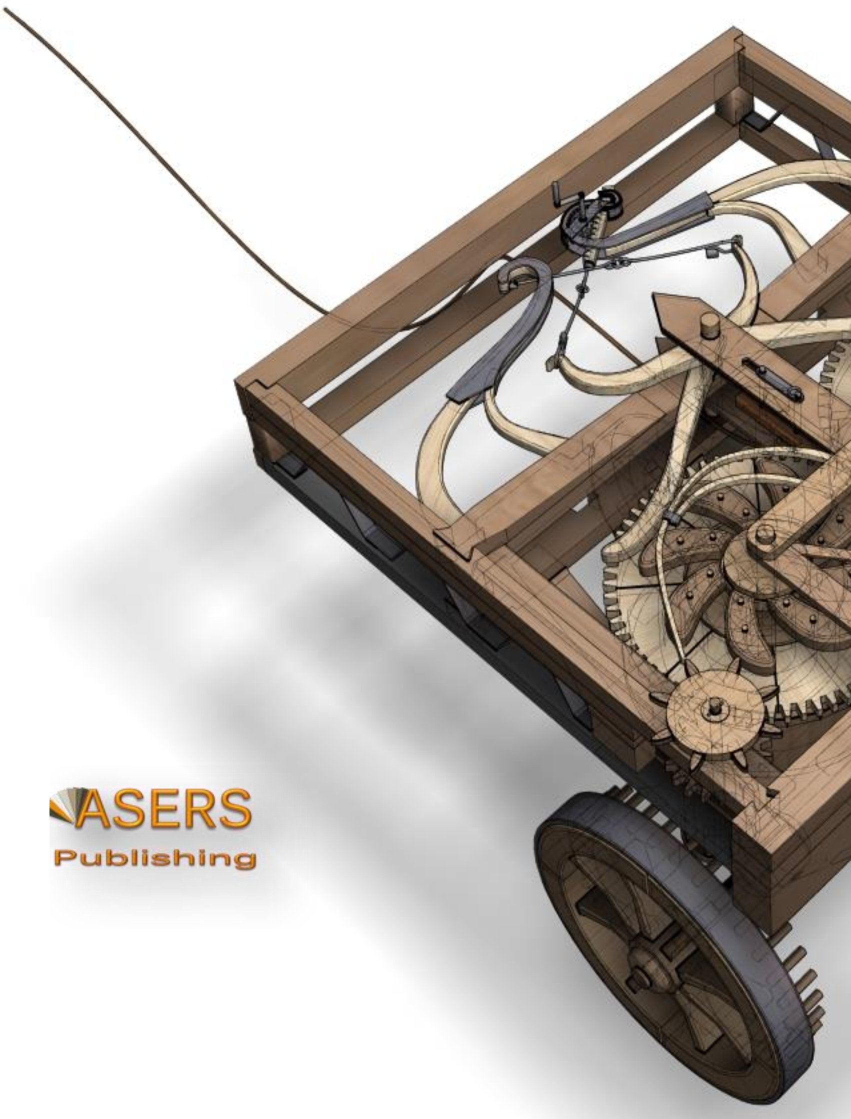
Theoretical and Practical Research in Economic Fields



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Role of Legal Certainty in Providing Economic Security: Ukraine's Experience

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Abstract: *Economic security is an element of the national security of the country. Even though regulation of economic security implies developing economic sectors or preventing threats, legal principles are not usually considered. The article analyzes how legal certainty as a principle forms a favorable environment, produces reliability, and encourages market players to realize their economic and entrepreneurial initiatives, provided that the country ensures a high level of it. A plurality of the elements of legal certainty makes the influence of the principle of legal certainty on the economic situation diverse and merely realized. It is proposed to divide these elements into two groups in the article. The first one consists of predictability, consistency, and stability. The second one incorporates the mechanisms, mostly legally provided, that prevent the violation of legal certainty. Further examples of court decisions and government acts show negative implications for economic security the violation of legal certainty can lead to. The stability that arises from legal certainty can help market players build their plans and calculate positive risks. Legal certainty contributes to the attraction of investments since profitability depends on the stability of legal regulation. Legitimate expectations are the components of the principle of legal certainty; they rely on the time an entrepreneur makes their business plans. Thus, the reliability that arises from respect to legitimate expectations plays a crucial role in long-term business planning. Immediate changes, the lack of enforcement caused by sudden changes in previously made decisions, and inconsistency in market management lead to a harmful economic effect on legitimate expectations.*

Keywords: economic security; legal certainty; rule of law; economic growth; principles of law.

