to bring the law of the EU above their national law in their legal systems, which means that in the event of a conflict between national and EU law, the latter will prevail. These include the principles that shape public order, which suggests that Member States are not only subject to their national / hard-core public policy and symbols, but also to EU transnational public policy. It is the model in which members have chosen to create the EU that has established a hierarchical system of norms, topped by union guidelines.

1.2.2. Unionization - a catalyst for an integrated system?

By developing its system and, more specifically, by examining larger scientific areas, such as private international law, which is intended to interpret the rules of application of the laws of different countries, and European international procedural law, which lays down procedural rules in international cases and procedural coordination between Member States, providing "rules of jurisdiction, lis pendens and the recognition of foreing judgements"[79], the EU understands the diversity of Member States in specific regulatory areas. The same Insolvency Regulation can be mentioned here: Denmark, which is not complying with the justice and home affairs system because of its exclusive will, has left the scope of this regulation. At the same time, it rejected the introduction of the euro in a referendum in 2000, when other countries, such as the Baltic States, considered it one of their political priorities. The existing approach of the Member States must therefore be harmonized / combined / coordinated. There was a need to provide a legal expression to expose such otherness.

The origins of this task stemmed from the provisions of the TFEU: Articles 67 and 81, which advocate respect for different legal systems, but also highlight the need to promote cooperation in civil matters on the basis of mutual trust and mutual recognition, based on the fact that the protection of one Member State is recognized as having the same legal value as other Member States. Also, in the drafting process, the EU has noted that its members clearly want to retain some final leverage on issues affecting their legal system. For this reason, in the process of building a community, functionalists had a more popular opinion among states than federalists.

[79] Directorate-General for Internal Policies, *supra note,* 53: p. 20;

Although the Member States undertake to comply with the standards laid down in the acts, they declare their willingness to retain sovereignty in the final assessment of specific issues[80]. As a result of this approach, universality is limited by territorialism, thus creating the need to enshrine in law the will of the Member States, an exceptional rule, the application of which would be possible and thus the interests of the Member States would be satisfied. In seeking how such an exception could be standardized, the EU had to realize at that time that each state was pursuing its position in a public policy, in a certain direction, and the otherness of these directions was essential. One of the trends was to join the community, but with a desire to control some decision-making[81].

Thus, a specific norm of public policy in legal documents appears here. In it, the EU recognizes that certain fundamental problems in the application of a single EU legal instrument can be ruled out for an objective reason: Member States have different interests and perceptions of societal issues, a certain 'foreign' pattern of behavior is unacceptable and may justify non-compliance[82]. This created a clause that was not limited to the Insolvency Regulation. As early as 1958, Article 5 (2b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided that a state may refuse to recognize an Arbitral Award on the basis of a public policy exception[83]. This expression was also used in Rule 7(c) of the Hague Convention[84], in Article 61 (1b) of the 1982 Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings, which did not enter into force[85], in Article 3(c) of the 1990 European Convention on Certain International Aspects of Bankruptcy[86], in Article 26 of the 1995 Convention on Insolvency Proceedings, which has not entered into force too. This has led the EU to use the term public policy as an element to describe the Member States' unique legal, cultural and political framework, which is relevant in the context of the document. As a result, a number of pieces of legislation have emerged that have used and continue to use the following expression: Directive 64/221/EEC, Directive 96/71/CE, Directive 2000/31/EC, Directive 2006/123, Regulation No 2201/2003, Regulation No 1206/2001, Regulation No 593/2008, Regulation No

[80] Aurelio Lopez-Tarruella, "The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention," *The European Legal Forum* (Munchen: IPR Verlag GmbH, 2000/01), p. 122;
[81] Perhaps this desire is one of the reasons why the EU has recently had problems with legal reforms in Poland and Hungary, which are controversial in the Community context;
[82] Directorate-General for Internal Policies, *supra note,* 53: p. 20;
[83] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)," Artice V 2(b), Treaties-UN, https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf;
[84] "Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters," 1971, Article 7(c), EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22007A1221%2803%29;
[85] "Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings (Bulletin of the European Communities, Supplement 2/82," Article 62 1(b), OP-Europa, https://op.europa.eu/en/publication-detail/-/publication/bdfe47f1-678d-45f3-94cb-6aff207d4fc1;
[86] "European Convention on Certain International Aspects of Bankruptcy, European Treaty Series – No. 136, Istanbul, 5.VI.1990," Article 3(c), COE, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b3d0;

864/2007, Regulation No 1215/2012 (in its new and old version). Among them and in the two regulations in force governing insolvency law (Regulation No 1346/2000 and Insolvency Regulation). It should be emphasized that the use of this term in all legislation derives from the same legal desire to create a conditional exception to protect against unacceptable legal provisions and judgments of another Member, and the exception stems from the interpretation of the same concept. Therefore, although directives and regulations regulate different areas of law, their theoretical and practical interpretation by the ECJ in one area opens up an understanding of public policy and its idea in others.

In identifying the public policy of each Member State, its differences should be sought in its intended elements, which are reflected in the legal instruments, as well as in distinguishing between essential expectations and other relevant phenomena. Each national law has its own territorial legal system - constitutional / federal legislation, laws, governmental ordinances or different order, different names, but the essence is the same - all designed to enshrine and implement the objectives of the guidelines or to legally promote those directions through the prism of principles. It is because of such a legal framework that the Insolvency Regulation legal act uses guiding / directing elements to the fundamental principles reflected in the constitutional state system, which usually derive from the constitution as a legal instrument, in order to emphasize their exclusive application. However, in the case of this study, the focus should not be on the existence of differences in content, as this has already been recognized by the researchers who developed the regulatory framework, but on their growing similarity, as in 2011 a special group of researchers, convened to examine precisely the application of the public policy in the context of EU legislation, argued that "the growing harmonisation of the legal systems of the Member States and their common basic values is beginning to reduce the need for a safeguard to avoid application of unacceptable legal provisions of other Member States"[87]. But where do these similarities come from?

When drawing up the legal instruments of nation states, it is inappropriate and erroneous to exclude EU law, which, as has not been unnecessarily pointed out, is supranational with a specific element of raising its own norms above national ones. This leads to a system in which the public order of the Member States is theoretically enshrined not only in its national system but also in EU documents. It must not be forgotten that the EU's powers stem from the voluntary transfer of matters from the Member States themselves to its competent authorities. However, such a transfer does not remove the relevance of the issues to national communities. Thus, in theory, the public policy of the Member States is not only the result of its own and that of the EU, but at

[87] Directorate-General for Internal Policies, *supra note,* 53: p. 20;

the same time the EU guidelines are above national because of the existence of the principle of the supremacy of its legal instruments in legal systems. It is this harmonization phenomenon that reduces the existence of differences that can be explained by unionization[88].

Unionization can be understood as a factor influencing the reality of the EU Member States, a process that creates the environment from which a modern approach to various issues of life is born. It is true that, for the time being, this should not be interpreted as a factor with a concrete end result, but rather as an ongoing process that influences the perception of phenomena and their interpretation in relations between the EU and the Member States. These relationships can be horizontal (between Member States), bottom-up (between Member States and EU), top-down (between EU and Member States) and round-up (between a Member State and an EU that deviates to another Member State)[89], thus forming intertwined quadruple connections with each other. A more precise definition of unionization that can be applied to it was provided by Professor Robert Ladrech of Keele University, naming it as "an incremental process re-orienting the direction and shape of politics to the degree that EU political and economic dynamics become part of the organisational logic of national politics and policy-making"[90]. This is complemented and specified by Adriene Heritier, Professor at the European University Institute, who directly links unionization to the direct impact of EU decisions on Member States' policies[91]. In this way, the EU distinguishes this phenomenon or spirit, which is not a physical expression but is conveyed in a direct or indirect tendency that affects the system of these relations, both the EU's own actions and the values of the Member States. The longer and closer the link between the Member States and the EU, the greater the influence of unionization, and the greater the impact, the greater the transformation of a Member State adopting uniform EU standards in regional, intergovernmental, procedural, administrative niches. It should indeed be mentioned that the EU is, however, at times experiencing crises that are moving the Member States away from a common position, and the United Kingdom has set an even more radical example by leaving the EU. Still, if the EU communicates guidelines to members through these links, then horizontal cooperation between members promotes a more effective meaning, understanding, sharing of tools to achieve the goals, or the generation of new ideas, with a view to presenting them at European level. In practice, such cooperation is characterized by the transfer of legal definitions or regulatory models from one country to another, thus benefiting from good member practice in line with the challenges and

[88] Unionization is called europeanization (or europeanisation) by others, but the use of the term is not appropriate, as the distinction between the European continent, its geographical concept and the political and legal area of the EU and its Member States must be maintained;
[89] Lenschow, *supra note,* 40: p. 55;
[90] Robert Ladrech "Europeanization of Domestic Politics and Institutions: The Case of France," *Journal of Common Market Studies 32* (1994), p. 69;
[91] Adrienne Heritier et al, *Differential Europe: New Opportunities and Restrictions for Member-State Policies* (Lanham MD; Rowman & Littlefield, 2001), p. 3;

outcome of the EU. In any case, it creates a momentum for change in the national system of a member in three dimensions: polity (intergovernmental relations, judicial and administrative structure), politics (party programs, public debate, public opinion) and policy (principles and norms, aspirations and standards). And not just the Member States. For example, Switzerland's close economic and political ties with the EU and its members, resulting from mutual agreements, have led to "induce the country to adopt many Community rules and hence ensure market access" [92].

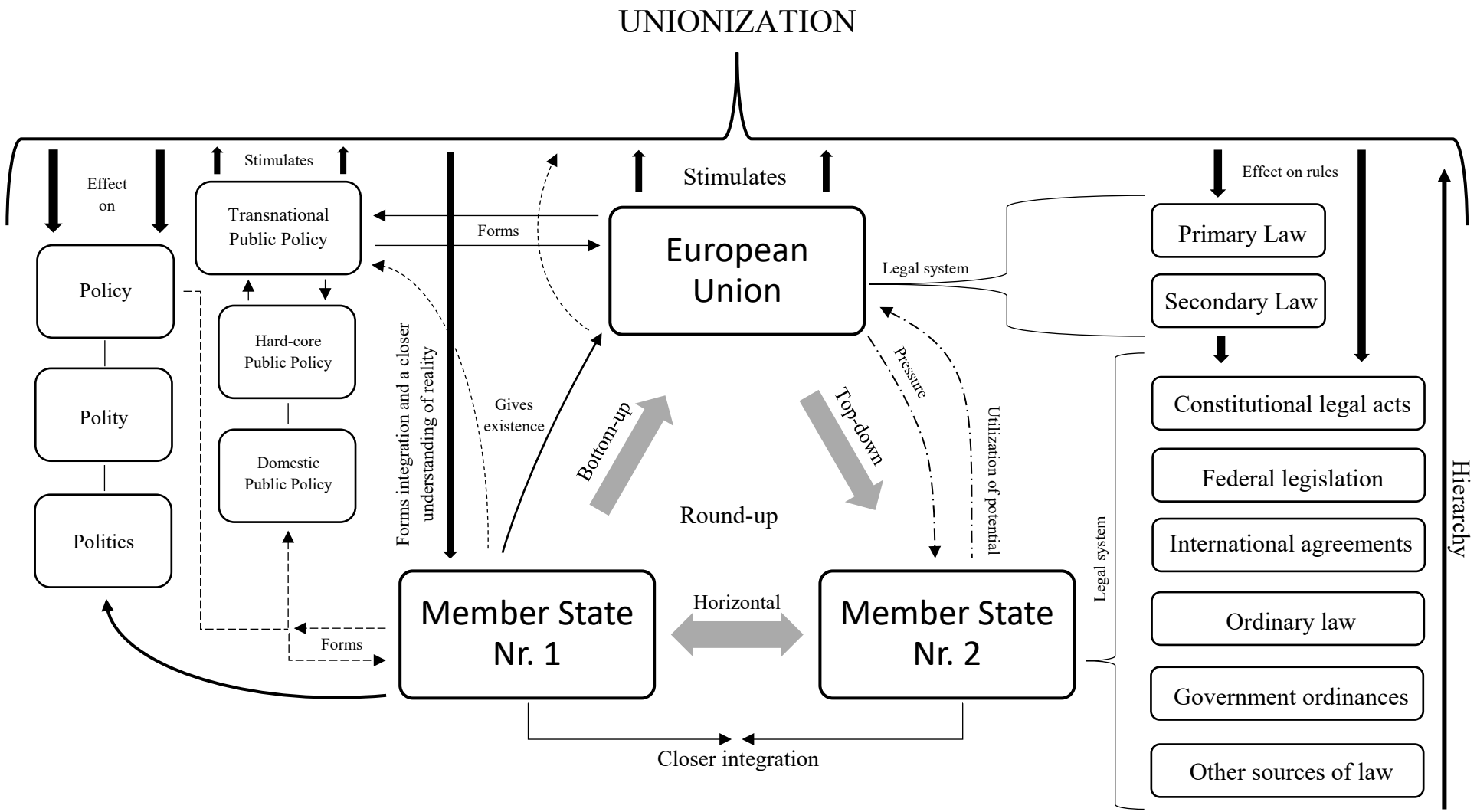
Two phenomena can be used to explain how unionization propagates: pressure and utilization of potential. As for the pressure element, in particular it can be direct or indirect. In the direct case, the pressure manifests itself through the aforementioned principle of the supremacy of EU law, thus indicating through legislation the concrete path to the achievement of the goals set by the EU, to which the member must respond. Indirect pressure, meanwhile, originates from the EU's ability to recommend or advise members on their specific actions. In both cases, there is a vertical top-down principle (or bottom-up in cases where the state itself requests assistance), whereby the EU formulates guidelines for Member States in a spirit of unionization. It is also worth mentioning here the difference in the magnitude of the pressure - a clear and strong binding push (usually through direct pressure) is possible, which the member cannot avoid. At the same time, there is a possible small, slight impulse to consolidate or change a certain phenomenon (usually through indirect pressure), which may not always provoke the reaction expected by the member, avoiding political action from change. At this point, the difference is made by the principle of utilization of potential, manifested in bottom-up relationships. It is the initiative of the Member States to change the system, as they see a certain possibility or benefit by adopting, on a voluntary basis, recommended behaviors or developing certain patterns of behavior itself, through appropriate interpretation, which will be seen as good practice in the EU arena and may subsequently be 'pressured' to other Member States (one example of a round-up relationship). The utilization of potential is therefore manifested through initiative and a desire to strengthen the internal or the political position of the EU as a whole by taking advantage of the innovative opportunities discovered. This possibility of policy emergence due to the ongoing unification reminds that "the EU is not merely a hierarchical rule-producing machinery, but an interwoven system of governance"[93].

Thus, public policy, which can be understood more specifically as *a set of legal provisions enacted by a community to address or enrich its life by creating a state position for the implementation and application of which public authorities are responsible*, is not limited to the

[92] Lenschow, *supra note,* 40: p. 55;
[93] *Ibid*, p. 61;

territorial nature of the Member States due to their own common desire to act through a supranational organization, the EU. It is by its basics an *ultima ratio* clause, but its territorial or universal nature is currently difficult to determine, as the exclusively territorial law that initially applied to it is theoretically influenced by EU rules and its meaning is therefore intertwined. Over time, the EU has acquired more and more spheres in which it operates, and this transformation has also led to the evolution of its internal legal and political structure. Its existence determines the need for the direction to exist, which stems from the Member States' own approach, the accumulation of good practice and the outbreak of a spirit of unionization. A transnational EU public policy has emerged that is directly interoperable / interactive and provides common best manner for domestic and hard-core public orders that are based on a territorial dimension. It is the latter that is influenced by EU guidelines and unionization, promoting the integration of countries. EU legal instruments are mostly based on the principle of supremacy, so the objectives of the community implemented through them are transformed into a complement to the concept of public policy of the nation. As regards the national public policy of a Member State, the guidelines drawn up by the EU on their above-mentioned integration into the common system cannot be excluded. M. Virgos and E. Schmit Report also provide a clear reference to the justification, explaining in the interpretation of the exception that the content of the application of the phenomenon "involves, in particular, constitutionally protected rights and freedoms, and fundamental policies of the requested State, *including those of the Community*"[94]. Such a system over time destroys the differences in territorial public order, thus allowing the theoretical conclusion that the differentiation that existed during the creation of this norm is no longer the same - territorialism began to relate to universalism. This phenomenon is explained by the spirit of unionization, the outbreak of which has led to rapprochement and cooperation in various life situations, including legal systems. Existing procedural and fundamental legal differences between Member States have been affected over time and are still currently affected by the factor of unionization. The following analysis allows it to be summarized in tabular form:

[94] Virgos, *supra note*, 4: p. 127;



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2. SUFFICIENCY CRITERIA. DOCTRINE RUDIMENTS IN CASE LAW.

2.1. Essential practice in non-insolvency ECJ decisions

Once the concept and features of public policy have been defined, it is appropriate to return to its interaction with Article 33 of the Insolvency Regulation. The article stipulates that any state may refuse to recognize a judgement in case it is contrary to the public policy - the general guidelines of the particular state, which are enshrined in legal instruments and have a unique community significance for its citizens. However, from a theoretical point of view, it has been revealed that national public order cannot be separated from the directions and legal norms developed by the EU. It has also been rightly pointed out that the application of the rule in other Community legislation follows the same prism of the exceptional rule, so that it would be scientifically illogical to omit the essential case-law which has been developed in interpreting this framework of guidelines. It should not be forgotten that the predecessor of the Insolvency Regulation only entered into force at the beginning of the 20th century and the Insolvency Regulation itself only in 2017, but the element was already integrated into the EU system in other, no less important social relations, creating an environment in which practice developed long before the emergence of insolvency legislation at union level. Therefore, this part of the study will be devoted to reviewing the most important practices developed by the ECJ in other areas that have created the concept and scope of the subject matter of the study, using the chronological flow of cases over time, together, by separating this sequence into phases according to the position of public policy interpretation formulated by the ECJ.

2.1.1. The first phase. Liberality.

2.1.1.1. Yvonne van Duyn (C-41/74)

Examining the very beginning of the application of the concept of public order, it can be observed that “it was clear in the mind of the Founding Fathers that the content of those public policy rules should be left to each member state for its own needs”[95]. However, the problem arose from the fact that the wording did not contain a specific definition or guidelines for its application, methods that would make it easier for national courts to apply this rule in cases. Thus, 1974 should rightly be considered as the first year of interpretation of the public policy rule at EU level. Community Directive 64/221/EEC on the movement and residence of foreign nationals entered

[95] Kessedjian, *supra note*, 20: p. 28;

into force on 25 February 1964. The case arose between a Dutch national and the then EU Member State of the United Kingdom, which refused to allow a woman to work in the Church of Scientology, which was established in the United Kingdom, although Article 48 of the then EEC Treaty[96] was also aimed at ensuring freedom of movement for workers. This was due to the fact that the state did not want to expand such activities on the basis of its public policy, which was manifested through the government's policy against the activities of the institution as harmful to society. The United Kingdom sought, in particular, to justify such a restriction through Article 3(1) of Directive 64/221/EEC, which provides for a public policy exception[97] and this was supported by the same Article 48(3) of the EEC Treaty, which established an exceptional situation.