JEL Classification: H56; K00; K40; F50; A12.

Introduction

The integration into the European Union requires Ukraine to pay attention to the legal stability that can ensure favorable conditions for economic development. The EU countries have opened borders for labor migration, provided a favorable tax system for their members, and introduced unique standards for the market accessibility of goods. The legal regulation in EU countries consists of European and national legislation to achieve common goals strategically. Ukraine, which strives to join the European Union, has to prepare the economy to be incorporated into the European economic system (Kryshtanovych *et al.* 2021). Although some of the initiatives in these regards involve the participation of local businesses and companies, it is the state's role to direct the legal regulation to attract investors and create auspicious conditions for economic growth.

Sustainable development requires profound, multifaceted, and foreseeable decisions aimed at producing a necessary result in the long perspective. Having adopted the sustainability strategy, Ukraine incorporated economic security as a part of the national security policy. Thus, numerous legal acts were adopted to regulate economic relations based on the fundamentals of economic security. Although their importance is beyond doubt, security in the economic sphere is also provided and supported by general legal principles, particularly legal certainty. General meaning and diverse application leave this principle behind in the legal documents on economic security, but its influence is immense.

This article delves into the significant impact of the principle of legal certainty on economic development and illustrates how the regulation policy helps countries obtain stability and a positive economic response. Since threats to the economy of Ukraine are multifaced due to the ongoing war, the country needs to find a source of support to be the base for economic development in the post-war period. Furthermore, it is necessary to limit and decrease the dangers to the system itself and ensure favorable conditions to support private initiatives, including investments. This second task appears to be a more complicated goal that cannot be achieved by enacting a single act. It involves the sphere of general regulation and state policy, implemented by legal decisions and acts. Legal certainty is a principle that secures investments, activates entrepreneurship, and constitutes a legal guarantee for companies. If the necessary level of legal certainty is reached, it minimizes the risk for the financial sector and companies in general; it encourages them to make a long-lasting project (Pavlichenko and Guzenko 2020). Legal certainty cannot be obtained immediately; it needs time to be shown and to have a favorable impact on economic relations, providing stability, reliability, and predictability. Thus, it is crucial for Ukraine, which struggles to finish the war, to cope with these challenges, and the right time to start implementing the decisions that will lead to legal certainty is not after the end of the war but now.

1. Economic Security: The Ways to Define and Obtain

Economic security is a part of national security and a very complex term always analyzed through the lance of the effectiveness of the use of the resources each country has to satisfy the needs of the domestic market and its position on the international level. Since every country has different access to resources, economic security means their effective use and multiplication to achieve economic growth. Economic security is a state of the economy when high and stable economic growth is ensured, an effective satisfaction of economic needs is provided, control is taking over the use of national resources, and the country's economic interests are ensured on national and international levels (Bazaluk *et al.* 2020).

Economic security is determined as a 'market-based economy, with globally competitive products and services that produce jobs' (Ronis 2011); 'security based on international economic relations such as trade in goods and services and economic flows, foreign direct investments, lending, and development aid' (van Bergeijk and Moons 2009). There are two approaches to economic security; the first discusses what should be achieved if its level is generally high. The second one examines threats that should be minimized for constant economic growth. Economic security allows the economy to be sustainable under the pressure of external and internal threats and characterizes the ability of the national economy to renovate to satisfy the needs of citizens and the state at an appropriate level (Akimova 2016).

Thus, economic security requires picking and supporting some spheres of special economic interest that bring a country to leading positions in the international market. However, it is necessary to protect the economy from the threats that prevent it from gaining economic advantages. This approach to defining and minimizing threats is a common way of determining economic security. A stable economic security starts with the formation of economic interests that often lead to dangers and threats – factors that can prevent from obtaining a desired economic result (Ștahovschi and Bucuci 2023). For example, a strategic document signed by the President of Ukraine (2021) shows the predisposition to the second approach that involves limiting threats, the list of which is embodied in the document. Another act of the President of Ukraine (2019) is concentrated on the aims of sustainability and the set of activities that should take place to increase the level of economic security. Both of them are to ensure economic security is achieved.

The recent strategic legal documents, adopted just before the beginning of the war in 2022, embody the country's view on measures that are to be undertaken to improve economic security. Although the legislation on economic security is quite diverse, it is necessary to highlight that this term, incorporated in Article 17 of the Constitution of Ukraine and used by over 50 laws of Ukraine, does not clearly define economic security.

Since economic security is a general status of the well-being of the different subjects of economic relations, it is not concentrated on the diverse interests of different groups. The economic interests of different groups and companies are traditionally mutually exclusive. Thus, providing a high level of economic security usually means governing and balancing the interests of different subjects of the economic system.

The government of Ukraine adopted numerous legal documents to ensure a high level of economic security, providing definite initiatives to support the particular sectors of the economy. Other important influencing factors are left behind; they lie in the field of stability of the legislation, reliability of the judicial system, predictability of governmental actions and regulations towards the entrepreneurs, and the rule of law that will guarantee a fair trial and access to justice in case of a dispute. Straightforward activities, general principles, and their efficiency in a particular country play an important role in this regard. One of these principles is legal certainty.

Economic security is the set of conditions favorable to the development of the social and economic systems of the country obtained by limiting the influence of unfavorable factors both inside and outside the country. These factors include the ineffectiveness of legal regulation, the inability to regulate social and economic processes efficiently, and the inconsistency and lack of system-oriented actions in implementing economic reforms (Dzhafarova *et al.* 2019). The temporal factor is of great importance, because economic security refers not only to the current situation but is regarded in the long-lasting perspective (Sack 2013; Latysheva *et al.* 2020). Since economic security is a permanent state and a result of persistent and effective governing, it is necessary to consider the role of the factors that can improve stability to support economic security in a long-lasting perspective. Further chapters will examine the role of legal stability and, thus, legal certainty.

2. Legal Certainty as a Basis for Legal Security

The principle of legal certainty is an ample concept rooted in the rule of law and fraught with several diverse elements. These elements could be divided into two groups. The first one consists of elements that incorporate values protected by the principle. This group involves predictability, stability, and consistency. The second group is formed from the number of elements that incorporate the precautions from the threats to legal certainty. They are non-retroactivity, respect for legitimate expectations, execution of court rulings, res judicata, clarity of legal norms, divulgation of legal acts and decisions, and limitation of abuse of powers of the administrative bodies.

One of the main aspects of legal certainty is stability. Stability stems from the legal policy and gives an opportunity to minimize the risk of unpredictable changes. Stability makes it clear how often and sharply the governmental position changes, how the government responds to threats and damages, or what level of accuracy is demonstrated in response to difficulties. That gives an overview of how the government deals with difficulties and problems. Moreover, it gives a clear understanding of what values prevail if the government tries to balance the interests of different groups.

The principle of legal certainty stems from the principle of the rule of law and is listed as its requirement. The Constitution of Ukraine declares the principle of the rule of law in Article 8, which usually forms a legal basis for using legal certainty in court rulings and case law. The Venice Commission (2016) defines legal certainty as a benchmark of the rule of law and requires accessibility of legislation and court rulings, foreseeability of the laws, stability and consistency of law, legitimate expectations, non-retroactivity, res judicata, and nullum crimen nulla poena sine lege. The approach of the European countries shows that they accept and recognize legal certainty even though it is not provided by legal acts, presuming that it arises from the principle of the rule of law.

The diverse and non-specific meaning of this principle led to some controversial approaches in the countries that had recently become democratic states and were in the process of development, where the principle of the rule of law was new and had a short period of implementation. One of them is Ukraine. In its legal doctrine, legal certainty is considered as follows:

1) as something that is legally regulated, for example, a ‘certainty of a legal statute,’ ‘certainty of legal regulation’ (Ogneviuk 2017), ‘certainty of the terminology in administrative process’ (Kolomoetz 2012), ‘legal certainty of the crimes in economic law’ (Topchiy 2019);

2) as a principle. In accordance with national legislation in Ukraine, the principle of legal certainty should be considered as a set of requirements for organizing and functioning the legal system in order to ensure the legal position of an individual by improving law-making and law enforcement (Scherbanyuk *et al.* 2023);

3) as an aspect of legal security. Legal certainty in terms of the democratic rule of law is essential for legal security because it is the most important (though not the only) implementor of this security (Potrzeszcz 2016). The case law of the ECtHR assumes the link between legal certainty and legal security (Priymak 2016).