The Court recalled, firstly, that not only regulations may have direct effect but also directives and, more precisely, that individuals must be able to rely on them before national courts. In the second place, the ECJ emphasized that in a case where the activity in question, which is not expressly prohibited by law, may be considered contrary to the State's public policy, but the administrative conduct of the public authority with position of harm to society should be clearly and sufficiently defined. Although the ECJ mentions that a Member State cannot unilaterally determine the scope of a rule without control, it has finally stated that:

> The concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty.[98]

In this thesis, the court agreed with the previously expressed opinion arising from the theory that the concept of public order is sensitive to time. It also points out that, although theoretical limits exist, public authorities have the power to interpret the understanding of conception, thus recognizing it as a real territorial one that may change due to objective factors of reality. Finally, it was considered that the public policy exception in Article 48 (3) of Directive 64/221/EEC and the EEC Treaty could be an appropriate ground for restricting the movement of persons within the territory of the Member States for employment purposes (the right to reside and work or do other

[96] "Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title III: Free movement of persons, services and capital - Chapter 1: Workers - Article 39 - Article 48 - EC Treaty (Maastricht consolidated version) - Article 48 - EEC Treaty," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E039;
[97] "Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Article 3(1)," EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31964L0221;
[98] "Judgment of the Court of 4 December 1974. - Yvonne van Duyn v Home Office. - Reference for a preliminary ruling: High Court of Justice, Chancery Division - United Kingdom. - Public policy. - Case 41-74," para 18, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0041&from=EN;

remunerated activities), despite the fact that a similar ban does not apply to its own nationals and there is no specific statutory prohibition, as there were other obvious restrictive features.

Thus, the first case retained the concept as a territorial factor which depends on the understanding of the Member State. This can change over time, so it is a varying phenomenon. It is also worth noting that there was no need for a specific legal act prohibiting the activities in question, as it was possible to express a public legal position on a certain issue of public importance through other administrative actions of a state institution.

2.1.1.2. Régina v. Pierre Bouchereau (C-30/77)

3 years after *Yvonne van Duyn v. Home Office*, another dispute arose, but in the same area of legislation, over the use of Article 48 EEC Treaty and the public policy exception in Directive 64/221/EEC. A person of French nationality who was employed in the United Kingdom was convicted of illegal drug possession. Another London court had previously found the person guilty on a similar basis as well. The question arose as to the legal interpretation of the deportation recommendation in the context of the above-mentioned legislation: is recommended deportation a measure falling within the scope of public policy instruments? Is only the current and future criminal tendency of a person to commit a crime an appropriate pretext for taking advantage of the public policy exception? In answering them without hesitation, in the field of legislation, the recommended deportation has been recognized as an appropriate action in the field of the article, and the criminal history is relevant only insofar as it can be evidence of a person's current danger to public order.

However, the crucial point in the case was the third question. In reply, the ECJ itself pointed out that, although it was not so directly asked, its essence was to provide for the meaning, definition or other guiding signs of public policy to be applied to it. Possibly, the Member States hoped to finally have a concrete answer to this question. Unfortunately, the ECJ's response was quite short. Still, concretizing the concept:

> [...] recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[99]

[99] "Judgment of the Court of 27 October 1977 Régina v Pierre Bouchereau. Reference for a preliminary ruling: Marlborough Street Magistrates' Court, London - United Kingdom. Public policy. Case 30-77," para 35, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0030;

From this thesis we can understand that the nature of the state institution in the application of the norm is emphasized again, thus confirming the element of public order representativeness. Another point to note is that the ECJ does not specify which right is to be violated, but the establishment of the fact of a violation (disruption) becomes an inseparable element. However, the most important place was revealed in the formation of the thesis 'genuine and sufficiently serious threat, affecting the fundamental interests'. The ECJ limited the scope of the rule on the basis of the existence of an emerging sufficiency test. Although it did not specify what breach of law was to be sought, the court showed direction by linking it to the most essential interests of the community, as if separating the areas of domestic (as no longer sufficient) and hard-core public policy through the directing of action exclusively to the fundamental rules of society. The bar was lifted. If until then there was no more accurate measure to apply the norm, then this decision created such a measure. The determination of the seriousness of the conduct and the need for it to be based exclusively on fundamental principles has given rise to the assessment criteria which national courts must meet before using the public policy instrument. The territorial concept has been narrowed down by its meaning through its interpretation. However, even this interpretation did not bring full specificity.

It is this decision which may partly explain why the wording of Article 33 has given rise to the expression 'manifestly contrary to [...] fundamental principles'. Both establish a specific sufficiency criteria, which arises from the necessity of the distinctive element of the event, which gave rise to the present case. This distinctiveness, or more precisely, the expression 'manifestly contrary' resulting from exclusivity, has already been emphasized by the 1996 report by Miguel Virgos and Etienne Schmit to review the understanding of the rules of the Convention on Insolvency Proceedings[100] (which never came into force). From the moment of the present judgment *Régina v. Pierre Bouchereau*, not everyone can make a sufficient contribution to the reality of the phenomenon to state that this is the appropriate pretext for using exceptions to the exceptionally important rules of the EU. Evaluation elements were needed and provided by the ECJ. True, one can see the difference here that not everything that is ‘sufficiently serious threat’ will be at the same time and ‘manifestly contrary’ to fundamental norms, but what is ‘manifestly contrary’ will always be a ‘sufficiently serious threat’. In other words, the threat to values does not lead to a direct absolute opposition to them, as the weight of the word 'sufficient' is relatively lower than that of a 'manifestly', but the absolute opposition actually always poses a threat. On the other hand, the ECJ uses the word ‘sufficient’, which, when interpreted over time, reveals that the criterion of adequacy also changes as the content of public policy alters, therefore, at present, from

[100] Virgos, *supra note*, 4: p. 127;

a contemporary perspective and with valid content, what is 'manifestly contrary' is a 'genuine and sufficiently serious threat' to benefit from the statutory exemption. It is in this wording that the ECJ has given guidance to Member States to act, while presenting it in a form that can be adapted over time.

2.1.2. The second phase. Interpretation.

2.1.2.1. Arblade and Leloup (Joined cases – C-369/96 and C-376/96)

Another important case for understanding the concept emerged in 1996 where the court moves from a liberal position to an attempt to interpret the content. Two French companies, Arblade and Leloup, were involved in construction work in Belgium. To do this, companies had to deploy workers to construction sites. Belgian law required the submission of various social documents relating to the situation and entry of those workers. Both companies refused to provide the documents, arguing that they complied with the requirements of French law and that Belgian law constituted an excessive obstacle to the exercise of one of the Community's rights to provide services. The interesting fact here was that Belgian law provided for such a waiver as an infringement under specific public-order legislation or *lois de police*. Such a law should be understood as a set of internal rules of the country from which individuals cannot deviate. If there were a conflict between the rule of law of another State and the rule of *lois de police*, the latter would be understood as a mandatory rule and would take precedence. At that time, the norms of the EEC Treaty provided for the rule of public order as a means of stopping European rules[101], and it, in theory, should have been successfully prevented through the application of that legislation (*lois de police*). The essence of the present case for this investigation is the court's approach to the concept of this legal act. Although the basis of previous ECJ rulings has shown that public policy and the legislation that makes it meaningful is a territorial self-determination of the Member States, however, in *Arblade and Leloup*, the court itself took the initiative to define what the *lois de police* exception rules are in the context of their application, stating that a common definition is necessary:

> That term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance there with by all persons

[101] Kessedjian, *supra note*, 20: p. 27;

> present on the national territory of that Member State and all legal relationships within that State.[102]

Not only does this interpretation reflect a redefinition of the exceptional social significance of public policy provisions, but more importantly, the ECJ's direction has changed since the previous two cases, as the court takes the initiative to interpret national law on public order, although until then this was recognized as a territorial element, the content of which could be defined by the Member States themselves. In the next paragraph, the ECJ went even further, recalling that:

> The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty. If it did, the primacy and uniform application of Community law would be undermined.[103]

Thus, the principle of the supremacy of EU law, which is linked to the application of an exceptional rule, is once again clearly stated, and more precisely, it can be read as the first vivid ECJ decision showing the relationship of EU law with national public policy content. The court seems to see the existing interdependence from each other, but does not specify how it manifests itself, only distinguishes that disregard for dependence undermines the principles of EU supremacy and equal application. However, this is an important moment in revealing that the distinguished theoretical relationship between these elements has been observed and conditionally confirmed in the practice of the ECJ itself. However, it must be acknowledged that, together with this judgment, the court has entered a new phase in which the previously existing territorial definition has become even more limited and accountable to the ECJ.

2.1.2.2. Directive 2000/31/EC

While this is not a decision of the ECJ, the legislation is no less important in this chronological order. Directive 2000/31/EC, which entered into force in 2000, regulates certain information services in the EU. The distinctiveness of this directive was in the consolidation of its public order provision and, more precisely, in its concretisation. The exceptional rule in the context

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[102] "Judgment of the Court of 23 November 1999. - Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96). - References for a preliminary ruling: Tribunal correctionnel de Huy - Belgium. - Freedom to provide services - Temporary deployment of workers for the purposes of performing a contract - Restrictions. - Joined cases C-369/96 and C-376/96," para. 30, EUR-Lex, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996CJ0369:EN:HTML;

[103] "Judgment of the Court of 23 November 1999. - Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)," *supra note,* 104: para. 31;

of the directive (Article 3(4(i))) had an unusually defined wording which provided for forms of expression of public policy:

> in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons.[104]

The meaning of this directive is important not so much in its internal sense as in the fact that the EU has provided examples of manifestations from which a Member State seems to be unable to derogate, as such aspects shape the possible interpretation of the rule and its form of expression. This means that if the ECJ has taken over the meaning of the norm, the EU institutions have also partially regulated the matter through this secondary legislation, thus determining the potential content of the exception. The instructions for such clarification mean that the Member, applying the exception in the context of this legislation, should compare the situation with these features.

2.1.3. The third phase. Limitation.

2.1.3.1. Eglise de Scientologie (C-54/99)

After attempts to interpret public policy, the ECJ began more to limit its content rather than to define it. The 1999 case. The Association Eglise de Scientologie de Paris, based in France on investment restrictions from the United Kingdom, challenged a French decision (regulation) on a system of prior authorization for the circulation of foreign investment, which possibly restricted one of the EU's key policy principles, free movement of capital. It is worth mentioning that this association was seen as based on the foundations of the sect, so there was a clear desire to closely regulate such activities. The State stated that under Article 73(b) of the then TFEU, which allows restrictions justified by the public policy exception, in cases where there is a threat to public order and its interests, individuals must obtain prior approval for the possibility of direct investment. Catherine Kessedjian regards this case as "the last blow to the freedom of member states to use their public policy against their European obligations"[105]. And here we have to pay attention to the expression of the facts presented by the professor in the case. The ECJ finally acknowledged that

[104] "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')," Article 3(4i), EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031;
[105] Kessedjian, *supra note*, 20: p. 34;

such a French system was contrary to the interests and fundamental principles of the Community (particularly legal certainty). According to Catherine Kessedjian:

> It [ECJ] held that the generality of the law was such that no operator could know in advance what specific circumstances would trigger the granting or the refusal of the authorisation. [...] By obliging a state to define in advance the specific circumstances in which an authorisation will be necessary, it dooms the state to always be late–operators always try to find ways to circumvent adverse legislative measures and leaves the state with only ex post means of protecting its public policy. [106]

It would be a logical sequence of thinking if the facts were interpreted correctly. However, an examination of the ECJ's decision and the opinion of the Advocate General calls into question that understanding of the case. Under those circumstances, none of the above subjects focused their analysis and issues on the granting or refusing procedure as an essential problematic element of the case. The fundamental part in question was that the French legal system required a person to apply for authorization if his foreign investment could be detrimental to the country's public policy. The ECJ has made it clear that:

> In the present case, however, the essence of the system in question is that prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy [and] public security', without any more detailed definition. Thus, the investors concerned are given *no indication* whatever as to the specific circumstances *in which prior authorisation is required*.[107]

This thesis is clarified by the Advocate General:

> Legislation such as the French legislation, which makes it a requirement to apply for prior authorisation for all transactions which 'may adversely affect public policy, public health or public security', includes an indeterminate and general series of transactions and is therefore not connected with a genuine risk of serious infringements of national provisions. [...] Such a system puts the investor in a state of uncertainty as to *whether or not he is actually required to apply for authorisation*. [...] It must be interpreted as not

[106] Kessedjian, *supra note*, 20: p. 34;
[107] "Judgment of the Court of 14 March 2000. Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister. Reference for a preliminary ruling: Conseil d'Etat - France. Free movement of capital - Direct foreign investments - Prior authorisation - Public policy and public security. Case C-54/99," para. 21, CURIA, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45038&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13371591;

> authorising a Member State to introduce or maintain in force a system of prior authorisation applicable to direct investments from abroad, where such investments may adversely affect public policy or public security, without defining the types of investment for which an application for authorisation *must be submitted* to the national authorities.[108]

Thus, both entities seem to have acknowledged that such a French regime would be justified if it were possible to understand clearly and unambiguously in advance when a person has to apply for approval, as he is not himself competent to interpret his activities as dangerous to public order. This means that the concept of public policy cannot be set and defined by a natural or legal person established in a Member State without a clear definition by the State. The general norm had to be seen as time-flexible in order to adapt to changes in realities, thus allowing the state itself to interpret the concept and the forms of possible violations within it. However, the ECJ was not persuaded by such commonality, as the persons to whom such a rule applies must have a clear understanding of its application and its possible consequences in a particular situation, and its exceptional element makes it difficult to envisage a specific form of expression.

It is also worth highlighting paragraphs 17 and 18 of this judgment, in which the ECJ effectively concentrates the essential elements of the concept of public policy developed by previous courts (mentioned in the analysis), thus creating a more restrictive *Eglise de Scientologie* rule, that is, he mentions, firstly, that the Member States are free to lay down the requirements for the derogation, but then makes explicit the restrictions on that rule: (i) violations are possible only for fundamental principles; (ii) misconduct is possible only in the presence of a genuine and sufficiently serious threat; (iii) misconduct is possible only through a strict interpretation, which prevents the state from ignoring EU rules; (iv) Provisions justifying the public policy exception cannot be justified solely on economic grounds; (v) the application of the clause is possible only in the absence of other, less restrictive means of achieving the same objectives[109]. And to these features, (vi) can be added the last and most restrictive – a Member State may not apply an exceptional rule which is not sufficiently clear to the public.

2.1.3.2. Krombach (C-7/98)

[108] "Opinion of Advocate General, delivered on 21 October 1999 (1) Case C-54/99 Association Église de Scientologie de Paris and Scientology International Reserves Trust v French Republic," para. 20 and 23, CURIA, http://curia.europa.eu/juris/document/document.jsf?text=&docid=44793&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13560553;

[109] "Judgment of the Court of 14 March 2000. Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister," *supra note*, 107: para. 17 and 18;

Judgment of the ECJ in 2000 in a case concerning the application of Brussels Convention (in reality, just the old version of Regulation No 1215/2012). This legislation is much closer to the Insolvency Regulation in terms of both ambitions "to facilitate, to the greatest possible extent, the free movement of judgements by providing a simple and rapid enforcement procedure"[110]. The case began when Dieter Krombach, a German citizen, was found guilty in France of violence that resulted in the unintentional deprivation of the life of a fourteen-year-old girl. Prior to that, the pre-trial investigation into this incident in Germany had been terminated. The French court, which ruled on the matter during the proceedings, ordered the defendant to appear in France to attend the hearing in person, but Mr Krombach did not come. At the same time, he was not represented in the proceedings by any other legal counsel, so the case was decided without this person's statements and defense. As mentioned above, the French court found the person guilty and sentenced him to 15 years in prison and damages. Of course, the representative of the deceased girl filed such a decision for enforcement in a German court, which was declared applicable and enforceable. As a result of that course of action, Mr Krombach appealed against that decision on the ground that he was unable to defend himself effectively during the proceedings before the French courts. The basis for this is Article 27 (1) of the Brussels Convention: "A judgment shall not be recognized if such recognition is contrary to public policy in the State in which recognition is sought"[111]. According to the defendant, the public policy exception applies where one of the fundamental rights is infringed and, in his case, the rights of the defense.

Although this is the most important issue for the investigation, the substance of another dispute in a case which partly reveals aspects of procedural law cannot be left out. As is apparent from the facts, a German national who is a defendant has been sued in France, although Article 2 (1) of the Brussels Convention states: that court has jurisdiction to hear a case of which he is a national[112]. This means that a German national had to be sued in Germany, in breach of the rule. However, the ECJ relied on Article 28 of the Brussels Convention, which provides that the public policy provision may not be invoked to challenge the rules for determining jurisdiction. This provision could possibly be linked to the 1996 report by Miguel Virgos and Etienne Schmit on the application of the Insolvency Regulation's early predecessor, paragraph 205 of which provided that "however, public policy cannot be used by Contracting States to unilaterally challenge the

[110] "Judgment of the Court of 28 March 2000. Dieter Krombach v André Bamberski. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - Enforcement of judgments - Public policy. Case C-7/98," para. 19, CURIA, http://curia.europa.eu/juris/document/document.jsf?text=&docid=45196&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13736323;
[111] "1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters /* Consolidated version CF 498Y0126(01)," Article 27(1), EUR-Lex, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:41968A0927(01);
[112] *Ibid*, Article 2(1);

system of the Convention"[113]. The convention in question, like the current Insolvency Regulation system, are based on rules of jurisdiction, which suggests that such an interpretation by the ECJ should also apply to the application of the Insolvency Regulation exclusive rule. Such an interpretation may be debatable here: according to the ECJ, the quality of the application of judicial rules cannot be called into question, although the principle of fairness and efficiency of legal proceedings is violated by such a wrong decision, delaying the process and wasting economic resources, In addition, what is important, misapplication of the norm can lead to mistrust among the citizens of the state or other parties towards the work of the court. At the same time, the principle of mutual trust should also be based on the principle of the protection of legitimate expectations, according to which the parties must have a reasonable hope that such universally applicable rules will be applied systematically and predictably. Systematicity should be manifested through respect for the obligation to enforce the rule of law in an analogous way, that is, states jointly undertake to apply the same legal framework, so that one state's refusal to comply with such a system or mistakes (unprofessionalism) may cause dissatisfaction of other members. Similarly, the principle of mutual trust would be difficult to operate if States had the right to express a 'vote of no confidence' in a judgment of a court of another State, particularly because of any procedural hook or different interpretation. On the other hand, however, the decision (motives) of the French courts to have jurisdiction in this case can also be seen. A national of a State whose investigation in Germany has been terminated has been killed, causing outrage, and the inability of the French courts to do so could provoke a negative public reaction to the lack of a fair trial, which should be understood as one of the constituent parts of the principle of justice, manifesting itself not in a formal way of expression of a judgment, but in a fair and just manner for each individual situation.

Returning to the application of public policy, the ECJ emphasized that it was the court's duty not to formulate its content but to set the limits to the application of a Member State's rule. At the same time, the exception cannot be used where there is a simple differentiation between national rules, that is to say, where a court of one State refuses to recognize a judgment of another on the ground that the content of a rule of law applied in the host Member State differs and which would lead to a different final decision[114]. The application of the element under investigation may arise only if the decision of the other State is:

> At variance to an unacceptable degree with the legal order of the State in which enforcement is sought in as much as it infringes a fundamental principle. [...] The

[113] Virgos, *supra note*, 4: p. 128;
[114] "Judgment of the Court of 28 March 2000. Dieter Krombach v André Bamberski," *supra note,* 110: para. 36;

> infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

In the first place, it is necessary to distinguish key expressions: 'unacceptable degree', 'manifest breach', 'recognized as being fundamental'. The first two link again why the expression 'manifestly contrary' appears in the version of the Insolvency Regulation next to the public order provision. The practice of the ECJ clearly tends to exclusively exceptional cases that are highly inconsistent with the system. It is true that such a specification restricts a Member State's territorial freedom to interpret cases which constitute a threat to the public policy. The third, 'recognized as being fundamental', in fact definitively confirms the theoretical view that the public order of the nation-state has an internal division according to the importance of its content, which in the context of this study is expressed through domestic and hard-core differentiation. The explicit requirement to single out the fundamental guidelines of society leads to an unequivocal targeting of a breach of public order specifically to those who are at a higher level, the hard-core. At the same time, as it was mentioned, the interpretation of the content of the exception is once again limited - the state must in practice form the essential parts of its legal rules and apply the article only to their violations. However, it is noticeable here, both in this case and in others that the ECJ is the final instance to assess the applicability of the fundamental provisions - the ECJ itself reviews whether the principle is indeed 'recognized as being fundamental'. In assessing the position of the rights of the defense, the court points out that it stems from the constitutional traditions of a Member State and from the case-law of the European Court of Human Rights, which explains that the principle of a fair trial also displays itself in the provision of an effective defense through a lawyer, specially in cases where the accused person does not appear in person at trial, thus, ultimately recognizes this as a fundamental principle of the EU[115]. And it is because of this:

> [...] observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings.[116]

In this way, maybe not so obviously, but it is shown how the fundamental norms of the nation state are also components of the EU, thus reducing the differences in values between the Member States due to the development of the EU over time. However, this wording of the ECJ suggests that the

[115] "Judgment of the Court of 28 March 2000. Dieter Krombach v André Bamberski," *supra note,* 110: Para. 38-42;
[116] *Ibid*, para. 42;

fact that the right to a fair trial is a fundamental principle of the EU gives it a special treatment which could be valid as an appropriate pretext even in the absence of precise national rules governing it, because it derives from EU law. Possibly, this is a more serious and real form of expression of EU public policy and proof of its existence in the imposition of a clause.