The elements of legal certainty include several key points and help achieve their goals; its legal regulation corresponds with the values. They are stability and predictability of legal regulation that should be constant, persistent, and reasonable, based on universal legal values, and aim to protect the rights in the most possible balanced way. Governance and legal regulation should be free from adopting legislation that discriminates against any political party or group; there should be no unpredicted and unjustified decisions of administrative bodies made according to their discretion. The results of the law-making process should be clear and understandable law, and a reasonable period should pass before amending the law that entered into force. Non-retroactivity guarantees citizens and companies can rely on existing norms enacted in advance in their activities.

The mechanism of executing predictability that should be raised by legal certainty is described by I. Lifante-Vidal (2020). The researcher argues that:

"it is not the number of subjects capable of making an abstract prediction but how many of the relevant subjects are capable of doing so. In this regard, one should consider that some regulations typically affect certain classes of subjects with conflicting interests and different possibilities of access to information, such as citizens/administration, consumers/suppliers, and employers/employees… Each class of individuals affected by a particular regulation can be interested in the predictability of certain aspects, and these regulations sometimes increase the relevant predictability for one of the parties at the cost of decreasing it for the other."

Legal certainty is a legal basis of stability that provides for building plans according to the law that are foreseeable and reliable, such as economic initiatives, entrepreneurship, or investments. There is no doubt that legal acts have to be changed from time to time and that legal regulation is dynamic, but legal certainty guarantees a mild effect of the changes or at least a reasonable time for their adoption. Whatever the situation is, the state fulfills its obligations, acts equally to the subjects of law, and guarantees a fair trial and protection of the vested rights. Legitimate expectations are to be respected.

3. The Impact of Legal Certainty on Economic Security

As stated above, legal certainty has a particular effect in a private case, such as its application to prevent retroactiveness of the law applied in criminal prosecution. However, it also generally affects the legal system and relations between subjects of law and administrative bodies. Legal certainty creates an environment that can either attract investors and increase economic activity or have a contrary effect.

It is safe to say that general legal principles are polymorphic and generalized; it is hard to evaluate them, mainly when they belong to different spheres, such as the economy. Nevertheless, they play a significant role in the decisions made by the subjects of economic relations. One of the greatest challenges that prevents creating a favorable investment environment is a low level of legal certainty since it becomes risky for foreign investors to invest in the region (Rodriguez Yong 2016).

Each investment, project, or initiative related to the economic sphere needs to be evaluated and economically justified. The expected profit is a primary reason for any enterprise, no matter how big or small a company is; it depends on the actions of the entrepreneur and other market representatives and the environment, generally ranked from micro- to macroeconomic factors. These factors include the reliability of the judicial system, tax policy, and activities of public authorities, including allowance or prohibition of a particular business. Other legal arrangments are of indirect impact and related to the frequency of the changes to legislation, equality and fairness before the law, the protection of vested rights despite the political influence, and the possibility for retroactivity in the application of the laws. All the listed factors influence the risks predicted and evaluated before the company starts the economic project. The harmful effect violation of legal certainty can cause is partially described.

H. Gribnau (2013) focuses on the retroactivity of tax legislation, which is an infringement of legal certainty. This happens in tax law when the amended law is applicable to past tax periods, and legislative change has a retroactive effect. Legal certainty is violated if the amended law has immediate effect and thus applies only to future taxable events or tax periods. Although the author substantiates that changes in the tax system are dictated by objective background, they should be made with respect to legal certainty, *i.e.*, in advance and within a reasonable period of adaptation. The impact of uncertainty leads to tax uncertainty that causes lower leverage, delays of heavy capital investments, and lower growth of an enterprise (Lee *et al.* 2022).

4. Protection of Legitimate Expectations

Legitimate expectation is another aspect market players rely on when making economic decisions. Legitimate expectations protected by law appeared in the 1960s; they are known as elements of legal certainty and date back to the economic theory of rational expectations. This indicates the subjects of economic relations are acting based on regularity. According to this theory, decisions are made based on previous practice and experience, considering the publicly available information and rationality. All these factors are closely linked with legal certainty since legal norms regulating particular relations are promulgated and should be clear for the parties to make the same conclusions based on one legal norm; thus, they should be interpreted in the same manner. Legal certainty requires its consistent application by courts and administrative bodies to form the unequivocal practice and thus an experience for participants of the same relations. Rationality should be guaranteed in legal regulation and application before it appears in the minds of the subjects of economic relations.