2.1.3.3. Maxicar (C-38/98)

The decision of the ECJ in 2000, in which Renault, established in France, and Maxicar, an Italian company, challenged the latter's harmful conduct in connection with the incorrect manufacture and sale of Renault parts. A French court recognized them and awarded damages, the enforcement of which Maxicar did not agree with, and appealed to Italy on the issue of non-recognition. Such enforcement should have been covered by the current Brussels Convention, which contained a public policy clause, which was intended to be used. Maxicar claimed that the decision had already been taken in Italy and was at the same time detrimental to its economic nature, in breach of Community law, namely the free movement of goods and free competition.

In this case, the ECJ reaffirms the strict scope of the clause in which the national state can verify compliance, but the limits must be commented on by the ECJ, as it restricts one of the main objectives of the Brussels Convention, the free movement of judgments[117]. Although the court does not question the possible fact that there have been breaches of national or EU rules, it argues that such a breach is not sufficient, as it must be of an exclusively exceptional nature, providing all the most essential procedural personal guarantees to the parties of the proceedings. The ECJ therefore stated that "misapplication of the fundamental guarantees of the EC-Treaty did not constitute (per se) a violation of public policy"[118]. For this reason, the refusal of recognition becomes unjustified.

This approach of the ECJ reveals an even more restrictive nature of the application of the national state exception, as the court limited the content when setting the thresholds. However, he has shown that for both national and EU law, the infringement must be sufficiently serious to reveal the existence of a 'manifestly contrary' scope in case-law. This implicitly implies that infringements of EU law with an exceptional form of opposition may be linked to the application of the public policy clause.

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[117] "Judgment of the Court (Fifth Chamber), 11 May 2000 (1), (Brussels Convention - Enforcement of judgments - Intellectual property rights relating to vehicle body parts - Public policy), In Case C-38/98," para 26-27, CURIA, http://curia.europa.eu/juris/document/document.jsf;jsessionid=28969E298D248F4E7536CB857047564B?text=&docid=45255&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14640257;

[118] Burkhard Hess et al, *The Brussels I-Regulation (EC) no 44/2001: the Heidelberg Report on the application of Regulation Brussels I in 25 member states (Study JLS/C4/2005/03)* (Munchen: C.H. Beck, 2008), p. 144;

2.1.3.4. Omega (C-36/02)

A 2004 case involving two rights: free movement of services and the right to human dignity. Omega GmbH was a company providing 'laserdrome' services, or more precisely, a game in which live individuals shot each other with fake laser weapons. The city authorities banned the game after protests ensued because the aim of the game was to kill what was in the community, incompatible with public order. Although the game was allowed at the time and came from the then EU Member State – United Kingdom, the German Court still justified banning the game because it developed a person's chauvinistic individual personality, directed against the fundamental right of others, arising from the Constitution of the state - human dignity. Dissatisfied with that decision, Omega GmbH challenged the judgement as contrary to the freedom to provide services.

The ECJ mentioned the rules of the *Eglise de Scientologie*. However, the crucial point was to assess whether the public policy which manifested itself in the violation of human dignity rights could outrival the freedom to provide services when another Member State recognized those services as lawful. In assessing this relationship, the ECJ distinguished in particular the context of the right to human dignity as a underlying German fundamental principle (main autonomous right) arising not only from the provisions of the German Basic Law but also from the practice of the ECHR of which the state is a member. Furthermore, this principle is also recognized as part of EU law and may be a sufficient pretext to use it as a basis for a public policy clause. Finally, although this seems to be understood from the theory of the concept of national public order, the ECJ confirms in practice that even other states accept a certain concept as acceptable (laser shooting to kill people is allowed in other Member States), it is not an indicator for a Member State to follow the same example - the public policy norm arises from national differences and the otherness of the system of protection[119].

2.1.3.5. flyLAL (C-302/13)

The decision of 2014, in which the companies of two neighboring countries - a bankrupt air service company established in Lithuania - flyLAL and the Latvian Riga Airport Administration together with Air Baltic Corporation competed. The dispute between these entities

[119] "Case C-36/02, reference for a preliminary ruling under Article 234 EC, from the Bundesverwaltungsgericht (Germany), made by decision of 24 October 2001, received at the Court on 12 February 2002, in proceedings between: Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn," para. 38, CURIA, http://curia.europa.eu/juris/document/document.jsf?text=&docid=49221&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13608144;

arose over the granting of airport tax rebates / discounts, which led to an infringement of competition law. The Lithuanian Court granted interim measures and sought the recognition and enforcement of this decision in Latvia, which led the courts of the latter state to express their concerns to the ECJ. Regulation No 44/2001 on the recognition and enforcement of judgments in civil and commercial matters and, more precisely, the established rule of public policy was relevant to this situation[120], which Latvia tried to use against the Lithuanian court decision, as recognition and enforcement (in the opinion of Latvian courts) distinguished by "the failure to give reasons regarding the determination of the amount of the sums [...] or the invocation of serious economic consequences constitute grounds establishing the infringement of public policy of the Member State"[121].

In particular, the need for the principle of mutual trust in the system, which entails the recognition of judgments and the efficiency, speed of proceedings, means that the public order provision should apply only in exceptional cases, otherwise the proper existence of the principle would be jeopardized. This leads to only a formal review of the decisions made by the courts of the countries of origin. The ECJ has also stated that the public policy clause is still a territorial principle, so the courts of a Member State have jurisdiction to determine the requirements (content) that arise for it. For this reason, the ECJ, although 14 years later, agrees with the provision in *Krombach* – it cannot define the content of the fundamental guidelines of this Member State, but is able only "to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State"[122]. However, touching on the economy aspect, the ECJ's decision may give rise to two ideas. In the beginning, he notes the opinion of the Advocate General, which represents the rule already set out by the *Eglise de Scientologie* that a breach of public policy cannot be caused solely by the economic loss. Still, in the following paragraphs, the ECJ states that in this situation it is inappropriate to recognize the application of interim measures as having serious economic consequences, as this measure is only intended to monitor the defendant's assets and not to seize them. Here it can be questioned that there is no answer to the situation - whether the economic criterion is absolutely inappropriate for the application of public order or whether it can be an integral basis for other violations of legal provisions. It would therefore be worthwhile to treat this

[120] "Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters," Article 34(1), EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R0044&from=LT;
[121] "Judgment of the Court (Third Chamber), 23 October 2014, flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS Request for a preliminary ruling from the Augstākās Tiesas Senāts, Case C-302/13," para. 44, CURIA, http://curia.europa.eu/juris/document/document.jsf?text=&docid=158845&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14267234;
[122] *Ibid*, para. 47;

case as a less directly confirming element of cost-effectiveness, but nevertheless an important stop for the adoption of the principles of public order, even after so many years of old ECJ practice.

2.1.4. Case analysis overview

A review of the case-law, which does not relate to insolvency proceedings, shows that the initial phase of the exemption was characterized by greater powers for national courts to interpret and apply the rule. This can be understood by comparing the cases of *Yvonne van Duyn* and *Eglise de Scientologie*. *Yonne van Duyn* acknowledged that a specific statutory principle was not necessary to equate a state's position on hostility to public order, but that a clear and unambiguous set of administrative actions by the state was sufficient. However, the *Eglise de Scientologie* marks that the public must have a specific understanding from where the obligation to comply with provisions which are recognized as harmful to public policy arises. The approach of reducing the power of States to use the element, recognizing that the application of a norm must be interpreted narrowly and the ECJ in verifying that whether such a norm is not any but fundamental, is already evident in further practice. Thus, although initially accepted as a territorial provision it was gradually limited by the provisions of the ECJ's evolving practice. In this way, the doctrine of the sufficiency (sufficiency criteria) seems to have been established, according to which the national court must measure the composition of a particular situation in the light of the rules laid down in the case-law of the ECJ. In analyzing the practice, positive, negative and neutral criteria were observed.

Positive in this place should be considered those who form the conformity procedure - the court of the Member State must assess the specific facts of the case, on the basis of which the element of doctrine and its applicability must be measured. The first of this branch is that the phenomenon must be directed exclusively to the fundamental principles of society, which are recognized as essential by the state, thus distinguishing their hierarchical structure in a higher position (hard-core > domestic). The fundamental guidelines may derive both directly from a Member State's constitutional law or its obligations to protect a particular freedom and right from other sources, and indirectly from norms enshrined in the EU framework which are in fact recognized as existing at EU level. Another feature that relates to this should be added here: the comparative rule has to be directed towards a public understanding of the fundamental norm, which should not be understood ambiguously or insignificantly, as its importance also derives from the understanding of society. The second element of the branch is that there must be a genuine and sufficiently serious threat to the fundamental principles of society. This means that not every violation of the guideline can be considered sufficient through its degree. This may raise the

question of the use of the phrase and the following: 'unacceptable degree' and 'manifestly breach' – their similarities / differences. However, the approach to be proposed may be that the public policy element is time-sensitive, so a 'manifestly breach' can reach an 'unacceptable degree' when it is understood in a given situation at the time as a 'genuine and sufficiently serious threat' to fundamental societal rules. The last element is that since the application of the clause is detrimental to a fundamental principle of mutual trust, it should be calculated by possible analogous other measures that would not be so exclusive and more beneficial to the parties to the proceedings. Where other ways, without prejudice to mutual trust, are identified, such measures or tools should be used.

Negatives, meanwhile, manifest themselves in clearly formulated prohibitions, compliance with which ensures the proper fulfillment of these elements until the ECJ itself denies or establishes additional practices. In other words, these are bans under the rule. The first is that the use of a Member State's exemption cannot be justified on purely economic grounds. This means that a practice where the breach of the essential guidelines occurred only through economic loss cannot be extenuated. Secondly, the rule cannot be aimed at the quality of the decision of the country of origin on the recognition of jurisdiction, otherwise there would be a real threat to the proper functioning of the mutual trust regime, which is promoted.

It is also worth mentioning here the neutral element, which is neither positive nor negative, but which is important ECJ practice on the application of the law, and more precisely on the inappropriate reasoning of the opposition to the application of the public policy rule. Thus, the exceptional rule under investigation arises from the existence of territorial differences, so that the situated regulatory differentiation between Member States, which would lead to a different court decision, cannot be relied on as a sufficient basis for a party to challenge another party's application of a public policy provision.

2.2. Exceptional rule in cases related to insolvency – Eurofood (C-341/04)

After reviewing the sufficiency criteria doctrine, finaly it can be a step forward in moving towards the application of the Insolvency Regulation. However, it has to be acknowledged that the Insolvency Regulation, or more precisely the old version, received only 1 ECJ case - *Eurofood*. The decision in this case was taken in 2006, which means that the main ECJ cases analyzed have already been decided. The question arose from the application of Article 26 (public policy) of Regulation No 1346/2000 at the time. The facts of the case concern Eurofood, a public limited company established in Ireland (Dublin), which has the status of a subsidiary deriving from an undertaking established in Italy. Eurofood was set up exclusively to fund the activities of its parent

company, which has expanded to 30 different countries around the world. Unfortunately, 7 years after its inception (1997-2004), it became insolvent. Also, Bank of America was a company subject to ongoing administrative scrutiny that provided this service to Eurofood, which will be the one to file for insolvency in Ireland. In 2003, the parent company (Parmalat) found itself in a very serious financial crisis. As a result, a special administrative procedure was opened in Italy on 27 December, for which an administrator, Dr. Enrico Bondi was appointed. In Ireland, meanwhile, on 27 January 2004, Bank of America filed a claim for debt from the bankrupt company, appointing administrator Pearse Farrel on the same day. On 9 February, the Italian Ministry authorized Eurofood (not Parmalat) as a subsidiary of the insolvent company to apply a similar administrative procedure and set a date of 17 February for the declaration (hearing) of insolvency. A representative of the Irish administrator also attended the hearing, who, together with Pearse Farrel himself, subsequently criticized the Italian administrator for repeatedly ignoring both oral and written requests, for undermining or rejecting to provide Ireland with documents submitted to an Italian court in connection with the company's bankruptcy and other important case data. Nevertheless, an Italian court declared the company bankrupt and decided to open the case, of which he became administrator again, Mr Bondi. However, on 2-4 March, an Irish court summoned creditors and other representatives involved in Eurofood's activities, bankruptcy and ruled that Eurofood COMI was in Ireland, with the case to be opened on 27 January, when Bank of America filed a request to institute proceedings. At the same time, the Irish court accused the Italian court and Enrico Bondi of not recognizing their decisions, stating that:

> The failure of Dr Bondi to put Eurofood's creditors on notice of the hearing before the Parma court despite that court's directions on the matter and the failure to furnish Mr Farrell with the petition or other papers grounding the application until after the hearing had taken place all amounted to a lack of due process such as to warrant the Irish courts refusing to give recognition to the decision of the Parma court under Article 26 of the Regulation.[123]

Dissatisfied with this decision, Enrico Bondi appealed to the Supreme Court, which finally referred the case to the ECJ, with the following problematic issues that need to be clarified: (i) whether the appointment of a liquidator / administrator is to be interpreted as a decision to open insolvency proceedings, as the parties needed to understand which state was the first to open proceedings, thus acquiring the status of a main insolvency case; (ii) who, in accordance with the rules of

[123] "Opinion of Advocate General Jacobs, delivered on 27 September 2005 (1), Case C-341/04, Eurofood IFSC Ltd," para. 41(4), CURIA, http://curia.europa.eu/juris/document/document.jsf?text=&docid=59924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14430890;

Regulation No 1346/2000, has priority to bring an action; (iii) whether it is possible for Ireland to properly recognize the decision of an Italian court to open an insolvency case when it has "legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision", and which refused to provide essential documents[124]. It was with the third question that the application of the public policy provision arose, as the Irish court was convinced that Italy's actions were contrary to the fundamental principles of Ireland. Thus, in that dispute, Ireland argued that it was the first to bring proceedings and therefore had jurisdiction to rule on Eurofood's insolvency, and if the ECJ ruled that the State's application of 27 January and the decision to appoint a liquidator did not count as decision to open insolvency proceedings, then, Ireland refuses to recognize the judgment of the Italian court in respect of the breaches of justice (due process), which is a fundamental principle of the Member's public policy. Italian representatives, meanwhile, disagreed, in particular, with the decision of 27 January to be treated as a 'decision to open insolvency proceedings', and it was even supported by the French and Austrian governments. Ireland, meanwhile, has been supported by the Czech, Finnish and German governments, along with the European Commission. Thus, the dispute was not only between the two, but also between the other Member States[125].

2.2.1. Opinion of the Advocate General

Sir Francis G. Jacobs, former President of the European Law Institute, a British lawyer, was appointed to give an opinion on this case. In examining his opinion, it is worth noting a few of his preliminary observations. In the first place, the Advocate General points out that Regulation No 1346/2000 derives from the Insolvency Convention, which has already been examined and a large part of which has been transposed into Regulation No 1346/2000. For this reason, the explanatory report by M. Virgos and E. Schmit, cited several times before, is also relevant to the interpretation of the insolvency law in force at the time. This presupposes the idea that the norms of insolvency law were not radically changed, their shift was determined only by the solution of certain practical problematic phenomena by clarifying or supplementing. As a result, the significance of the study has not disappeared, even after more than 2 decades. The second point relates to the first, since Sir Jacobs distinguishes the preculiar character of the then Regulation No

[124] "Judgment of the Court (Grand Chamber) of 2 May 2006. Eurofood IFSC Ltd. Reference for a preliminary ruling: Supreme Court - Ireland. Judicial cooperation in civil matters - Regulation (EC) No 1346/2000 - Insolvency proceedings - Decision to open the proceedings - Centre of the debtor's main interests - Recognition of insolvency proceedings - Public policy. Case C-341/04," para. 24, CURIA, http://curia.europa.eu/juris/document/document.jsf;jsessionid=FC3A2E109586905DAD749B02D73C02C4?text=&docid=56604&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14418890;

[125] It should be noted that the states were involved due to their influence and interests in the insolvency proceedings. Their views differed on different issues in the case;

1346/2000 in that it did not address the issue of insolvency of groups of companies, so that each such undertaking is a separate debtor. It is precisely this place that the Insolvency Regulation has rectified - Chapter V in the current document is intended to regulate exactly this branch, thus reaffirming the first point's assertion that the Insolvency Regulation was not a source of radical change but merely a plugging of holes in practice.

Returning to the relevant facts of the case, the Advocate General, although devoting his examination to substantiating the facts of both parties, considers that a 'decision to open insolvency proceedings' must also be regarded as a court order appointing a liquidator having special powers to influence the legal and economic position of a failing company. That view borns both from the very objectives of Regulation No 1346/2000, which are to ensure efficiency and consistency, and from the definitions in its content. Finally, Sir Jacobs states that "the appointment of such an office-holder [liquidator] seems central to the concept of a 'judgment opening insolvency proceedings'"[126]. He was also unconvinced by Enrico Bondi's attempt to see a three-stage procedure in Regulation No 1346/2000: application, provisional appointment and instituting proceedings (opening), as "the Regulation does not seek to harmonise national law"[127]. At this point, apart from Enrico Bondi's proposal, but commenting on the passage quoted by Sir Jacobs, it should be borne in mind that the principles of mutual trust and recognition form a uniform issue of treatment of judgments in the Member States, which is one of the objectives of insolvency law with a cross-border element. At the same time, interinstitutional cooperation, which is being encouraged and is now being further stimulated, is creating a phenomenon of uniform legal and administrative practice which is affecting the system in the Member States. Therefore, such an argument should not be fully justified in the light of the prism of the European regulatory framework: common rules such as pre-emption of jurisdiction, COMI, applicable law and others create a principle of harmonization for the functioning of nation states, which, because of the rules in general, creates an identical perception in the resolution of such cases. Simultaneously, the same concept of public order over the effect of promoting common values and unionization may have intertwined over time. Harmonization does not work on an absolute principle, but it has a peculiar form of expression that cannot go unnoticed.

The question of Ireland's right to review jurisdiction recognized by an Italian court was answered in the negative, indicating that the blocking of jurisdictional review was transferred from other EU public policy legislation and ECJ practice. Such a provision, according to Sir Jacobs, passed from the provisions of the Insolvency Convention, which has not entered into force[128]. As

[126] "Opinion of Advocate General Jacobs," *supra note*, 123: para. 41(4);
[127] *Ibid*, para. 77;
[128] *Ibid*, para. 103;

regards the question of the elements for determining COMI and, more specifically, whether the fact that the subsidiary is controlled by the parent company from another State is sufficient to classify it as a COMI in the State in which the parent company operates, the Advocate General was hostile to such a statement. According to him, such an argument is not sufficient, since the head office can only be a formality which requires more corroborating facts, and at the same time such an office must be assessed through information provided by third parties, the importance of which derives from the regulation itself. Although Sir Jacobs agrees with Enrico Bondi in part, he ultimately sees that each entity can have its own jurisdiction, as it (in this case, the Eurofood (subsidiary)) can maintain its continuous corporate identity at the place of registration, regardless of the parent company's place of establishment.