"The principle of legal certainty emerged in EU law mainly through the principle of protection of legitimate expectations that encapsulates itself an efficiency rationale. Indeed, the legitimacy criterion allows for telling apart unreasonable claims from reasonable one with respect to the investments incurred in light of previous law. This principle requires compensation of damages to be awarded whenever a claim is said to be legitimate and to the extent of the reliance costs incurred (reliance damages) or considering the missed benefits (expectation damages)" (Tsaras *et al.* 2018).

Legitimate expectations play a crucial role for investors as they have to predict the outcome of their entrepreneurship in the long-term perspective. Investors have to choose the country for investment if they are going to expand their business. Legal certainty is of great importance in this competition to attract investments and should be increased (Coelho 2015).

Even though the exact interrelation between legal certainty and changes to economic investments can hardly be determined, its influence is shown in different ways. The straightest interaction is shown in the report of the Civil Law Initiative on Legal Certainty Index. Market players can predict the profitability of investments if they determine individual economic risks based on the social and economic behavior of market actors, including customers, competitors, and the government (Deffains and Kessedjian 2015). Long-term investments require a set of rules and stability in their application and enforcement. The conditions provided below can affect it harmfully.

Immediate changes. Immediate changes violate the rule of law, which includes legitimate expectations 'interpreted as allowing the individuals to mitigate the costs and even avoid any loss' (Tangea *et al.* 2013). The entry of the law into the legal force with the delay after its adoption helps to adjust to the change that will occur. The government should provide this delay to parties to understand the provisions and adjust their behavior to them.

The Supreme Court of Ukraine (2019), in its Ruling No. 825/1496/17, dismissed a claim of the company of application of the new tax regulations to the tax period of the year in which they were set out. The Ruling appealed to stability as the principle of tax policy that has its links with legal certainty. The applicant refused to pay the property tax pursuant to the legal provisions that stemmed from the law entered into force on December 25, 2015. These provisions gave the power to local authorities to set property taxes in their region and to provide benefits for vulnerable groups. The decision on this issue was made by the local council of Nizhyn Region (Ukraine) on January 21-26, 2016; it embodied the provision that this decision would enter into force on January 1, 2016, which was retrospective.

The tax administration calculated the taxes based on this new provision, and the dispute was brought to court on whether the local regulations enacted after the beginning of the tax period should be applied to the period of the year 2016 or not. The court ruled in favor of the local tax administration based on the provision that their calculation was made in accordance with the new legislation in force. However, the court noted that the principle of stability was violated but recognized that the tax administration acted in public interests. Therefore, it was presumed there was no violation of law. The dissenting judgment contained the opposite opinion; the stability and legitimate expectations as legal principles should prevail in this situation, and the tax regulation could be applied only to the further period. This is due to the principle of legal certainty, concerning particularly legitimate expectations and non-retroactivity.

Lack of enforcement. The contracts signed by parties usually embody provisions of the early termination of the contracts based on the compensation the other party has in case of a 'change of mind.' The clause of force-major is also related to the reasons that forced the party to terminate the contract. Thus, it is common in the legal practice that the other party should be protected from the unreasonable sudden changes made by its counterparty. These provisions usually involve a demand to inform the other party in advance and pay compensation that pretends to be used to cover the expenses made to execute the contract and to organize the activities the parties intend to execute under a contract. The authority is not under pressure or liability for changing its decisions in the public sphere. However, their decisions usually affect many legal persons and the costliest investments.

The obligation to obey the law and its principles is inevitable to any legal person, including the state, even though it lays down the legislation. This means the state has the legal capacity to amend the legislation, but even the state can not violate it or be released from undertaking obligations as soon as this legislation is in force. Legitimate expectations arise from the official governmental position embodied in general and individual normative acts. When the decision lacks enforcement, a connection between the proclamation and the enforcement is not achieved. According to the WJP, the Rule of Law Index in Ukraine (2022) is ranked 106 among 140 countries on the factor of regulatory enforcement, which measures the extent to which regulations are fairly and effectively implemented and enforced. It is emphasized that the regulations are not evaluated but the way and efficiency of their implementation. When the contract is concluded between two parties, the lack of its execution can cause damage to one party, while the same made by the authorities has an impact on the subjects of regulations and generally.