Finally, the concept of public policy and the application of the article were reached. As the Advocate General points out, the right to a fair hearing and a fair legal procedures (with the subsequent addition of the right to be present at trial) is based on the exception, but immediately emphasizes: "if my analysis of the first question referred is correct, the fifth question does not in my view arise, since the Italian proceedings were opened after the Irish proceedings and therefore do not in any event require recognition (at least as main proceedings) under the Regulation"[129]. It must therefore be acknowledged that, in the light of the facts, the use of that provision is not appropriate, according to the lawyer. However, the opportunity was taken and the application was reviewed. It can be inferred from the analysis that the element of limited application of the exceptional rule arising from the wording 'manifestly' is confirmed. This is agreed by the provision in the recitals to Regulation No 1346/2000 that "grounds for non-recognition should be reduced to the minimum necessary"[130], thus emphasizing the element of exclusivity. The next point that should be marked:

> I also agree [...] that the Court's judgment in Krombach suggests that the Court [ECJ] can and should review the limits of what can properly fall within the public policy exception in order for the fundamental goals of recognition and cooperation not to be frustrated.[131]

As follows, such a move towards the *Krombach* judgment shows once again that the disputes which have arisen in the various fields over the provisions of the public policy and the interpretation of their content are important in defining its elements in other areas as well. Also, the following agreement to define the uses of the clause does not give a very precise answer: whether it is intended to state that the ECJ must verify the existence of a limit in each case, or

[129] "Opinion of Advocate General Jacobs," *supra note*, 123: para. 129;
[130] "Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings," Recital Nr. 22, EUR-Lex, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000R1346;
[131] "Opinion of Advocate General Jacobs," *op. cit.,* para. 136;

whether such a thesis requires the ECJ to establish new methods and guidelines for setting a limit. However, there is a return to the details of the case and its recognition that the right to a fair trial is a fundamental principle deriving from EU law, which must be guaranteed by the ECJ, so if a party reasonably considers that this principle has been infringed, it falls within the scope of the public policy exception. Sir Jacobs makes use of the provision in the Virgos-Schmit report to provide examples that:

> Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings.[132]

The importance of the principle in question also stems from the fact that (as previously established) a court cannot question the jurisdiction of a state. This means that the inability to challenge the substance of the decision in each case results in a limited ability of the state to intervene (correct the mistakes made), and non-compliance with such a principle can lead to resentment of the other state. Mutual trust without proper handling of the case and application of the principles is encouraging no more reliance, destroying the foundations being built. The requirement of a fair trial (legal proceedures) must therefore be a key element of the Member States' order, which is assessed by the Member State in accordance with the public policy provision. This may raise the question (which has been questioned by the Italian authorities in particular): is it necessary / obligatory to rely on an exceptional rule or is it a choice in the light of all the elements which show that there has been an infringement? Since, according to Enrico Bondi, the wording of Article 26 of Regulation No 1346/2000 (now Article 33 of the Insolvency Regulation) defines 'may refuse to recognize', which differs from 'shall not be recognized' in the Brussels Convention, so as following, there is a difference and no guarantee of such rights, which is contrary to public order could be defended in an Italian court appealing against such a decision in a simple manner. Here, the Advocate General agrees with the existing distinction, but points out that the Irish court has made its position very clear on the existence of the infringement and its challenge to it as being especially detrimental to public policy, and in addition, an individual appeal poses a very serious threat to the success of the insolvency proceedings, as such appeals cost time, which is incompatible with other principles of law. Most importantly, however, a permanent refusal to use public policy simply because there is an alternative that is not sufficiently effective would run counter to the objectives of the exemption. Sir Jacobs does not reject the argument that

[132] Virgos, *supra note*, 4: p. 128;

the derogation should be used only in exceptional cases and where there are no other less restrictive means of achieving the same result, on the contrary, he sees, as an example of *ex parte* safeguards, that the path proposed by Italy is not appropriate to compensate for the failure to use public order[133].

In summarizing the observations made by the Advocate General, it must first be borne in mind that they were of an advisory nature only. Their content showed that the *Krombach* case was one of the key factors in shaping his approach to the case and, more precisely, a good confirmation of the importance of the EU principle in this matter, which the national court is entitled to state and defend. The difference between Regulation No 1346/2000 and the provision of the Brussels Convention, which gives the right to choose whether to use this instrument in the event of insolvency, is recognized. However, this freedom cannot be restricted through unjustifiably proposed alternatives which do not in fact lead to less legal consequences, otherwise the application of the exception would be meaningless.

2.2.2. Final judgment of the Court in the Eurofood case

The Grand Chamber, composed of 11 judges, was appointed to rule on the case. After hearing all the opinions submitted, the ECJ finally reached its conclusion. First of all, when deciding on the basic rules for determining COMI, the court defines that the information available to third parties about the subject-matter of the case - the company - is of paramount importance here, as it avoids the letterbox effect, that is, the recognition of companies that do not carry out economic activities in the state as COMI, as their testimony can provide true and objective information about the company's activities. Other factors that could call into question the presumption of a registered office are undeniable, but they must be substantial and serious. Also, the ECJ shares the Advocate General's view that the mere fact that a parent company controls or may control the activities of a subsidiary is not sufficient to establish its COMI at the place of residence of the parent undertaking. The ECJ goes on to state that the recognition rule is linked to the principle of mutual trust, which is, in fact, one of the cornerstones of a mandatory system of jurisdiction, avoiding duplication or overflow of proceedings in different countries and avoiding ineffective procedural checks on jurisdiction. Therefore, one process involving others, the decisions of which should not be called into question in practice, must have exceptionally high requirements to meet essential procedural expectations, including the implementation of the principle of due process. Jurisdiction, the primacy of which is based on the chronological criterion of time, can be challenged only by bringing an action against the state which brought the main

[133] "Opinion of Advocate General Jacobs," *supra note*, 123: para. 150;

proceedings, challenging the decision before its courts in accordance with its national law. Commenting on the opening of the case, the ECJ seems to be taking a more moderate position on the harmonization effect of Regulation No 1346/2000. According to the court, although there is no uniform implementation of insolvency proceedings, the law, by its content, promotes efficient and effective cross-border proceedings, which help to harmonize the different legal instruments of the nation states that would apply when seeking a solution[134]. A significant factor at the moment is also the distinction between the legal systems of the Member States, which lead to different procedures, such as the fact (example) that some Member States bring proceedings at once, others bring interim proceedings and only then the real one, so and the time taken to verify facts is diversive. The combination of such factors leads to discrepancies. The ECJ reveals that Regulation No 1346/2000 seeks to curb such procedural differences in a consistent manner by the aforementioned chronological criterion of time:

> It is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) [...] be capable of being applied as soon as possible in the course of the proceedings. The mechanism [...] could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.

On that basis, the ECJ decided to specify the meaning of the moment, which it said was not only formal, but also included statements by the debtor to raise it, the consequences of which would lead to the restriction or deprivation of the debtor's assets, thus ruling in favor of the Irish court.

In interpreting the last question, and the most important one for the investigation, concerning public order, the court is not as broadly descriptive as the Advocate General. Initially, the ECJ relies on the Krombach rule that the exception can only be applied in exclusive cases, that is, when it "would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle"[135]. This line of argument once again highlights one of the theoretical claims that public policy provisions have an internal division of significance (in this case) arising from the main constitutional norms of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas it is clearly stated that only fundamental principles of procedure, or more precisely, breaches of them, can be justified by the provision. Further developing its interpretation, the ECJ follows Sir Jacobs' ideas that due process is a general principle of EU law, compliance

[134] "Judgment of the Court (Grand Chamber) of 2 May 2006. Eurofood IFSC Ltd," *supra note*, 124: para. 48;
[135] *Ibid*, para. 63;

with which is the responsibility not only of national courts but also of the ECJ itself. The problem of the situation is equated with the right to be heard and the right to access the case documents. Enforcement of these becomes essential as they ensure the principle of legal protection. "[...] any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency"[136]. In the final, concluding paragraphs, the ECJ allows a public policy clause only in the event of a breach of the right of the person concerned to be heard, and calls on the Irish court to assess the level of breach of this principle rather than the fact that it is fundamental.

2.2.3. Evaluation rules – do they exist?

The practice of the ECJ reveals an existing system of close links between different fields of practice, the analysis of which creates the possibilities for the application of the term public policy, and more particularly the limits. Although the ECJ's practice with regard to the Insolvency Regulation is very poor, with only 1 court ruling in the *Eurofood* case, it is complemented by other, no less important, substantive rulings based on each other's judgments, thus forming a close system. Such a connection helps to establish the existence of an intended direction, which in itself over time develops the doctrine of the sufficiency to facilitate the application of that clause. Also, the application of the exception according to its wording in different instruments may differ slightly, such as the existing right in the Insolvency Regulation and the obligation in the Regulation No 1215/2012 (successor to the Brussels Convention and Regulation No 44/2001) or sector-specific clarifications in the content of directives. However, the practice has substantiated the theory that it is always the exclusive norm, and the formulation of the sufficiency criteria remains relevant to all court decisions, as its content does not deviate from the practice being developed. The positive, negative and neutral elements developed by the ECJ in the exercise of its duty to define the scope of the article can be used as a guide star to determine the possibility of use, as it summarizes the prohibitions, features and evaluation criteria. Emphasis is placed on the fundamental nature of the value, the particular harmfulness of the activities directed against it, the unjustifiability of the question of economy and the questioning of jurisdiction, and the existence of differences arising from the characteristics of national systems. It should be noted that in the *Eurofood* case the ECJ did not seem to assess all these elements, but it relied on one of the system files, *Krombach*, thus showing that the validity is derived from their content. Also, the fact that not all of them have been used does not prove that the existence of other features of the courts is

[136] "Judgment of the Court (Grand Chamber) of 2 May 2006. Eurofood IFSC Ltd," *supra note*, 124: para. 66;

unfounded, as the very decision to refer to elements of public policy was not even so relevant in the present case. This suggests that the development of doctrine is also relevant to the EU system of cross-border insolvency. Also, it may seem at first glance that this is not an accurate description of the application of the norm. However, its specific application cannot be made by the ECJ (with a partial deviation in the *Arblade and Leloup*), as the exception due to its origin means that it can set limits, but not the exact form of their expression, the prerogative of the nation state to apply it remains. Until the changes take effect, the ECJ will be in relative uncertainty where its interpretation may be redundant / excessive. However, it is unfounded to say that Member States are left alone to apply the article.

Similarly, the fact that Regulation No 1346/2000 was amended in the Insolvency Regulation does not lead to a significant change in the interpretation of that provision, since the amendments were not relevant to it. The norm has been fairly consistent in content since its inception, emphasizing its exclusivity. Only the limits of its application in practice have been pushed to the restrictive side, which coincides with the theoretical statement that certain hard-core, not domestic provisions apply to this article. It is true that the final relationship between the EU's transnational and national law remains partly unclear and in particular which direction the ECJ will turn in its interpretations. However, the case - law suggests that the ECJ's assessment of a national court's pleas alleging breach of public policy also refers to the existence of rules laid down by the EU, which may demonstrate the exclusivity of a law which has a significant effect on the seriousness of a national decision to refuse recognition and enforcement. This leads to the conclusion that the fact that such a general rule of the EU has been infringed in legal proceedings would only make it easier for a Member State to prove that public policy is justified.

CONCLUSIONS

As mentioned in the introduction, the study is divided into two separate but related parts - a theoretical analysis of public order and its practical significance and manifestation in the practice of the ECJ. A proper and comprehensive examination of the subject under discussion is possible only with the help of both.

1. Using the analysis of science developed so far and the systematization of the concept, the notion of public policy can be shortened as follows: *a set of legal provisions enacted by a community to address or enrich its life by creating a state position for the implementation and application of which public authorities are responsible*.

2. The concept distinguishes 4 elements of public order: symbolism, communality, legal enforceability and representativeness. Each of them explains why and how the definition of the clause is seen. However, in the future, as its perception and scope of use improve, the elements may be supplemented.

3. Different factors influenced the content of the concept, which is usually related to the understanding of individual or collective morality. The following can be distinguished: egoism, altruism, socio-Darwinism, environmentalism, Kantianism, utilitarianism, basics of the organization of institutions and states. However, it is noteworthy that there are many more.

4. Analyzing specifically the EU model of public order creation, a particular theory of unionization is formed. It manifests itself through the legal, cultural, procedural integration of national systems and the spirit of the EU itself. The existence of such a network has, over time, allowed the moral dispositions of states to come closer to each other. At the same time, procedural and substantive differences decreased.

5. Public policy is applied in EU legal documents (directives, regulations) as an exception to the basic rules, or more precisely, their application. Therefore, the concept is not limited to cross-border insolvency law as this is a fairly universal norm, the essential foundations of which remain. Although the areas in which it is used vary, this does not mean that its concept or court interpretations in one cannot be applied to others. Their content, based on three public policy divisions according to their value and scope, suggests that, firstly, EU public policy is transnational and a breach of it (at least) facilitates the process for a Member State to prove the use of the exemption and, secondly, the article requires a minimum of hard-core standards, as it raises exceptional application requirements which no longer meet only national norm due to inadequacy. Legal practice as a whole reveals that the doctrine of the sufficiency criteria can be developed, with positive, negative and neutral elements that set the boundaries by applying the clause. In this way, in part, creating a direction in which the concept can be interpreted.

6. Although the sufficiency criteria systematises and can facilitate the administration of justice and the correct application of EU rules, in other words, could relieve the decision-making for the courts of the Member States, the study shows that there is a great deal of room for improvement in clarity not only for cross-border insolvency cases but also for other conflicts of application of EU law related to the public policy clause. And it is also influenced by the direction of the ECJ in decisions, which should be monitored further.

RECOMMENDATIONS

The study revealed that the case law of the ECJ does not have a specific and fully clear precedent system for the Member States to assess the existence of a public policy clause not only in the field of insolvency law but also in others. However, the study also systematised the existing case law by gathering guidance from individual cases, while drawing attention to the ECJ's approach to the use and application of the concept of public policy. This gives rise to the proposed doctrine of sufficiency, which should be more widely criticized beyond insolvency law. On this basis, due to the efficiency of the legal system, legal predictability and the need to ensure fair decision-making, EU officials and political leaders should clarify the meaning and application of the resulting concept of public policy by specifying and providing an unambiguous view on this exception and the existence or verification of content. Using the methods and analysis of this study, and with resources and more targeted ideas, expanding the field of research and tools, an updated position on the content of the concept and the limits of evaluation should be tested and established. In this way, confirm/deny the existence of sufficiency criteria or update it. However, not only those representing the EU but also the Member States should speak out, presenting their views on this situation, which needs time to find common ground. At the same time, especially when there is an insufficient initiative on the part of EU officials to interpret the system on a top-down basis, the emergence of such a decision or legal action should be encouraged by Member States' lawyers and judges, as they have a direct interest in a fair decision application of the rules. This scientific work should be a breakthrough in the debate on filling this partial legal vacuum and finding a common solution. At the same time, it must be acknowledged that the conduct of such a debate is also related to the processes of perception and functioning of the EU public policy system, therefore the theoretical concept of unionization and the importance of the analysis of forms of expression should be borne in mind. An expanded approach to the principles of operation of unionization, its speed, disadvantages and advantages, and new ideas for its development would only facilitate the answer to questions about the legal application of public policy and, possibly, a fundamental modernization of the public policy exception procedure. One of the topics of discussion should be The Union Bill of Rights, which could help to solve the problem of the content of the public order in the EU in the future, as the document would provide clear guidelines for a common legal transnational Union moral content for the Member States and their courts.

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Last access: 2021-04-23

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ABSTRACT

The research of the master's thesis was focused on the search for the content of the concept of public policy and its practical application in EU law, especially in the field of cross-border insolvency proceedings, which mainly manifests itself through the Insolvency Regulation. Therefore, with the help of international science of sociology, psychology, politics and law developed by various authors, it was explained from a theoretical point of view - what is public policy and what features distinguish it from other definitions. At the same time, direct and indirect factors influencing its content were sought. One of the outstanding processes analyzed in the study was unionization. The theoretical analysis of the science was later supplemented by a practical element, examining the practice developed by the ECJ in insolvency law and beyond, as a clear link between the exception rule and other areas of law was seen. The established doctrine of sufficiency (sufficiency criteria) has confirmed that the courts of the EU Member States are not completely left alone in determining the scope of the norm.

Keywords: *order, policy, sufficiency, unionization*.

SUMMARY

One of the aims of the EU is to simplify matters for the Member States. These include the work of courts in cross-border cases and, more precisely, the recognition and enforcement of judgments in another Member State. Such a system is based on the principle of mutual trust, which means that the Member States recognize a judgment of another Member State in their territory and enforce it as if they were their own. This model also underpins the field of insolvency law from the emergence of Regulation No 1346/2000 to the current Insolvency Regulation. While such a system is quite evolutionary, it is not absolute, as states still want to retain some sovereignty and, in exceptional cases, to have a tool that makes recognition and enforcement non-binding. As a result, an additional rule of law has emerged in EU, the concept of public policy, which is an *ultima ratio* instrument that goes beyond cross-border insolvency proceedings. It is this instrument and its application that is the subject of this study: "The Concept of Public Policy Clause and Its Application in Cross-Border Insolvency Proceedings: Theoretical and Practical Analysis." The research aims to elucidate the interaction between the theoretical understanding of public order and its practical application. The theoretical part reveals that the concept is conditioned mainly by the internal and external factors of human morality, which have become the object of study in various disciplines (egoism, environmentalism, institutionalism, utilitarianism, etc.). As it became an integral part of the legal and political systems of the states, methods of qualification emerged, the most significant of which was the division according to the hierarchical importance of the element into domestic, hard-core, and transnational. The EU also has a major role to play, over time as a result of the unionization process, creating a common core of values for the Member States that becomes integral to the Community legal order. The process of unionization is encouraged not only by the EU itself but also by the positive or negative practices of the Member States, creating a rather complicated system. Meanwhile, the practical part of the study shows that the EU, and more particularly the ECJ, has changed its position in terms of the application of public policy, concretizing and highlighting the element of extraordinary exclusivity. Member States may avail themselves of the exemption in cases where the decisions of another State are manifestly contrary to its system. The case law does not offer a specific answer or definition of public order, but provides criteria for assessment. In this way (although mostly not in the field of insolvency), the ECJ has developed certain references that can help national courts to apply or understand this exception, which is not limited to insolvency law, and all such guidelines in the investigation take on the title of the doctrine of sufficiency (sufficiency criteria).

ANNEXES

Annex No. 1. Disciplines and topics related to public policy.

Source: Martin Potucek et al, *Public Policy. A Comprehensive Introduction* (Prague: Karolinium Press, 2017), p. 20;

Discipline	**Example topics**
Philosophy	Logics, values and ethics, theory of justice
Sociology	Understanding society as a whole, social structure in terms of classes and other groups, social status, social problems, social interests, social exclusion
Economics	Instrumental rationality, institutional economics, cost-benefit analysis, political economy, special economic policies
Political science	Political processes, institutions and actors
Public administration	The role of bureaucracy in shaping policies and implementing decisions
Legal sciences	Law as a normative and regulatory framework
Management theory	Processes of decision making, implementation and evaluation

Annex No. 2. Development of public policy provisions.

Source: Author's personal design.