The example of the court decision on the case of Vanco company in Ukraine shows that an administrative decision can be controversial when it comes to issues of economic security, legal certainty, and legitimate expectations. In 2008, the Cabinet of Ministers of Ukraine (the higher executive body) terminated the contract with Vanco company on the development of the hydrocarbons in the Prykerchensky region located in the continental shelf of the Black Sea. The withdrawal of the permission by the Ministry of Environmental Protection and Natural Resources of Ukraine followed that decision. Both executive bodies held that their decision was made in the public interest and was lawful even though the company suffered significant damages, including the efforts and expenses spent to execute a contract. By the initiative of the President of Ukraine, the case was held by the Constitutional Court of Ukraine. The analyzed issues were related to the sphere of the balance between the public and private interests, mainly economic security as a public interest and the private interest of entrepreneurship, guaranteed on a free-of-charge basis.

Although the Constitutional Court of Ukraine dismissed the claim because of the procedural issues and its powers, the case was a subject of analysis in scientific papers (Savchyn 2009) since it is an illustrative example of how economic interests are affected. Economic security, as mentioned above, should neither be focused on the satisfaction of the economic interests of one group of entrepreneurs nor show the prevail of one group over another. The public aspect of economic security involves direct (the possibility of gaining economic profit from developing the continental shelf) and indirect (protection of the legitimate expectations of the entrepreneurs and their investments) needs. Each situation with widespread effect should be solved on a case-by-case basis that examines the particular economic interest in each situation.

Inconsistency. The above citation of I. Lifante-Vidal underlines that legal acts can unequally affect different groups of legal persons who are current market actors, giving privileges to ones and making entrepreneurship unprofitable for others. This can happen when the decision made affects one sphere of the economy or one particular group of entrepreneurs. In case of a sudden and unexpected change in the regulation, legitimate expectations could be violated. One of the examples to illustrate this is the prohibition of the gambling business, which was a lightning-fast decision of bodies of the executive power in Ukraine in 2009. The reasons for the adoption of the Law prohibiting the gambling business (Verkhovna Rada of Ukraine 2009) were immorality and the contra-social effect of this way of profiting. The law did not give companies acting in this sphere time to get adjusted to the changes, as it entered into force rapidly and broke the legitimate expectations of the companies that had licenses issued for a period of five years by the government authorities.

One such case was brought to ECtHR with its final decision in 2019. The ECtHR ruled that there was an infringement of Article 1 of the amendments to the Convention of Ukraine regarding the withdrawal of the license previously issued in the case of Svit Rozvag, Tov, and others v. Ukraine (application 13290/11) (ECtHR 2019). By granting a long-term license, the government demonstrated that it allowed such a way of business in Ukraine and afterward recognized it as illegal by setting out the law in 2009. It was the subject of the ECtHR to decide whether the gambling business should be allowed since it refers to the state's sovereignty. However, the Court underlined that the way the state prohibited it was a violation of the provisions of the Convention. The court held that the applicants did not violate the law in any case, but the exchange of the legal position was sudden and unpredictable and prevented them from obtaining the expected profit.

The applicants were not given a transition period, and it was a controversial decision of the authority to issue a 5-year license allowing the gambling business just a few months before the law prohibiting it was adopted. That was frustrating and broke the predictability, *i.e.*, the legal certainty. It was a curious fact that the decision on the case dated back to 2019, and the gambling business was again permitted in Ukraine by new legislation in 2020. It will be reasonable to agree with Fabio U. Coelho that ideology matters when issues of legal certainty are discussed; it is well illustrated in the proposed example. When the authority cannot come to the final conclusion about what to prohibit and what to allow, predictability remains vulnerable, and legal expectations can hardly be satisfied because of the changeable position of lawmakers.

Conclusions and Further Research

The economic security of the country is a component of national security that unites public economic interests and interests of the private companies. The analysis shows the government supports the approaches to define economic security aimed at detecting the potentially profitable spheres and minimizing the negative influence of threats. The article argues that the legal framework plays an essential role in forming a favorable environment for economic security through setting the legislation and implementing legal certainty. The inconsistency of the legal regulation, frequent fundamental changes in legal approaches, and low level of enforcement of legal regulations can decrease the level of legal certainty and thus cause a harmful effect. It is argued that the public interest that usually prevails should be regarded widely and include the interests of those market companies that can withdraw from the market due to disruptive governing. The way to avoid this harmful effect is to provide stability and consistency of legal regulation and respect legitimate expectations. The country, particularly Ukraine, can improve its economic environment by making it favorable if it provides and applies legal certainty. This enables the market players to minimize the risks and predict their activities in a long-term perspective. Respect for legitimate expectations should be obtained to ensure economic security for investors.

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Declaration of Competing Interest

The author declares that she has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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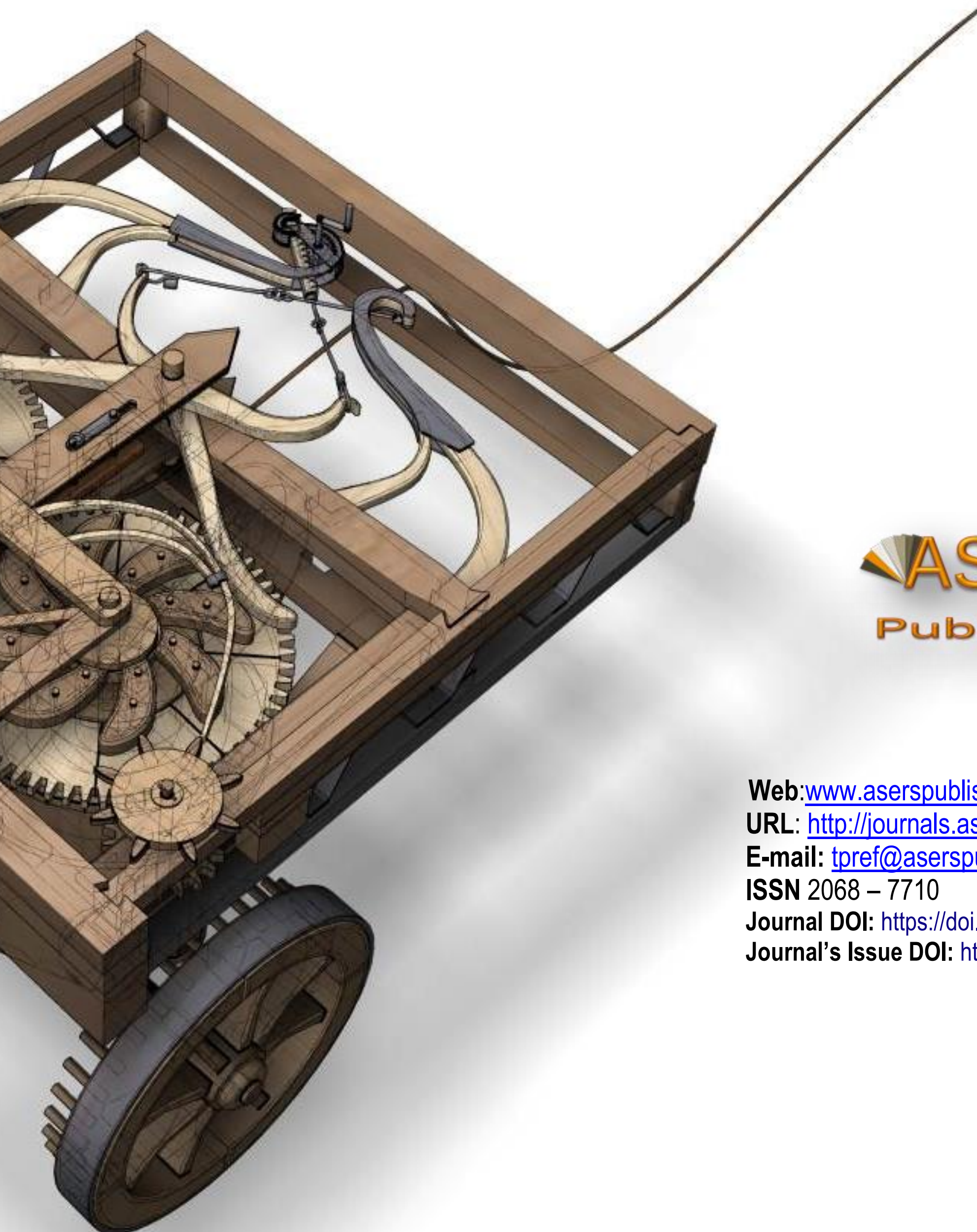

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